



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1647 OF 2013**

**RUTH WAKIO MBAGA.....CLAIMANT**

v

**KACHE LIMITED t/a KACHE BY ANGIE.....RESPONDENT**

**JUDGMENT**

1. Ruth Wakio Mbagha (Claimant) instituted legal proceedings against Kache Ltd t/a Kache by Angie (Respondent) on 11 October 2013 and the issue in dispute was stated as *Wrongful and unfair termination of employment*.
2. A Reply to Claim was filed on 12 November 2013.
3. The Cause was not scheduled for hearing until the Deputy Registrar issued a hearing notice on 17 January 2017 for the Cause to be heard during the service week (initiative in which Judges from outside Nairobi sit in Nairobi in order to clear case backlog).
4. When the Cause was called out for hearing on 4 April 2017, the Respondent was not present (neither was its advocate in Court) and because the Claimant was ready to proceed, the Court allowed the hearing to proceed.
5. The Claimant gave sworn testimony.
6. Essentially, two issues arise for determination, *whether there was unfair termination of employment and appropriate remedies including entitlements accruing out of the contractual relationship*.
7. The Claimant stated that she was employed by the Respondent as a Sales lady in December 2005 at a monthly salary of Kshs 20,000/-.
8. According to the Claimant, the Respondent did not issue her with a written contract until 1 October 2010 when a letter of appointment was issued. She accepted the contract.
9. Under the written contract, the Claimant was employed as a Sales Assistant but at a reduced salary of Kshs 15,000/- net. The contract indicated that previous employment was casual/probationary employment.
10. As regards the separation, the Claimant testified that on 11 October 2011 she fell ill and while in hospital, the Respondent's Director, Angela called her on the phone and instructed her to go to Kilimani Police Station. At the station, she learnt that there had been a theft at the Respondent's offices the previous night and she was asked to assist in tracing some 2 employees.

11. At the same time, the Director informed her that she was being suspended pending investigations into the theft and that she was later charged with theft before the Magistrates Court (the charges were withdrawn on 12 November 2012).

12. The Claimant also testified that in November 2011, she followed up with the Respondent's Director for her September and October 2011 salary but the Director informed her that her contract had been terminated. She was not paid any dues.

13. On why she considered the termination of her employment unfair, the Claimant stated that she was not given any notice nor given an opportunity to make representations.

14. The Claimant further stated that she was not paid house allowance from December 2005 to September 2010.

### **Whether termination of employment was unfair**

15. The law on the process to be undertaken by an employer before terminating the employment of an employee on account of *misconduct, poor performance or physical incapacity* is primarily found in section 35 of the Employment Act, 2007 which contemplate written notice; section 41 which envisage a notification of allegations and a hearing (procedural fairness).

16. On the substantive fairness, sections 43 and 45 of the Act place a burden upon the employer to prove the reasons for termination and that the reasons are valid and fair.

17. The Claimant's evidence that there was no notice or hearing is unchallenged and uncontroverted.

18. Further, the Respondent did not appear during the hearing to prove the reasons for termination and that the reasons were valid and fair as contemplated by sections 43 and 45 of the Employment Act, 2007.

19. The Court also notes that the allegations in the Response that the Claimant did not report to work of her own accord remain no more than allegations, with no evidence to support the same.

20. The Court therefore finds that the Respondent unfairly terminated the employment of the Claimant.

### **Contractual entitlements**

#### **House allowance**

21. The Claimant was not issued with a written contract as required by sections 9 and 10 of the Employment Act, 2007.

22. Considering her unchallenged evidence and the requirements of section 9 as read with sections 10(7) and 31(2) of the Employment Act, 2007, the Court finds the head of claim for house allowance is merited.

#### **Leave**

23. The Claimant stated that she did not take leave for the first 5 years of employment and she sought Kshs 100,000/-.

24. Although the evidence is not challenged, in consideration of the provisions of section 28(4) of the Employment Act, 2007, the Court finds this head of claim as overtaken by operation of law.

25. The Claimant also sought Kshs 15,000/- on account of leave for the last year in employment.

26. With her testimony remaining unchallenged, the Court finds the head of claim merited for the last year of employment.

## **Service pay**

27. There is no suggestion that the Claimant was a member of a pension scheme or contributor to the National Social Security Fund and thus caught up by the provisions of section 35(5) and (6) of the Employment Act, 2007.

28. The Court finds the claim for service pay sound in law.

## **Pay in lieu of Notice**

29. Because no written notice was given, the Claimant is entitled to pay in lieu of notice equivalent to one month's salary.

## **Compensation**

30. Considering the period of service of about 6 years, the Court is of the view that the equivalent of 7 months gross salary as compensation would be appropriate.

## **Conclusion and Orders**

31. The Court finds and holds that the employment of the Claimant was unfairly terminated and awards her and orders the Respondent to pay her

(a) Salary for September 2011	Kshs 15,000/-
(b) Salary for October 2011	Kshs 15,000/-
(c) Pay in lieu of Notice	Kshs 15,000/-
(d) House allowance	Kshs 194,250/-
(e) Service pay	Kshs 57,500/-
(f) Pay in lieu of leave for 2010/2011	Kshs 15,000/-
(g) Compensation	Kshs. 105,000/-
<b>TOTAL</b>	<b>Kshs 416,750/-</b>

32. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 6<sup>th</sup> day of April 2017.**

**Radido Stephen**

**Judge**

## **Appearances**

For Claimant            Mr. Muchai instructed by Njoroge Jimnah & Co. Advocates

For Respondent        Chaudhri & Associates

Court Assistant        Nixon