



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 191 OF 2014**

**CATHERINE WAYUA MUTUA.....CLAIMANT**

**VERSUS**

**DAZZLE CREATION LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 14<sup>th</sup> February 2014 and filed in court on even date, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Memorandum of Response on 18<sup>th</sup> August 2014.
2. At the interlocutory stage, my brother **Nzioki wa Makau J** directed the Respondent to release the Claimant to proceed on maternity leave and to pay her the sum of Kshs. 40,500 being maternity leave pay plus her salary for the month of January 2014, in the sum of Kshs. 13,500.
3. When the matter came up for the main hearing, the Claimant testified on her own behalf and the Respondent called its Manager, Lillian Mueni Nzioka. Both parties also filed written submissions.

**The Claimant’s Case**

4. The Claimant was employed by the Respondent as a general labourer from August 2003. She earned a daily rate of Kshs. 450, paid twice a month. She states that the Respondent terminated her employment on 3<sup>rd</sup> February 2014, after she submitted an application for maternity leave.
5. The Claimant further states that during the entire duration of her employment she never took any leave. She contends that she worked throughout, without any rest day. She also claims that she was not paid house allowance. Her claim is as follows:

- a) A declaration that the termination of her employment was unlawful and unfair
- b) Salary for the month of January 2014.....Kshs. 13,500
- c) House allowance for 132 months.....267,300
- d) Unremitted NSSF dues for 6 years and 5 months.....30,800
- e) Pay in lieu of 528 off days.....475,200

- f) Unremitted NHIF dues for 11 years.....21,120
- g) Leave pay for 11 years.....148,500
- h) Certificate of service

### **The Respondent's Case**

6. In its Memorandum of Response dated 12<sup>th</sup> August 2014 and filed in court on 18<sup>th</sup> August 2014, the Respondent admits having employed the Claimant as an unskilled worker from 9<sup>th</sup> August 2003. The Respondent also admits that the Claimant was paid a daily rate of Kshs. 450, at intervals of twice a month.

7. The Respondent alleges that on 11<sup>th</sup> February 2014, the Claimant caused a scene at the work place by crying and abusing her superiors, while demanding three months' salary in advance, before proceeding on maternity leave.

8. Pursuant to an order of the Court, the Claimant was paid maternity leave dues and salary for January 2014. She however did not resume duty after the maternity leave. The Respondent denies receiving any letter from the Claimant asking to proceed on maternity leave. Rather, it is the Respondent who allowed the Claimant to proceed on maternity leave as required by law.

9. The Respondent states that the Claimant took all her leave as it fell due. She was also granted off days. Regarding the claim for house allowance, the Respondent states that the daily rate of Kshs. 450 paid to the Claimant was inclusive of house allowance.

10. The Respondent denies terminating the Claimant's employment and states that the Claimant herself absconded duty, without notice. In this regard, the Respondent lays a counterclaim against the Claimant in the sum of Kshs. 13,500 as notice pay.

### **Findings and Determination**

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

- a) Whether the Claimant has proved a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has proved a counterclaim against the Claimant.

### **Unlawful Termination?**

12. The Claimant states that her employment was terminated upon her application for maternity leave. The Respondent on the other hand states that the Claimant did not resume duty after expiry of her maternity leave. In her testimony before the Court, the Claimant confirmed that after maternity leave, she did not go back to work because she had already been terminated. She however did not adduce any evidence to support the allegation of termination and the Court disbelieved her word.

13. For this reason, the claim for unlawful termination fails and is dismissed. Salary for the month of January 2014 was paid at the interlocutory stage and the claim thereon is therefore superfluous.

14. Regarding the claim for house allowance, I have this to say; the Claimant was paid a daily rate which is ordinarily inclusive of house allowance. In the absence of any proof that the daily rate was below the applicable minimum wage, the claim for house allowance cannot stand.

15. Similarly, the claim for off days is without basis since the Claimant herself told the Court that she did not work on Sundays, meaning that she was allowed one day off every week. With respect to the claim for leave pay, the Respondent produced records showing that the Claimant was on leave in July 2010 and September 2013. The Claimant did not dispute these records and the claim for leave pay for her entire period of employment with the Respondent is therefore without basis and is dismissed.

16. On the claims for unremitted NSSF and NHIF dues, the only thing to say is that any outstanding dues are payable to the relevant statutory bodies being the National Social Security Fund and the National Hospital Insurance Fund and not to the Claimant.

17. The Respondent states that the Claimant's certificate of service is ready for collection and there is therefore no dispute on this head.

### **The Counterclaim**

18. From the foregoing findings, the Claimant effectively left the Respondent's employment without notice and she is therefore liable to pay the equivalent of one (1) month's salary in lieu of notice.

### **Disposition**

19. In the end, I make the following orders:

- a) The Claimant's entire claim is dismissed;
- b) The Respondent's counterclaim in the sum of Kshs. 13,500, being one month's salary in lieu of notice is allowed;
- c) Each party will bear their own costs.

20. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mageto for the Claimant

Mr. Nyabena for the Respondent