



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 65 OF 2016**

*(Before Hon. Justice Mathews N. Nduma)*

**RUTH PAMELA ADHIAMBO.....CLAIMANT**

**-Versus-**

**MASENO UNIVERSITY.....RESPONDENT**

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

1. The suit commenced on 6<sup>th</sup> March, 2016. The Claimant seeks against the Respondent:-

- (a) Twelve months compensation for unfair termination of employment.
- (b) Service pay for 16 years served calculated at 15 days salary for each year at (Kshs.9,025.15).
- (c) Payment of 832 rest days worked at the rate of Kshs.432.40 per day.
- (d) Payment of 336 leave days at the rate of Kshs.432.40 per day.
- (e) Unpaid overdue for 8,760 hours at the rate of 79.90 per hour.
- (f) Underpayment of salaries for sixteen year period.
- (g) Interest at court rates.
- (h) Costs.

**Facts of the Claim**

2. The Claimant was employed as a sanitary attendant on a casual basis between 1999 and April 2009 at the rate of Kshs.88.35 per day.

3. In the period between May 2009 and 30<sup>th</sup> April, 2012, the Respondent paid the Claimant Kshs.100.35 per day.

4. In the period between May 2012 to December 2012, the Respondent paid the Claimant Kshs.204.50 per day and in the period between January 2013, to January 2015, the Respondent paid the Claimant Kshs.264.50 per day.

5. The Claimant worked continuously for 16 years and performed her duties diligently and the Respondent wrote her several letters of commendation produced as **Appendix RPA2**.
6. On 31<sup>st</sup> January 2015, the Respondent summarily dismissed the Claimant from work without giving him any reason, notice to show cause or disciplinary hearing.
7. The Claimant pleaded with the Respondent to reinstate him by a letter dated 5<sup>th</sup> February, 2015 in vain.
8. The Claimant had throughout the period of employment asked the Respondent to accord him recognition as a permanent employee which he was, and pay him all benefits payable to permanent employees in terms of the Employment Law applicable in Kenya, in vain.
9. The Claimant was therefore not given leave days nor paid leave allowance, was not paid overtime for hours worked in excess of a normal working day of 8 hours. The Claimant worked daily from 7.30 am to 5pm, an aggregate of 9 hours and therefore was entitled to payment of overtime for 30 minutes daily for 16 years.
10. The Claimant further worked seven (7) days a week beyond the statutory six days a week for 16 years and the Claimant was not paid for the rest days worked.
11. The Respondent further did not make any contribution to NSSF or contribute to any pension scheme or provident fund for the Claimant for 16 years and the Claimant is entitled to payment of gratuity as prayed.

### **Response**

12. The Respondent filed a response to the statement of claim on 1<sup>st</sup> July 2016, in which the Respondent admits that the Claimant worked as a sanitary attendant for the Respondent but disputes that the Claimant was a permanent employee for the period of employment.
13. The Respondent admits also that the Claimant performed his work diligently and the Respondent wrote him several commendation letters.
14. The Respondent denied that it summarily dismissed the Claimant for no reason at all, without issuing him with a notice to show cause and without according the Claimant a disciplinary hearing.
15. The Respondent avers that the Claimant was at all material times engaged as a casual employee.
16. The Respondent denied the specific claims made by the Claimant in respect of underpayment, overtime, leave pay, rest days and service pay and puts the Claimant to strict proof thereof.
17. The Respondent denied that the casual employment converted to permanent employment in terms of section 37(1) of the Employment Act, 2007.
18. The Respondent admitted all the Legal Notices produced by the Claimant were applicable for the specific periods named in the notices.
19. The Respondent in the alternative pleaded that the Claimant worked for the Respondent from 1st April 2003 and earned a constant daily pay of Kshs.264.50 and that the Claimant was not in any continuous employment with the Respondent as alleged or at all. That the Claimant was relieved of employment after every three months and was re-employed again as a casual.
20. The Respondent denied having received any demand notice. In short, the Respondent prays that the suit be dismissed with costs.

## **Submissions**

21. The Claimant filed written submissions on 28<sup>th</sup> September, 2017 and the Respondent filed its written submissions on 4<sup>th</sup> December, 2017.

22. The submissions by the Respondent are significant in that various admissions were made therein as follows:-

(a) The Respondent admitted that the Claimant was a permanent employee from the year 2006 and that the period prior to the year 2006 should be treated as casual engagement since no oral evidence was adduced to prove that employment was continuous.

(b) That the Claimant is entitled to service pay for a period of 8 years, from 2006 when she started working for the Respondent permanently.

(c) That the claimant is entitled to underpayment from the year 2006 to the year 2015.

(d) That the Claimant is entitled to payment in lieu of untaken leave for 8 years from the year 2006 up to the year 2015.

## **Denial**

23. The Respondent did not admit the claim in respect of rest days and overtime.

24. The Respondent also continued to deny that the claimant was unlawfully and unfairly summarily dismissed from employment and proposed compensation equivalent to three months' salary in the event, the court found in favour of the Claimant.

25. The submissions by the Claimant were by and large in support of the pleadings and prays the suit be allowed as prayed.

## **Determination**

26. The issues for determination are as follows:-

(i) Whether the Claimant was in continuous employment from 1999 to 2015 as alleged by the Claimant or from 2006 to 2015 as alleged by the Respondent.

(ii) Whether the summary dismissal of the Claimant was for a valid reason and in terms of a fair procedure.

(iii) Whether the Claimant is entitled to the reliefs sought.

## **Issue**

27. It is trite law that the Plaintiff must in the least make a prima facie case which the Defendant must rebut, failing which, the Plaintiff is said to have proved her case on a balance of probability. **See Eastern Produce (K) Limited v John Lumumba Mukosero Eldoret Civil Appeal No.25 of 1998.**

28. The Claimant pleaded in the Statement of Claim that she was engaged as a sanitary attendant by the Respondent on a casual basis between 1999 up to 2015. That she worked continuously for the entire period until she was summarily dismissed on 31<sup>st</sup> January, 2015. The Claimant filed an affidavit sworn on 7<sup>th</sup> March, 2016 verifying these averments to be true and correct.

29. The Respondent made unattested and bare denial averments in the statement of response to the

Claimant's Statement of Claim on 1<sup>st</sup> July, 2016.

30. The Respondent thereafter made admissions admitting many of the matters it had plainly denied in its response.

31. With regard to the issue of employment, the Respondent now admitted that the Claimant had worked for the Respondent as a casual prior to the year 2006 and became permanent employee from the year 2006 to the year 2015.

32. The turn around by the Respondent made a dent on the credibility of the Respondent, and the court is inclined to believe the attested facts by the Claimant that she had worked for the Respondent as a sanitary attendant from 1999 to 2015, a continuous period of 16 years.

33. The Respondent has therefore failed to rebut the prima facie evidence by the Claimant and the court finds that the Claimant has discharged the onus of proof placed on her on a balance of probabilities. The court finds therefore the Claimant worked continuously for the respondent as a sanitary attendant from 1999 to the year 2015 and that the Claimant is entitled to all the benefits that the Respondent has admitted in its written submissions from 1999 to 2015, a period of 16 years. The Claimant was not provided any social security or pension scheme during the entire period.

34. Accordingly, Judgment is entered in favour of the claimant as against the Respondent in respect of the following terminal benefits as prayed:-

(a) Service Pay calculated at 15 days salary for each year served for sixteen (16) years in the sum of Kshs.72,193.20.

(b) Payment in respect of underpayments for sixteen (16) years in the sum of Kshs.417,967.00.

(c) Payment in lieu of 336 untaken leave days in the sum of Kshs.145,286.40

### **Overtime**

35. The Claimant has proved on a balance of probabilities that she worked from 7.30 am to 5pm daily and therefore worked 30 minutes overtime daily for 16 years and is entitled to Kshs.39.95 per half hour worked extra totalling to 4,380 hours in the sum of Kshs.349,962.

### **Rest Days**

36. Equally, on the basis of the attested statement of facts by the Claimant which was not rebutted by the Respondent the court finds that the Claimant proved this Claim on a balance of probabilities. The court awards the Claimant Kshs.359,750.80 in respect of 832 rest days worked for 16 years since the Claimant was not given a rest day per week, in terms of Section 37(2) of the Employment no. 11 of 2007 and the Employment Act Cap 226 of the Laws of Kenya (now repealed in 2008).

### **Compensation**

37. The Claimant again tendered attested statement of Claim and documentary evidence, showing that she was summarily dismissed for no reason without a show cause letter and disciplinary hearing by the Respondent. The Respondent made a bare denial and did not tender any oral or documentary evidence showing the reason and manner of termination of the employment of the Claimant.

38. The only version available to court of how she was separated from her employer is that given by her and nothing to the contrary.

39. The court finds that the Claimant has proved on a balance of probability that she was unlawfully, and unfairly summarily dismissed on 30<sup>th</sup> January 2015, in violation of sections 41, 43 and 45 of the

Employment Act, 2007.

40. The Claimant is therefore entitled to compensation in terms of section 49(1) (c) as read with section 49(4) of the Act.

41. The Respondent proposed that the court should award the Claimant equivalent of three months salary in compensation in the event the court found in her favour.

42. The court has considered the circumstances of this case in terms of section 49(4) as follows -

43. The Claimant worked diligently for a period of 16 years. The Claimant was paid no terminal benefits upon dismissal. The Claimant was not even given notice to reflect on her predicament or paid in lieu thereof. The Claimant was not given a Certificate of Service in recognition of her 16 years service, but instead, the Respondent denied that she was an employee initially only to later on admit that she was not a casual but a permanent employee albeit for a period of 8 years.

44. The Respondent demonstrated bad faith and lack of gratitude.

45. The Claimant suffered loss and damage. The Claimant would have wanted to continue working and she did not contribute at all to the summary dismissal meted on her.

46. The court finds this as an appropriate case to grant the maximum compensation being equivalent of 12 months salary in the sum of Kshs.108,289.80 to the Claimant.

47. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:-

(a) Service pay	Kshs. 72,193.20
(b) Rest days	Kshs.359,756.80
(c) Leave days	Kshs.145,286.40
(d) Overtime	Kshs.349,962.00
(e) Underpayment	Kshs.417,967.00
(f) Compensation	Kshs.108,289.80
<b>Total award</b>	<b>Kshs.1,453,454.00</b>

(g) The award in (a) – (e) is payable with interest at Court rates from date of filing suit till payment in full while that in (f) from date of judgment.

(h) Respondent to pay Costs of the Suit.

**Judgement Dated, Signed and Delivered this 14<sup>th</sup> day of December, 2017**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances:-**

Mr. Okoth for Claimant

M/s Alinaitwe for Respondents

CC. Chrispo Aura