



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 78 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 19th December, 2018)

ZUHURA NYOKABI.....CLAIMANT

-VERSUS-

REIMAN COMPANY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed the instant Claim on 23rd January, 2013, through the firm of Khalwale & Company Advocates seeking damages for wrongful dismissal from and termination of employment and refusal to pay terminal dues and other monies owed to the Claimant.
2. The Claimant states that he was employed by the Respondent as a General Worker on 12th September, 2011 earning a basic monthly salary of Kenya Shillings Eighteen Thousand Only. She further states that she used to report to work at 7.40 am and worked till 7.00 pm on weekdays and weekends without overtime pay.
3. She avers that she was not issued with an employment contract or termination notice. Further that her services were terminated on 10th November, 2012 for no reason.
4. The Claimant further avers that she served the Respondent diligently and honestly for a total period of 1 year and 2 months and that during this period she was not provided with any housing nor house allowance.
5. In his Memorandum of Claim the Claimant prays for Judgment be entered against the Respondent for:-

- a) One Month's salary in lieu of Notice Kshs. 18,000.00*
- b) House Allowance 15% of Basic salary Kshs. 37,800.00*
- c) Severance pay of 15 days per year Kshs. 9,000.00*
- d) Overtime to be computed by Court*
- e) Unpaid Leave for 1 year Kshs. 18,000.00*
- f) NHIF and NSSF contributions of service*
- g) Issuance of certificate of service underpayment costs.*

6. The Respondent in its Reply to the Memorandum of Claim dated 16th May, 2013 and filed in Court on 17th May, 2013 denies that the Claimant was its employee. It is stated therein that the Claimant was on probation from the month of 1st June 2012 to end in September 2012 when she was summarily dismissed.

7. The Respondent avers that the Claimant's monthly salary at the time of separation was in fact Kshs. 11,540 with leave allowance of Kshs. 6,000 and annexed copies of the payslip to prove this.

8. The Respondent further avers that the Claimant worked from 8:00 am to 5:00pm and as such the claim for overtime does not arise.

9. The Respondent avers that the Claimant's termination was legal as provided under Section 44 of the Employment Act, 20047 and that subsequently the Claimant had been paid all her salary, allowances and benefits due to her upto the date of her dismissal.

10. The Respondent further avers that the Claimant is not entitled to NSSF and NHIF contributions the same having been fully paid during the period of service. Further that the Claimant is not entitled to annual leave having not served for a consecutive period of 12 months to qualify for the same.

11. The Respondent further prays that the claim herein be dismissed with costs.

Evidence

12. On 14th April 2015, the claimant (CW1) in her testimony stated that she was employed by the Respondent from 12th September, 2011 as an office administrator. She was however not issued with a letter of employment. It was her evidence that part of her duties she used to supervise cleaners, banking cheques, purchasing stationeries and doing other errands.

13. It was her evidence that despite working long hours her salary did not have any overtime allowance. Further that she was not housed by her employer and was not paid house allowance.

14. CW1 further testified that on 15th October, 2012 she was called by her boss and asked to proceed on 21 days leave and that she resumed duty on 10th November, 2012 but was informed that her services were no longer needed.

15. CW1 testified that she was not given any reason for termination and no hearing was given. Further that she was not paid any of her dues at time of separation. That she reported the matter to the labour officer who wrote a letter to the Respondent but they never attended the meeting.

16. It was her evidence that she was a member of NSSF for only 3 months and no contributions were made for the other months.

17. It was her evidence that she was not summarily dismissed since she was never given any letter to that effect.

18. The firm of Hassan N. Lakicha, upon Application was granted leave to enter appearance for the Respondent in place of the firm of Kiriba & Company Advocates and CW1 was recalled on 25th September, 2018 for cross examination.

19. On cross- examination CW1 stated that when she was asked to proceed on 21 days leave on 15th October 2012 and she was not paid her salary for the month of October 2011.

20. The Respondent put up one witness one Mr. Nafa Ali Abass, a businessman dealing in manufacture and sell of mineral water. RW1's written statement dated 24th September, 2018 was adopted by Court as his evidence in chief in which he reiterated the averments in the Memorandum in Response to the Claim.

21. RW1 in his statement states that the Claimant was terminated due to breach in her terms and conditions of work due to theft.

22. On Cross -examination RW1 stated that the Claimant was his employee he however did not issue any employment letter. He further stated that the Claimant worked for 3 months and some days and that her salary included house allowance.

23. On further cross examination RW1 stated that he issued the Claimant with a termination letter. However, the same was not produced in Court.

24. The Respondent urged the Court to dismiss the instant Claim with Costs.

Submissions

25. The Claimant submitted that **Section 44** and **45** of the **Employment Act, 2007** were not complied with and as a result she is entitled to the reliefs sought in her Memorandum of Claim.

Respondent's submissions

26. It is submitted by the Respondent that the period of employment from 1st June 2012 to end of September 2012 is as corroborated by the exhibits produced in Court.

27. It is further submitted that the Claimant's termination was in accordance to Section 44 (4) (g) of the Employment Act, 2007 and as such the Claimant is not entitled to the reliefs sought in her Memorandum of Claim.

28. The Respondent prays that the Claim be dismissed with costs.

29. I have examined all the evidence and submissions of the parties herein. From the Claimant's evidence, she was employed on 12.9.2011 and dismissed on 10.11.2012. She was not issued with any appointment letter.

30. The Respondent contends that the Claimant only served on probation from 1.6.2012 to end of September 2012 when she was summarily dismissed.

31. The Claimant was able to demonstrate through a further list of documents, petty cash vouchers showing payments to her from October 2011 to July 2012.

32. The Respondents never gave any evidence to discredit these vouchers. The contention by the Respondent that the Claimant worked from June 2012 to September 2012 is false.

33. On the issue of termination, the Respondents aver that the Claimant committed acts of gross misconduct. The particular misconduct said to have been committed is not explained.

34. Section 43 of Employment Act states as follows:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

35. I note that particulars of misconduct that the Claimant committed are not explained. It is also apparent that the Claimant was not subjected to any disciplinary hearing but was sent away on compulsory leave and then dismissed on reporting back to work.

36. She was also not given any notice before the termination as envisaged under Section 35(1) of Employment Act 2007 which states as follows:-

(1) “A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be :-

a) where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice;

b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing”.

37. It is therefore my finding that the Claimant was unfairly dismissed and I award her as follows:-

1. 12 months' salary as compensation for unlawful termination = 17,540 x 12 = 210,480/=.

2. Unpaid leave for 1 year = 17,540/=.

3. NSSF contribution not remitted = 11 months x 400 = 4400/=.

4. House allowance at the rate of 15% of salary x 14 months = 36,834/=

Total = 286,794/= less statutory deductions

5. The Claimant should also be issued with a certificate of service.

6. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 19th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Lakicha for Respondent – Present

No appearance for Claimant