



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1102 OF 2013

NOEL INGOKA SELEBWA.....CLAIMANT

VERSUS

TRACY KAVINDA.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 16th July 2013 and filed in Court on even date, the Claimant has sued the Respondent for unfair termination of employment.
2. The Respondent filed a Memorandum of Defence on 8th December 2015 but chose not to testify at the hearing. The Claimant testified on her own behalf.

The Claimant's Case

3. The Claimant was employed by the Respondent as a house help at a monthly basic salary of Kshs. 8,000 effective 4th March 2012. On 14th February 2013, the Respondent terminated the Claimant's employment.
4. The Claimant states that she was terminated without valid cause and without notice. Further, in effecting the termination, the Respondent failed to comply with the law. She now claims the following:

- a) Salary arrears for the month of February 2013.....Kshs. 8,586
- b) One month's salary in lieu of notice.....8,586
- c) Annual leave for one year.....8,586
- d) Severance pay for one year.....4,950
- e) House allowance for 12 months.....12,360
- f) Weekdays overtime.....39,600
- g) Off duties.....31,680
- h) Underpayment of basic salary.....7,032

i) Official public holidays.....	4,290
j) Saturdays overtime.....	13,860
k) Sundays overtime.....	27,720
l) NSSF dues for 12 months.....	4,800
m) Transport allowance.....	36,500
n) 12 months' salary in compensation.....	103,032
o) 12 months' salary for loss of employment.....	103,032
p) Certificate of service	
q) Costs plus interest	

The Respondent's Case

5. In her Memorandum of Defence dated 7th December 2015 and filed in Court on 8th December 2015, the Respondent admits having employed the Claimant as a house servant on 3rd April 2012 at a monthly salary of Kshs. 8,000.

6. The Respondent states that the Claimant's performance was unsatisfactory, an issue the Respondent had raised with the Claimant. From October 2012, the Claimant began to fall ill and the Respondent allowed her regular paid sick offs. The Respondent also gave the Claimant money towards her medical expenses.

7. In the month of November 2012, the Claimant was constantly absent from work despite her having recovered. The Respondent issued the Claimant with a verbal warning. In January 2013, the Claimant's employment was terminated.

8. It is the Respondent's case that the termination of the Claimant's employment was lawful and fair. The Respondent states that the Claimant was issued with a termination notice in December 2012.

Findings and Determination

9. There are two issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

10. The Claimant claims that her employment was terminated without a valid reason. In response, the Respondent states that the termination was triggered by the Claimant's poor performance which was characterised by persistent absenteeism.

11. There was however no evidence that these charges were ever put to the Claimant for her response and their veracity was therefore untested. That said the Court finds that the Respondent failed to establish a valid reason for the termination as provided under Section 43 of the Employment Act, 2007. Additionally, it would appear that the Respondent took the decision to terminate the Claimant's employment without affording her an opportunity to be heard as required under Section 41 of the Act.

Remedies

12. Flowing from the foregoing, the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair and awards her four (4) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination exercise. I further award the Claimant one (1) month's salary in lieu of notice.

13. The Claimant also claims house allowance. Section 31(1)and(2) of the Employment Act provides that:

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

14. From the evidence on record the Claimant was neither housed nor was she paid house allowance and the Court therefore awards her house allowance at 15% of her basic salary. The resultant figure of Kshs. 9,200 is adopted as her salary for purposes of this claim. The claims for annual leave and service pay also succeed and are allowed.

15. The claims for salary arrears, underpayment, overtime, off duty, public holidays and transport allowance were not proved and are dismissed.

16. Finally I enter judgment in favour of the Claimant in the following terms:

- a) 4 months' salary in compensation.....Kshs.36,800
- b) 1 month's salary in lieu of notice.....9,200
- c) House allowance for 12 months.....14,400
- d) Annual leave for one year (9,200/30x21).....6,440
- e) Service pay for one year(9,200/30x15).....4,600

Total.....71,440

17. This amount will attract interest at court rates from the date of judgment until payment in full.

18. The Claimant is also entitled to a certificate of service and the costs of this case.

19. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF FEBRUARY 2017

LINNET NDOLO

JUDGE

Appearance:

Noel Ingoka Selebwa (the Claimant in person)

Miss Kamau for the Respondent