



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 101 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**CECILIA MALAKWEN.....CLAIMANT**

**- Versus -**

**THE NOBLE HOTEL AND CONFERENCE CENTRE.....RESPONDENT**

**J U D G E M E N T**

By Memorandum of Claim dated 19th April 2016 and filed on 21st April 2016 the Claimant avers that she was unfairly terminated from employment by the Respondent. She prays for the following remedies:

- i. A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, she was not remunerated as required by law.
- ii. Payment of the sums of money claimed under paragraph 9 above.

a. One months in lieu notice

Basic Salary Kshs. 11,500

b.  $21 \text{ days} / 12 \times 11,500 / 30 \times 6 \text{ months}$  Kshs. 20,754

c. Overtime dues –

48hrs Pwk

$12 \text{ hrs} \times 6 \text{ days} = 72 \text{ hrs} - 84\text{hrs} = 24\text{hrs O.T}$

$24\text{hrs} \times 4\text{wks} = 96 \text{ hrs p.m.}$

$96\text{hrs} \times 1.5 \times 11,500 / 208 = 7961 \times 18 \text{ months}$  Kshs.143,298

d. Unpaid Public Holiday

10 days per year x years worked x basic/30 x 2

$10 \text{ days} \times 1 \text{ year} \times 11,500 / 30 \times 2$  Kshs. 7,666.67

e. House Allowance at 15 % of the Basic

11,500 x 15% x period worked

1,725 x 18 months Kshs. 31,050

f. Compensation for unfair termination

Gross pay x 12 months

13,225 x 12 months Kshs.158,700

**TOTAL CLAIM Kshs.356,239.67/=**

iii. Costs and Interests.

iv. Any other relieve the Honourable may deem fit to grant.

The Respondent filed a Defence denying the allegations of unfair termination. It is the Respondent's case that the termination of the Claimant's employment was lawful and procedural. The Respondent prays that the Claim be dismissed with costs.

The case was heard on 14th November 2016. The Claimant testified on her behalf while the Respondent's Director JANE WAMBUI NGANGA testified on its behalf. The parties thereafter filed and exchanged written submissions.

### **Claimant's Case**

The Claimant testified that she was employed by the Respondent as a security guard on 3rd September 2013. Her first salary was Kshs. 9500. The salary was increased to Kshs. 11500 in March 2015. Her employment was terminated on 8th March 2015. She worked from 6am to 6pm on 6 days a week. She also worked on public holidays. She was not paid any allowances or overtime. She went on annual leave in 2014 but did not take leave in 2013.

The Claimant testified that on 8th March 2015 she reported for work but was sent back home. She was not issued with a letter of termination. She received the letter of termination later from one of her colleagues.

The Claimant testified that she was not paid terminal dues. She was also not given a hearing or notice of termination of employment. She denied that she did not do her work diligently or that she left her work station unattended.

She urged the court to enter judgment against the Respondent as prayed in her claim.

Under cross examination the Claimant denied that the Respondent suffered loss due to her negligence of duty. She further denied that she was called for a hearing on 8th March 2015.

In the written submissions filed on behalf of the Claimant it is submitted that the evidence shows that she was terminated without due process as laid down in the law and is entitled to the remedies sought.

### **Respondent's case**

JANE WAMBUI NGANGA (RW1) testified that the Claimant's employment was terminated due to incompetence and lack of diligence. She testified that the Respondent has 3 gates: the main gate; staff gate; and the kitchen gate. Cecilia was stationed at the staff gate where the Respondent lost a lot of things because the gate was unattended. She testified that there was a lot of compromise due to Cecilia's laxity.

Jane testified that on 7th March 2015 construction work was going on. At 5 O'clock while her co-director was inspecting the construction work he found the gate open and Cecilia was not at the staff gate but at the main gate. She testified that there were 5 guards during the day and Cecilia was supposed to ask one of the other guards to man the gate for her while she was away.

Jane testified that Cecilia was handed over to her head of department who dealt with her case.

Jane testified that Cecilia's letter of termination was delivered to her through another staff. She stated that Cecilia did not go back to clear so that her terminal dues could be paid. The terminal dues payable are salary for 7 days worked, one months' salary in lieu of notice and prorata leave of 3 months. She would also be issued with a certificate of service.

Under cross examination Jane stated that she could not tell what was lost through Cecilia's negligence. She stated that Cecilia was not given a written warning, that she appeared before a disciplinary committee but there were no minutes of the disciplinary hearing filed in court.

In the written submissions filed on behalf of the Respondent it is submitted that she was lawfully terminated under section 44(c) of Employment Act due to gross misconduct and failed to clear so that she could be paid her terminal dues of Kshs. 16,866 that is still held by the Respondent. The Respondent denies that the Claimant is entitled to any other terminal benefits.

### **Determination**

I have carefully considered the pleadings and evidence on record. There is no dispute that the Claimant was an employee of the Respondent or that her employment contract was terminated by letter dated 8th March 2015. The only issues in dispute are whether the termination was unfair and if she is entitled to the remedies sought.

The letter of dismissal does not refer to any disciplinary hearing. The Respondent's witness JANE WAMBUI NGANGA referred to a hearing but stated there were no minutes. There is also no letter inviting the Claimant for a disciplinary hearing or a letter asking the Claimant to show cause why she should not be dismissed for gross misconduct.

JANE WAMBUI NGANGA contradicted herself when she stated that the Claimant was given a hearing while at the same time she stated the case was referred to the Human Resource Manager to deal with. That human resource officer was not called to testify.

I am satisfied on the evidence on record that the Claimant was not given a hearing at all. The letter of termination is the same letter where she was informed about the charges against her. The termination did not comply with sections 41 and 43 of the Employment Act and is therefore unfair in terms of section 45(2) of the Act. I therefore find and declare the termination of the Claimant's employment by the Respondent unfair.

### **Remedies**

The Claimant having been unfairly terminated is entitled to pay in lieu of notice and days worked but not paid both of which the Respondent has offered to pay although the amount payable is disputed. The Claimant testified that she worked from 6am to 6pm for 6 days a week, a fact that is not denied by the Respondent. She is therefore entitled to overtime pay. The maximum working hours being 52 per week, the Claimant worked an extra 20 hours per week for only 12 months as this is a continuing wrong.

The Claimant further prayed for underpayments. The consolidated salary for day guard from May 2013 was Kshs. 10373. The Claimant was therefore underpaid by Kshs. 873 per month up to March 2015. She was therefore underpaid by a total of Kshs. 873x16 months.

The Claimant is not entitled to house allowance as the underpayments are based on consolidated wages

which are inclusive of house allowance. The Claim for public holidays was not denied by the Respondent's witness. The Claimant is therefore entitled to payment for public holidays falling between September 2013 and 8th March 2015 which are 15 in total. Based on a hourly rate of Kshs.51.20 and double rate of pay for 12 hours a day she is entitled to Kshs. 18,432. The Claimant is also entitled to compensation for unfair termination which I award her at 2 months' salary taking into account the length of service and all other relevant circumstances.

On the Claim for annual leave the Respondent offered to pay the Claimant prorata leave of 3 months. No records or other evidence was produced by the Respondent to prove that the Claimant took leave during the period she was in employment of the Respondent. Under section 74(1)(f) of the Act an employer is required to submit records of annual leave in the following terms:

*(f) of an employee's annual leave entitlement, days taken and days due specified in section 28;*

In the absence of such records the Court presumes as provided in section 10(7) that the Respondent has failed to discharge its burden of proof that the Claimant did not take annual leave. I therefore award the Claimant annual leave for a period of 7 months being 12.25 days translating to Kshs. 4,696.00.

### **Conclusion**

I therefore award the Claimant the following:

- |                                 |                 |
|---------------------------------|-----------------|
| (i) Pay in lieu of notice       | Kshs. 11,523.00 |
| (ii) Salary for 9 days worked   | Kshs. 3,456.90  |
| (iii) Underpayments             | Kshs. 13,968.00 |
| (iv) Overtime (20x52x1.5x51.20) | Kshs. 79,892.75 |
| (v) Public holidays             | Kshs. 18,432.00 |
| (vi) Compensation               | Kshs. 23,046.00 |
| (vii) Annual leave              | Kshs. 4696.00.  |

The Claimant is also entitled to a certificate of service which the Respondent has agreed to issue and which the Court directs that Respondent issues to the Claimant within 30 days.

The Respondent will pay Claimant's costs of the suit.

**Dated and signed and delivered this 20th day of JULY, 2017**

**MAUREEN ONYANGO**

**JUDGE**