



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1609 OF 2013

CATHERINE MBITHE MAINGI CLAIMANT

VERSUS

[DILIP] SHAH RESPONDENT

JUDGEMENT

The Claimant was employed by the Respondent on 17th March, 2005 as a Cleaner at a wage of Kshs.2,000.00 per month. Such employment was terminated on 2nd June, 2013 when the Claimant demanded to be paid her terminal dues.

The Claimant is seeking payment of;

- a) Notice pay at Kshs.2,000.00;
- b) House allowance Kshs.29,700.00;
- c) Service pay Kshs.8,250.00;
- d) Leave pay Kshs.11,550.00;
- e) Underpayment May 2009 to May, 2010 Kshs.49,000.00;
Underpayment May 2010 to May, 2011 Kshs.56,916.00;
Underpayment May 2011 to May, 2012 Kshs.67,032.00;
Underpayment May 2012 to May, 2013 Kshs.80,159.60;
- f) Salary arrears for April, 2013 Kshs.1,500.00;
- g) Salary arrears for May, 2013 Kshs.2,000.00;
- h) Unpaid salary for 2 days in June, 2013 Kshs.133.00.

The Claimant testified in support of her case that she was employed by the Respondent to wash toilets, stairs and sweeping his business premises and compound and had to report to work daily, Monday to Friday from 7am to 4pm and on Saturday she left at 12pm. There was no contract of employment and the salary started at Kshs.1,500.00 and later increased to Kshs.2,000.00 per month. She was paid monthly

without a house allowance or payment of statutory dues. She worked for the Respondent for 8 years without taking leave save at Christmas when she was given one week when other employees would also be away.

On 3rd June, 2013 the Claimant got sick and the Respondent allowed her to go home. She bought medicines and on 9th June, 2013 when she reported back at work the Respondent told her there was no work for her and also refused to pay due salaries. The Respondent was aware that the Claimant was sick and had no money to go to a hospital and therefore went to a chemist to buy medicines and had not been registered with the NHIF. The Respondent had also employed somebody else to replace the claimant. Such was unfair and the claims made should be paid.

Defence

In defence, the Respondent case is that the Claimant was employed as a casual labourer at his offices at Baricho Road undertaking duties of cleaning during morning hours only. In May, 2013 the Claimant failed to attend work or offer an explanation prompting the Respondent to seek for her replacement. Termination of the Claimant was therefore not unfair or unlawful as she did not make any effort to justify her absence as sickness on its own does not allow the employee the liberty to absent self from work without leave or notice of the employer.

The defence is also that section 2 of the Employment has defined a casual employee as the worker who is paid daily which was the case for the claimant. Section 37 and 35 of the Employment Act do not apply in the claimant's case as her employment never converted and notice for termination or service pay were not due. The Claimant absented herself from work and the termination was justified. The remedies sought are not due.

In evidence, the Respondent testified that upon employing he claimant, she was a casual worker meant to clean the bundling in the morning as there was no other work the rest of the day. The Claimant reported to work at 7am to 7.30am and then leave. The Claimant was only at work for ½ an hour. She then left for other work duties in other places. The Claimant tenants complained of the claimant's services. The cleaning arrangement by the Claimant went on for over 7 years but in 2013 she started being absent and the tenants got agitated with poor cleaning of the building. The Claimant did not report that she was sick and her colleague made such a report.

The Respondent also testified that he hired the Claimant in 2005 when he purchased the building but never kept work records. The building had two floor and 8 offices. The cleaning services were not good and was paid Kshs.2,000.00. she was paid by petty cash and no records were kept. All communications were verbal. The Claimant worked in other buildings along the road and when she fell ill, the tenants opted to hire their own cleaners.

Submissions

The Claimant submits that she was not a casual worker as she was in the full employment of the Respondent for 8 years from 2005 to 2013 when she was terminated without notice or any reasons. By application of section 37 of the Employment Act she became an employee of the Respondent as she worked continuously and without taking a break as held in **Josphat Njuguna versus High-rise self-help Group [2014] eKLR**.

The Claimant also submits that she was unfairly terminated from her employment as there was no valid reason, she was entitled to sick leave under section 30 of the Employment Act and as held in **British Leyland UK Ltd versus Swift [1981] I RLR 91**. The termination was therefore without due procedure in accordance with section 41, 43, 45 and 46 of the Employment as the Claimant was not given a hearing, there were no reasons or valid and fair reasons for the termination and the same resulted into unfair termination of employment as held in **Mwendwa Maluli versus Kenya Power and Lighting Co. Ltd [2014] eKLR**. Where an employer fails to follow the legal and mandatory procedures in effecting a termination of employment the same is unfair.

The Claimant was underpaid contrary to Wage Guidelines applicable from 2005 to 2013 and the arrears are due. The Regulation of Wages and Conditions of Employment (General) Amendment Orders applicable make provision for minimum wage payable to the Claimant as a cleaner. The pay of kshs.2,000.00 was below such minimum wage. The remedies sought are therefore due.

The Respondent submits that the Claimant was terminated for failing to attend work without informing the Respondent and was thus replaced and the Respondent complied with the provisions of section 44(4) of the Employment Act. The type of work the Claimant was required to undertake was to clean the building daily as part of hygiene and cleanliness which she failed to attend thus breaching her employment and the termination was proper. No compensation or notice pay are due.

The Claimant was not underpaid as the nature of work she was undertaking was for half an hour each day and was then allowed to work for other employers. As a casual employee she was paid for her dues.

Determination

Section 2 of the Employment Act defines a 'casual employee' to be a worker employed for 24 hours and is paid at the end of such a day. The Respondent admitted the Claimant was in his employment from 2005 to 2013 and was paid at month end. He used petty cash to make such monthly payment. By application so section 37 of the Employment Act, the Claimant effectively worked daily and for more than one month and performed duties which could not reasonably be expected to be completed within an aggregate period of three months so as to be termed as a casual employee. The Respondent had the liberty of issuing the Claimant with a piece-rate contract, fixed term contract or a contract setting out the specific duties to be carried out and the agreed wage. Such was not done and therefore noting the time of service in the aggregate and the mode of payment of due wages, the Claimant was a full time employee.

The Respondent also failed to comply with section 15 of the Employment Act;

15. Informing employees of their rights

An employer shall display a statement in the prescribed form of the employee's rights under this Act in a conspicuous place, which is accessible to all the employees

The Claimant remained at the service of the Respondent without any written terms and condition of her employment. This is contrary to clear provisions of the law.

The Claimant testified that she got sick and was away from work for a month. She did not attend hospital as she had no money and went to a chemist and bought some medicines. She informed an old man near her place of work. The Claimant resumed duty later and found the Respondent had replaced her position and after a while such a role was phased out due to complaints by tenants who opted to hire own staff to clean as the Claimant was not doing a good job.

The Employment Act allow an employee who is sick, unwell or is unable to attend work due to sickness to inform the employer within a reasonable time. Section 34 of the Employment Act addresses the right to medical attention and the requirements to be met by an employer and an employee thus;

34. Medical attention

(1) Subject to subsection (2), an employer shall ensure the sufficient provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

(2) An employer shall take all reasonable steps to ensure that he is notified of the illness of an employee as soon as reasonably practicable after the first occurrence of the illness.

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that

the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill. [Emphasis added].

In **Dorothy Njoki Ndungu versus Machakos University College [2016] eklr**, the court held;

A third party is allowed to attend before an employer and make presentations on the same [when an employee is sick]. Indeed the law goes further to allow an employee who is sick or unwell to have up to 30 days away but upon return must submit particular documents, a medical certificate from a medical practitioner. Such I find to be quite open and generous to meet. Otherwise, an employee will claim illness without taking the necessary steps and absconds duty and when put to task, claim a violation of constitutional and legal right. The law is not only meant to address an employee's rights, the law serves both parties to an employment relationship and rights at the work place.

In the claimant's case, she was away for a month, the old man she told about her sickness is not stated and she did not follow this evidence to confirm if the old man informed the Respondent about her sickness and need to be away and even where the old man was able to make such communication, the Claimant did not present any medical evidence of her sickness or the certificate required to confirm that she was sick and required medical attention and hence absent from work.

The protections given in law to ensure an employee who is sick receives medical attention equally protect the employer's right to summarily dismiss an employee who is absent from without due cause. Section 34(3) provides;

(3) It shall be a defence to a prosecution for an offence under subsection (1) if the employer shows that he did not know that the employee was ill and that he took all reasonable steps to ensure that the illness was brought to his notice or that it would have been unreasonable, in all the circumstances of the case, to have required him to know that the employee was ill.

I find no effort by the Claimant to address her absence from work for a period of one month. Such is not justified and the resulting termination of her employment by the Respondent and by replacing her was justified. No compensation is due.

Remedies

Failure to issue the Claimant with written terms and conditions of employment gave her the legal protections under the Employment Act and the Regulation of Wages (General Amendment) Orders. For reasons not clear, the Claimant has based her claim from May, 2009 and not before. This was not gone into during her evidence but her counsel was gone in-depth into the subject of applicable Wage Orders in the written submissions. I will however consider what is pleaded and the evidence of the claimant.

The Regulation of Wages (General Amendment) Orders are government orders setting out minimum wage increases and taking into account various policy issues and guidelines each year and for compliance by all employers. The Wage Guidelines and regulations give meaning to the rights in the Employment Act and the Labour Relations Act.

In the Wage Orders applicable for the period of May, 2009 to May, 2010 a cleaner's monthly wage was Kshs.6130.00 and the Claimant is entitled to the difference from the kshs.2,000.00 that was paid all being Kshs.49,560.00.

For the following year ending May, 2011 the wage underpayment is Kshs.56,916; in 2012 the wage underpayment amounts to kshs.67,032.00; and for the remainder of the period claim for Kshs.78,948.00 is justified. The total underpayment all amounting to Kshs.252,456.00.

On the wage of Kshs.2,000.00 that the Respondent has admitted to having paid him Claimant for the

duration of employment, such was not inclusive of house allowance in terms of section 31 of the Employment Act. The underpayments noted and award above are without the due house allowance. The Claimant is awarded a house allowance of Kshs.53,133.00 in terms of the wage orders applicable and the facts of non-payment of the same.

Service pay is due in terms of section 35 of the Employment Act where there were no statutory dues deducted or remitted and no statement of payment details were issued or submitted in court to confirm that on the paid wage of Kshs.2,000.00 there were remittances to NSSF and NHIF. On the finding that the Claimant was underpaid, there was no compliance with section 15 of the Employment Act, service pay is due and is hereby awarded based on the payable minimum wage due to the Claimant in accordance with the Wage Orders all at Kshs.8,250.00.

Section 28 of the Employment Act requires an employer to ensure that each employee is able to take annual leave and where such leave is not taken, there is payment in lieu therefore. Such leave is to be earned within the first 18 months. The Respondent testified that due to the nature of the claimant's work she was at work daily and as required until she absented herself. The leave pay is due all at Kshs.11,500.00.

The claim for salary arrears for April 2013 at Kshs.2, 000.00; May, 2013 and pay for 2 days in June, 2013 has not been challenged or evidence submitted for such payments. The Claimant is awarded the sum of Kshs.3,133.00

On the finding the termination was justified save for the legal dues owing, notice pay is not payable. Such claim is declined.

Before I conclude, I would like to appreciate **Mrs G. Ogalo-Omondi of Oraro & Company Advocates** for accepting to take up this matter for the Claimant *pro bono* and going out of her way to ensure that she received legal representation in this matter. The history to this was that judgement had been entered for the Claimant and the Respondent applied and the same was set aside which angered the Claimant to the extent that she could not appreciate why the case had to be heard again instead of the Respondent paying the judgement award. The claimants became angry, agitated, distressed and made remarks that were not very kind. Mrs Omondi was able to step in and calm the Claimant and the hearing commenced afresh. Such is an honourable task to achieve and I would like to thank Counsel for such stepping in. such selfless service should not go unrecognised and be made part of this judgement. I would like to thank Mrs G. Ogalo-Omondi.

In conclusion, judgement is hereby entered for the Claimant against the Respondent in the following terms;

- a) Total underpayment Kshs.252,456.00;
- b) Service pay Kshs.8,250.00;
- c) Leave pay Kshs.11,500.00;
- d) House allowance Kshs.29,700.00
- e) Salary arrears Kshs.3,133.00.
- f) Costs of the suit.

Dated and delivered in open court this 30th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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