



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 632 OF 2010

MUENI MUTIE.....CLAIMANT

VERSUS

GIKEO GUEST HOUSE.....1ST RESPONDENT

BENARD MWANGI.....2ND RESPONDENT

JUDGMENT

Introduction

1. This suit was commenced on 4.6.2010 by Mueni Mutie alleging that she was unfairly and wrongfully dismissed from employment by the respondent on 17.5.2008. She therefore prayed for the following reliefs:

“By virtue of the Respondent’s failure to pay the Claimant has lost dues in the form of unpaid weekends and holidays and severance benefits which she now claims as hereunder:-

(a) Service/gratuity pay 6,100x 9x 2/3	Kshs.36,600.00
(b) Compensation for Loss of future earnings 6,100x12	Kshs.73,200.00
(c) Payment in lieu of notice	Kshs. 6,100.00
(d) Marternity leave 6w,100x3	Kshs.18,300.00
(e) Underpayment of wages (3,600x9x12)	Kshs.388,800.00
(f) Public holidays (9x12x9x2)	Kshs.1,944.00
(g) Unpaid leave days (9x6,100)	Kshs.54,900.00
(h) Unpaid rest days – Sundays (52x12x9)	Kshs.4,212.00

Total Kshs.584,056.00

2. Unfortunately, the Claimant died on 28.11.2010 and she was substituted from the suit by the administrators of her estate Mr. Gedion Mutie Munyao and Godfrey Kitonga Mutie vide a limited Grant

of letters of Administration issued on 25.10.2011.

3. The respondent filed her defence on 22.7.2010 denying any employment relationship with the Claimant and further denied the alleged wrongful termination of her contract of employment. In the alternative, the respondent averred that she only employed the Claimant on casual basis as and she was entitled to terminate her services without giving any prior notice. She further denied liability to pay the reliefs sought and averred that the Claimant was never entitled to the same.

4. The suit was heard on 24.10.2018 when the Claimant called one witness but the respondent did not attend the hearing to tender her defence. After the hearing, the Claimant filed written submission.

Claimants' case

5. CW1 is the deceased Claimant's father and administrator of her estate. He produced a copy of the Letters of Administration **ad litem** as exhibit 1. He testified that the deceased was employed by the respondent in 1999 and worked continuously until 2008 when she went on the maternity leave but upon reporting back on 17.5.2008 she was terminated. The reason cited for the termination was that she had a small child who was affecting her work performance.

6. He further contended that before the termination the deceased was not accorded any prior hearing or served with a termination notice. He therefore prayed for reliefs pleaded in the statement of claim. He contended that during his service, the deceased was receiving Kshs.2500 per month as opposed to the minimum wage of kshs.6000 published under the law. CW1 further contended that before the termination, the Claimant had been given maternity leave but no salary was paid during the leave period. He further stated that the Claimant was working throughout even on Sundays and public holidays and she was housed at the employers premises.

Analysis and Determination

7. The foregoing evidence by the CW1 was not rebutted by the respondent. I therefore find that the deceased Claimant was employed by the respondent as a cleaner. I also make a finding that she worked from 1999 to 17.5.2008 when she was dismissed after reporting back from maternity leave. Finally, I find no dispute that the law applicable to this case is the retired Employment Act which was repealed on in 2008 when the 2007 Act came into force. The issue for determination is therefore whether the Claimant is entitled to the reliefs sought.

Severance/gratuity pay

8. The Claimant was working in a hotel and as such her contract of service was governed by the Hotel and Catering Trades Order. Under Regulation 19(ii) the Claimant was entitled to gratuity at the ratio of 15 days pay per year because she was not terminated for misconduct and she was never registered to benefit from the NSSF.

Salary in Lieu of Notice

9. The Claimant worked for 9 years before termination. Under Regulation 20(1)(a) of the said regulations, she was entitled to 2 months notice before termination. However she is only awarded one month salary in lieu of notice because that is what she prayed for.

Compensation for wrongful termination

10. The said relief was not provided for by the repealed Employment Act and as such it is dismissed.

Maternity Leave

11. CW1 stated that the Claimant was not paid salary during her maternity leave. He prayed for

salary for 3 months. However, under Regulation 11 the Claimant was only entitled to 2 months maternity leave with full pay. I therefore grant her salary for 2 months only.

Underpayment of Wages

12. CW1 contended that the minimum wage for the Claimant was Kshs.6000 but she was getting only Kshs.2500 per month. He therefore prayed for arrears of Kshs.3600 per month for 9 years. The relevant wage orders were never referred to and as such the basis upon which the alleged under payment of wages is based has not been demonstrated. It has also not been proved that from 1999 to 2008 the rate of underpayment was equal. Consequently I dismiss the alleged underpayment of wages for lack of particulars and evidence .

Public Holidays and Off Days

13. The Claimant contended that she worked on 9 public holidays per year for 9 years and 52 Sundays per year for the 9 years. She however did not exclude the days she was on maternity leave. That means that the claim for the public holidays and Sundays worked is exaggerated. I therefore decline to grant it.

Accrued leave

14. The claim for leave is granted because there is no evidence in the form leave records produced by the respondent to counter the same. Under Regulation 9(1)(a) the Claimant was entitled to 24 days annual leave.

Conclusion and disposition

15. I have found that the deceased Claimant was continuous employed by the respondent from 1999 to May 2008 when she was wrongfully dismissed. I have further found that the contract of service for the Claimant was governed by the Regulations under the Regulation of Wages (Hotel and Catering Trades) order under which she was entitled to the reliefs awarded herein above. Consequently I enter judgement for her as follows:

(a) Notice.....Kshs.2,500.00

(b) Gratuity.....Kshs.12,980.75

(c) Maternity leave.....Kshs.5,000.00

(d) Leave.....Kshs.20,769.25

Total **Kshs. 41,250**

The Claimant will also have costs and interest at the court rates from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018

ONESMUS N. MAKAU JUDGE