



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.144 OF 2015

MARY KAGHEHA NGAIRA.....CLAIMANT

VERSUS

MISSION IN ACTION KENYA.....RESPONDENT

JUDGEMENT

Background – the claimant filed the Memorandum of Claim on 2nd June, 2015. The respondent was served on 18th June, 2015 and accepted service by acknowledging and stamping the summons and returns have been filed in the Affidavit of Service of Richard Kipkurui Kerich. There was no appearance or defence filed.

The claimant moved the court seeking hearing directions on 1st March, 2016, on 5th April, 2016, 6th March, 2017, 8th December, 2017 and 5th June, 2018. In all these instances the claimant served the respondent and there was no attendance. On 5th June, 2018 a hearing date was allocated for 15th October, 2018 and the claimant directed to serve the respondent.

On the due date, the hearing was confirmed and allocated at 11.30am.

At the allocated hour, Mr Cyrus Kivuta was in court for the respondent. he applied for time to file defence on the grounds that the officer who was served in the year 2015 had not informed the respondent that there was a matter in court and the respondent needed to appoint an advocate.

The claimant counsel opposed the application and noted the respondent had been served on several occasions and failed to attend. The initial summonses were served upon Mr Cyrus Kivuti who accepted the same and cannot assert that another officer of the respondent was served.

Upon examination of the record, indeed it became apparent to the court that the respondent officer Mr Cyrus Kivuti was the one who received summons on 18th June, 2015. On another occasion Nancy Muendo received mention notice and on another occasion Samson Ochieg received the mention notice. The hearing Notice was served upon Ms Bulami, the director of the respondent on 4th October, 2018.

In total, four different officers of the respondent had notice of proceedings herein spanning several years from the year 2015 to 2018. No action was taken until the due hearing date.

Noting the motions taken by the claimant to have her case heard, the court declined to adjourn to allow the respondent more time to file defence. The time lapse and failure to file defence was inordinate and was not explained. No effort was taken to move the court before the hearing date.

Claim

The claimant was employed by the respondent in December, 2011 to December, 2013 as a General labourer earning a wage of kshs.250.00 per day. In December, 2013 the claimant was absorbed as a

monthly employee earning a wage of kshs.7, 940.00 per month.

From January, 2014 the claimant was paid a salary that varied and was not constant as follows;

January, Kshs.7, 120.00;

February, Kshs.6, 840.00;

March, Kshs.6, 820.00;

April, Kshs.7, 850.00;

May, Kshs.7, 603.00;

June, Kshs.7, 200.00; and

July, Kshs.7, 700.00

The paid wages were inconsistent with Legal Notice No.197 of 2013. The respondent was not compliant.

The claim is also that the claimant worked in a shift from 5.30pm to 8.00am or 6.30am to 5.30pm making all 10 hours per day. Such amounted to overtime work for 2 hours each day which was not compensated. The claimant was also not allowed to take annual leave or paid in lieu thereof.

The claimant was not registered with any statutory body and her statutory dues were never remitted by the respondent as the employer until July, 2013.

In August, 2014 the claimant was verbally dismissed from her employment with the respondent. there was no notice issued, there were no reasons given and she was not given a hearing. Such amounted to unfair termination of her employment.

The claimant is seeking the following dues;

- a) *Underpayment Kshs.11,699.05;*
- b) *Overtime Kshs.46,263.00;*
- c) *Pay in lieu of taking leave kshs.24,074.40;*
- d) *Notice pay Kshs.9,024.15;*
- e) *Service pay Kshs.205,623.00;*
- f) *General damages for unlawful termination*
- g) *Certificate of Service.*

The claimant testified that she was employed by the respondent which takes care of orphaned children and was employed as a caregiver. From the years 2011 to 2013 she was paid as a general worker and on a daily rate of kshs.250.00 per day and from December, 2013 she was taken as a monthly employee and paid monthly through the bank. In August, 2014 the claimant was called to the office and told there was no work. No notice or reason had been given. The information was sudden and no terminal dues were paid.

Without any defence or appearance by the respondent the case closed with the claimant's case.

Determination

Section 8 and 10 of the Employment Act, 2007 requires every employer to issue an employee with a written contract of employment even where employment has commenced on oral terms. Such an employee should not be kept on an oral contract for a period of over two (2) months. To do so only invites the court to make a finding against the employer as the duty to issue a written contract is vested upon the employer.

In this case, where the claimant remained in the employment of the respondent beyond the period contemplated under section 10(2) and (3) of the Employment Act, 2007 she became entitled to rights and protections under the Act and in accordance with section 37 thereof. She was entitled to notice before termination of employment in accordance with section 35, was entitled to be given reasons for termination of employment in accordance with section 43 read together with section 41 of the Act and the failure by the respondent to do so was in violation of the mandatory terms of section 45 of the Act and this resulted in unfair termination of employment.

Notice pay is due in a case where termination of employment is devoid of due process and has not complied with the provisions of section 35 of the Act. The last due gross wage in terms of Wage Orders published in Legal Notice No.197 of 2013 is Kshs.9, 024.15. such is awarded in Notice pay.

On the claims made for underpayments, the claimant has applied to requisite Wage Orders published by the Minister and is entitled for underpayments due at kshs.11, 699.15.

Overtime claimed is on the basis that the claimant worked for extra two hour each day in her shift. Without defence to challenge these averments overtime work is awarded kshs.46, 263.00.

On the claim for leave pay, the claimant testified that in May, 2014 she took her annual leave. That the leave claimed related to the years 2011 to 2013. By application of section 28 of the Act, and having taken leave just before employment was terminated, such claim for leave backwards must fail.

Service pay is claimed on the basis the claimant was not registered with the NSSF until 10th July, 2013. Upon such compliance, service pay is not awarded going backwards. The respondent complied with the provisions of section 35(5) before employment could terminate.

On the claim for general damages for unlawful termination of employment, such remedy is not due in a proper case of violation of rights under the Employment Act, 2007 as the law has made provision for compensation under section 49 of the Act. To go outside the Act and seek general damages would require the claimant to satisfy the court as to how such a remedy arises. Taking note that the claimant has the benefit of legal representation, I take this is the remedy sought and not compensation. Such remedy shall not issue.

Accordingly, judgement is hereby entered for the claimant with a declaration that termination of employment was unfair and awarded notice pay at Kshs. 9,024.15; underpayment due Kshs.11, 699.15; overtime pay kshs.46, 263.00; and costs of the suit. The claimant shall also be issued with a Certificate of Service in accordance with section 51 of the Employment Act, 2007 for the entire period she served the respondent.

Dated and delivered at Nakuru this 1st day of November, 2018.

M. MBARU JUDGE

In the presence of: