



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 140 OF 2016

(Before D. K. N. Marete)

MARY SEBBY NAKHUNGU.....CLAIMANT

VERSUS

AYUB SHAH.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 20th September, 2016. The issues in dispute are therein cited as;

- a) Whether the claimant was unlawfully, unprocedurally and unfairly terminated from employment by the respondent.*
- b) Whether the claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in this memorandum of claim.*
- c) Whether the claimant is entitled to an award of a proper certificate of service;*
- d) Who should pay costs and interest of the suit;*

The matter is not defended or at all. This is despite service. There has not been any appearance for the respondent whatsoever.

The claimant's case is that at all material times to this cause, he was employed by the respondent as a house servant. This was with effect from 1st November, 2008 and at the time of his unfair termination he earned Kshs.10,107.00.

It is the claimant's further case that he served the respondent with loyalty, diligence and with full dedication and commitment till 9th January, 2016 when he was wrongfully, unprocedurally and unlawfully terminated from service without valid reasons or justification. He claims that this was in violation of Section 41(1), 43(1) and 44(4) of the Employment Act, 2007 as follows;

7. That the respondent violated Sections 41(1) of the Employment Act, 2007 which provides that when an employer intends to dismiss or terminate the employment of an employee..... it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative

of his choice present during this explanation. The claimant contends that the respondent never explained to him precisely the reasons for the termination of service and neither did the respondent allowed him to dispute the reasons given for her unfair termination of service.

8. That Section 43(1) of Employment Act provides that in any claim arising out of termination of 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 of the employment shall be deemed to have been unfair...Claimant contends that the respondent never explained to him precisely the reasons for the termination of service and neither did the respondent prove that the said reasons of termination as valid reasons.

9. That Section 44(4) of the Employment Act lists grounds which amount to gross misconduct and which entitled the employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness of any kind of accusation. The claimant submits that the respondent did not give him a chance to dispute the correctness of accusation before unfairly and unprocedurally dismissing him from employment.

Again, the procedure anticipated on Section 41 and 45, Employment Act, 2007 was not pursued. This is a follows;

12.

(i) The claimant was never accorded a hearing or an opportunity to call her witness in her defence and/or dispute his termination from service.

(ii) No notice of the termination was issued to the claimant by the respondents as required by law;

(iii) Proceeding with termination of the claimant without any basis or justification;

(iv) Humiliating the claimant in the process of the said termination;

(v) The respondent acted in breach of the contract of service with the claimant and as provided under the employment act 2007.

(vi) The claimant was never explained to the reasons for the unfair termination by the respondents.

13.

(i) The respondent did not give the claimant termination notice as provided by Section 35 (1) c & 36 of the Employment Act;

(ii) The respondent denied the claimant's employment without following the procedure laid down in the Employment Act specifically the procedure laid out in Section 15,41 and 45 of the Employment Act;

(iii) The respondent did not regulate the working hours of the claimant. The claimant worked overtime with no pay contrary to Section 27 (1) of the Employment Act.

(iv) The respondent failed to pay the claimant his severance pay as by law requires.

(v) The respondent did not give the claimant lawful leave days contrary to section 28 (1) of the Employment Act.

(vi) The respondent failed to pay the claimant her 12 months wages for loss of employment as provided under Section 15 of the Labour Institutions Act and Section 49 (c) of the Employment

Act;

He prays as follows;

i. *One month pay in lieu of notices*
Kshs.10,107.10/-

ii. *Days worked from 1st – 9th January*

10107.10-1576.065

11623.165 x 9

Kshs.3486.9495

iii. *Salary balance for December 2015*

10107.10 +1576.065-5000

Kshs.6623.165

iv. *Service pay for year worked*

v. a) $10107.10 \times 7 \text{ years} \times 15 \text{ day}$

Kshs.35,374.85

b) *Pro rata leave from 1st November 2015*

– 31st December 2015 2 months

$21/12 = 1.75 \text{ days per month} \times 2$

$3.5 \times 1010.10/30$

1179.16167

Kshs.

vi. *Overtime*

Monday to Friday = 6.00am to 4.00pm=10 hours – 8 hours- 2 hrs

2 hours x 1.5 = 3 hours x 5 days=15 hours

Saturday 6.00am to 4.00pm = 10 hours – 5 hours x 1.5=7.5 hours

Sunday 7.00am to 12noon= 5 hours x2=10.0 hours

Total hours per week = 32.5 hours per week

i) $1/11/2008-30/10/2015=364 \text{ weeks}=7 \text{ years}$

$7 \text{ years} \times 52 \text{ weeks}=364 \text{ weeks}$

ii) $1/11/2015-30/12/15= 2 \text{ months} \times 4 \text{ weeks}= 8 \text{ weeks}$

iii) $1/1/2016-9/01/2016=1 \text{ week}$

$364 \text{ weeks} + 9 \text{ weeks} = 373 \text{ weeks} \times 32.5 \text{ weeks} \times 32.5 \text{ hours}=121122.5 \text{ hours}$

$1010.10 \times 121122.5 \text{ hrs}/195$

= Kshs.628,324.717

vii. *Underpayment of wages*

a) Legal notice no 38 dated 9/5/2006

1/11/2008 to 30/4/2009= 6 months

4792 + 728.80 h/a

5510.80 – 4000 x 6months

Kshs.9,124.80/-

b) Legal notice no 70 dated 20/5/2009

1/5/2009 to 30/4/2010=12months

5655 +848.25 – (4000) x 12 months

Kshs.30,039.00

c) Legal notice no 98 dated 28/5/2010

1/5/2010 to 30/4/2011= 12 months

6221 + 933.15-(4000) x 12 months

Kshs.37,849.80

d) Legal notice no 64 dated 27/06/2012

1/5/2012 to 30/4/2013 = 12 months

6,999 +10,49.85-(4000) x 12 months

Kshs 48,586.20

e) Legal notice no 71 dated 3/6/2011

1/5/2011 to 30/4/2013 = 12 months

7915.90 + 1187.385-(4000) x 12 month

Ksh 61239.42

f) Legal notice no 197 dated 30/07/2013

1/5/2015 to 30/4/2013 = 12 months

9024.15 + 1353-(4000) x 12 months

Kshs 51,022.18

g) Legal notice no 197 dated 30/07/2013

1/5/2015 to 30/12/2015 = 4 months

17107.10 + 1516.065 – (6000) x 4 months

Kshs.17,511.09

h) Legal notice no 117 dated 20/5/2015

1/1/2014 to 30/4/2014 = 8 months

9024 + 1353.6225-(4000) x 8 months

Kshs. 17,511.09

