



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 308 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 26<sup>th</sup> April, 2016)**

**MILDRED ATENGE EMURIA ..... CLAIMANT**

**VERSUS**

**FIDELIS WAMALWA .....RESPONDENT**

**RULING**

1. The Claimant filed her Memorandum of Claim on 19/2/2014 and thereafter an Amended Statement of Claim dated 20<sup>th</sup> April 2015 through the firm Ogosso & Associates Advocates praying that the Honourable Court awards as follows:
  - i. ***A declaration that the said termination was unfair.***
  - ii. ***An order directing the Respondent to pay the sum of Kshs.203,895.25 as particularized in paragraph 7 of the claim.***
  - iii. ***An order for the payment of Kshs.117,371.40 to the Claimant being compensation for unfair termination of employment.***
  - iv. ***An order directing the Respondent to issue a Certificate of Service to the Claimant.***
  - v. ***The costs of this suit with interest thereon at the Courts rates.***
  - vi. ***Any other relief as the Court would deem just and expedient.***

**Facts of the claim**

2. The Claimant was employed on 15<sup>th</sup> January 2010 as a house help where she was paid a salary of Kshs.6,000.00 a month and worked until the 8<sup>th</sup> of September 2013 when her services were terminated.
3. She was offered no explanation as to her termination nor was she given a fair hearing.
4. The Claimant states that the termination was during ungodly hours of 12 am when she was sent out of the house and the watchman was instructed to ensure she was out of the compound forcing her to seek refuge at the Langata Barracks Police Station until morning.
5. The Claimant states that she was not given any notice, nor was she issued with a show cause letter.

When she made her legitimate demands for payment, her pleas were unheeded to and the Respondent threatened her against taking legal action. The Claimant is a young single mother who has lost her only source of income and has been financially crippled by the termination. Attempts to have the matter amicably resolved at Kituo Cha Sheria bore no fruit.

6. The Claimant believes that the action by the Respondent is contrary to the laws of Kenya namely Article 41 of the Constitution, Section 41 and 45 of the Employment Act 2007 and Article 28 as read with 29(f) of the Constitution of Kenya. Moreover, the Respondent failed to register the Claimant with NSSF and NHIF.

7. The Claimant demands that she be paid her terminal dues as follows:

- a. **One month's salary in lieu of notice** = **Kshs.9,780.95**
- b. **Annual leave**  $9,780.93/30 \times 21 \times 44/12$  = **Kshs.25,904.44**
- c. **Service Pay**  $9,780.95/30 \times 15 \times 44/12$  = **Kshs.17,931.74**
- d. **Under payment from January 2010 – April 2010**

$$(6,130 - 6,000) \times 4 \text{ months} = \text{Kshs.520.00}$$

e. **Underpayment from May 2010 –April 2011**

$$(6,743 - 6,000) \times 12 \text{ months} = \text{Kshs.8,916.00}$$

f. **Underpayment from May 2011–April 2012**

$$(7,586 - 6,000) \times 12 \text{ months} = \text{Kshs.19,032.00}$$

g. **Underpayment from May 2012 –April 2013**

$$(8,579.80 - 6,000) \times 12 \text{ months} = \text{Kshs.30,957.60}$$

h. **Underpayment from May 2013 –September 2013**

$$(9,780 - 6000) \times 5 \text{ months} = \text{Kshs,18,904.00}$$

i. **Public holidays**

$$(9,780.95/30 \times 10 \times 44/12) = \text{Kshs.11,957.95}$$

j. **Rest days**

$$(9,780.95/30 \times 48 \times 44/12) = \text{Kshs.57,381.57}$$

$$\text{Total} \text{ -----} = \text{Kshs.203,895.25}$$

8. The Claimant's claim against the Respondent is for Kshs.203,895.25 plus compensation for unlawful termination for up to twelve months salary being Kshs.117,371.40.

### Response

9. The Respondent's case is stated in the amended Memorandum of Response filed on the 6/05/2015 by the firm of Mutua Waweru & Company Advocates. In their response, the Respondent avers that there was not a time that an employer-employee relationship existed between the Claimant and themselves, and that the Claimant was only permitted to stay in Respondent's House in Nairobi out of kinship.

10. The Claimant was a spouse to the Respondent's cousin Mr. Peter Wenanai who was in prison serving a jail term, leading the Claimant to go through severe economic hardship as she was unskilled and was not in possession of an identity card thus unable to secure a job.
11. At the request of family, after the Easter Holiday in April, 2010, the Respondent took in the Claimant with a view of mitigating some of the challenges. She helped her get an apprenticeship with one of the tailors in Langata where she learnt dress making skills. She stayed with the Respondent as a relative and would only assist in light duties as the Respondent had other domestic help who would do house help chores.
12. The Respondent gave the Claimant a stipend that never went below Kshs.5,000.00, and was allowed to travel back upcountry during school holidays in April, August and December of every year to see her school going children.
13. The Respondent claims that the Claimant left her house voluntarily and she gave her a sum of Kshs.5,000.00 and sent her mother a further Kshs.10,000.00 through mobile money transfer. She did not work on gazetted holidays and should be put to strict proof thereof.
14. The Claimant did not hold a national identity card and could therefore not register as a member of the NSSF or NHIF. Further her claim for service pay is not merited as she was not formally employed.
15. They also submit that in respect of the claim for the period on 2.04.2011, her claim should fail as it comes after the 3 years of accrual under Section 90 of the Employment Act, 2007.
16. Having considered evidence from both parties, the issues for determination are as follow: -
  1. ***Whether this claim is time barred.***
  2. ***Whether there was an employment relationship between Claimant and Respondent.***
  3. ***If yes, how this relationship was termination.***
  4. ***Whether the Claimant is entitled to prayers sought.***
17. On 1<sup>st</sup> issue, the Claimant has stated that she was employed by the Respondent on 15.1.2010 and terminated on 8/9/2013. The cause of action if any then arose on 8/9/2013.
18. This case was filed on 3/3/2014. The claim for time barredness under Section 90 of Employment Act does not therefore arise as the claim was filed within 3 years as envisaged under the law.
19. On 2<sup>nd</sup> issue, the Claimant avers that she was employed as a house help by Respondent on 15.1.2010. No employment letter was given to her.
20. The Respondent on their part avers that there was never any employment relationship between her and the Claimant who is a relative being a wife of their nephew.
21. They also aver that the Claimant was taken for a tailoring apprenticeship in Langata where she learnt dress-making. They aver that they had another domestic house help who did household chores.
22. The Claimant has not provided any evidence that she was employed by the Respondent other than stating so.
23. The Respondents have averred that they could not employ the Claimant since she also didn't have an Identity Card. The Claimant provided no proof that she had an Identity Card in 2010, when the onus shifted to her to do so.
24. In the circumstances, I find the Claimant has not established her case as required in terms of

showing there was an employment relationship between her and the Respondent.

25.I therefore need not pursue issue Number 3 and 4 above. I therefore dismiss her case with no order as to costs.

Read in open Court this 26<sup>th</sup> day of April, 2016

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent