



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2380 OF 2016

JOAN NANYAMA KUKESICLAIMANT

VERSUS

JUNGLE DOVE LIMITEDRESPONDENT

JUDGEMENT

The Memorandum of Claim was filed on 23rd November, 2016. The Respondent was served with summons and Affidavit of Service filed on 18th January, 2017. there was no appearance or defence filed. The matter came for hearing on 10th April, 2017 the court directed that the Court Process Server to effect service upon the Respondent and confirm with the court. This was done by Boniface Maina and he filed Affidavit of Service on 28th April, 2017. The court satisfied that the Respondent was served but opted not to attend proceeded to hear the Claimant in her evidence.

Claim

The Claimant was employed by the Respondent on 9th September, 2015 as a Tailor at a monthly wage of Kshs.12, 000. There was no contract of service issued. On 28th May, 2016 the Claimant was terminated from her employment wrongfully as there was no notice, hearing or reasons given for the same. She was not paid her terminal dues and is claiming;

- a) Notice pay at Kshs.12,000.00;
- b) Service pay for 6 years at kshs.34,689.88;
- c) Leave for one year at Kshs.6,300.00;
- d) NSSF deductions not remitted for 7 months Kshs.2,800.00;
- e) NHIF deduction Kshs.1,600.00;
- f) Compensation; and
- g) Costs.

The Claimant testified in support of her claim that upon her employment on 9th September, 2015 she worked diligently for the Respondent until 28th April, 2016 when her supervisor advised her to go home and would be called. She waited at home but no call came and opted to go back to the Respondent and

find out why the call had not come through. The Claimant also reported the matter to the County Labour Officer who called the Respondent by letter invitation but the Respondent did not attend or give a response. The Claimant went to Kituo Cha Sheria where an advocate sent a demand notice to the Respondent but there was no response and her terminal dues have never been paid.

Determination

From the payments records the Claimant submitted in her evidence, the salary deposits in her bank account with Equity Bank, Account Number [particulars withheld] shows that her salary was paid by the Respondent from 8th December, 2015 to 7th May, 2016. This is a time period of 6 months and for the payment in December, 2015 to apply, the Claimant must have been at work for November, 2015 to be entitled for the due payment of a salary. All total to 7 months.

The failure by an employer to issue an employee with an employment contract, written terms and conditions and a written notice of termination of employment only works against the employer. Where an employee is engaged for work continuously for a period of over one (1) months and such an employee proceed to under similar duties without a stop and does so for over 3 months, such an employee would be issued with a written contract of service. Such is a requirement in law under sections 8, 9, 10 and 37 of the Employment Act. Where there is no written contract of service, the employee is protected in law.

Termination of employment for an employee protected in law must be in accordance with the same law. There must be notice, hearing and reasons given for the termination. Whatever nature of misconduct, whether due to poor performance or due to any gross misconduct, the employer must procedurally address itself to rights and procedures set out under section 41, 43 and 44 of the Employment Act.

Where the court is presented with a claim where the employer just decides to send an employee away, such without any justification, the ultimate legal requirements not met, such is an unfair termination of employment by virtue to section 45 of the Employment Act which requires an employer to have a just and reasonable cause so as to terminate employment.

Without any defence and appearance of the respondent, the claims are not challenged and shall be assessed on their lawfulness.

The claim for notice pay is due as there is not notice of termination. The Claimant is awarded Kshs.12, 000.00.

Claim for service pay for 6.3 years is not founded on any law and where the Claimant worked for 7 months, in terms of section 35 of the Employment Act, such a claim of service pay for 6.3 years is not due. Such is declined.

Leave of 0.75 years I take is premised on the 7 months at work. The Claimant served for 7 months and leave due can be prorated at Kshs.61, 300.00.

NSSF and NHIF dues deducted and not remitted are due to the statutory bodies and not back to the claimant. This is a matter appropriate for the action of the County Labour Officer to deal, follow and ensure the Respondent has remitted the dues and the Respondent sanctioned for non-remittance of the same when due and as deducted from the claimant's wages. The County Labour Officer shall deal and advice the Claimant within 14 days.

Compensation for unlawful termination is due in a case of unfair termination of employment. The Claimant had worked for 7 months before her termination it is not the number of months here which are relevant but the adherence of the Respondent to the rule of law in terms of procedure and reasons for termination. None exists here to warrant the unlawful and unfair termination of employment. An award of 3 months gross wage is appropriate compensation for the claimant. The Claimant is awarded Kshs.36, 000.00 in compensation.

Accordingly, judgement is hereby entered for the Claimant against the respondent. Compensation awarded at Kshs.36, 000.00; notice pay at Kshs.12, 000.00; and leave due Kshs.6, 300.00.

The County Labour Officer [Nairobi, Industrial Area] shall within 14 days ensure the Respondent has paid the NSSF and NHIF dues with regard to the claimant's period of employment and such shall be drawn from there Respondent Accounts and where a sanction is due, such shall be appropriately applied.

The County Labour Officer shall file a report with the court. Mention on 8th June, 2017 to confirm payments.

Dated, signed and read in open court this 25th day of May, 2017

M. MBARU

JUDGE

In the presence of:

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