



**REPUBLIC OF KENYA**

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

**CAUSE NO 806 OF 2014**

**MARGARET WACHUKA MWANGI.....CLAIMANT**

**VS**

**NYALE ESTATE LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. Margaret Wachuka Mwangi, the Claimant in this case worked for Nyale Estate Limited, the Respondent herein. She brought this action following the termination of her employment on 12th February 2014. She seeks compensation and terminal dues.

2. The Claimant's claim is contained in a Memorandum of Claim dated 12th May 2014 and filed in Court on 15th May 2014. The Respondent responded under protest on 11th July 2014 but did not attend the hearing in spite of due notification. The Claimant testified on her own behalf. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant states that she was employed by the Respondent as a general worker at a daily rate of Kshs. 230 from September 2010. On 12th February 2014, the Claimant reported for duty as usual. As she was leaving for the day after 5.00 pm, she was informed by the Manager, Gerald Thigwa that her employment had been terminated due to shortage of work. She was not issued with a termination letter.

4. Claimant contends that the Respondent continued to operate at full capacity even after the termination of her employment and no other employee was terminated on the ground of shortage of work. She was not paid any terminal dues.

5. The Claimant's claim is as follows:

- a. A declaration that the termination of her employment was unlawful and unfair
- b. One month's salary in lieu of notice.....Kshs. 6,900
- c. Leave pay for 3 years.....20,700
- d. Service pay @ 15 days' pay per completed year.....10,350
- e. 12 months' salary in compensation.....82,800
- f. Costs plus interest

**The Respondent's Case**

6. In its Statement of Defence (under protest) filed on 11th July 2014, the Respondent states that the Claimant was a casual worker earning a daily wage. The Respondent further states that the Claimant absented herself from work from 7th February 2014 to 11th November 2014, without permission only to report on 12th November 2014 without any explanation for her absence. The Claimant's action amounted to gross misconduct. She therefore lost her job on account of absenteeism.

7. According to the Respondent, the Claimant was not entitled to any redundancy dues as she was paid on a daily basis when she worked. Since she was a casual worker who would absent herself at will without notifying her employer, it was no longer tenable to keep her in her casual employment.

### **Findings and Determination**

8. There are three issues for determination in this case:

- a. Whether the Claimant was a casual or regular employee;
- b. Whether the termination of her employment was lawful and fair;
- c. . Whether she is entitled to the remedies sought.

### **Nature of the Claimant's Employment**

9. The Respondent's main line of defence is that the Claimant was a casual employee and is therefore not entitled to the remedies sought.

10. Section 2 of the Employment Act, 2007 defines a casual employee as:

***“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time”***

11. The Claimant testified that she worked for a continuous period of three (3) years running from 2010 to 2014. In the final submissions filed on behalf of the Respondent it is submitted that because the Claimant had no written contract and was paid a daily rate, then she was a casual employee. With respect, this is a misunderstanding of the law on casual employment. The definition of casual employment is dependent on the length of continuous service only. Indeed under Section 37(1) of the Employment Act, any continuous employment that exceeds thirty (30) days automatically converts to term contract.

12. That being the case and in the absence of any evidence that the Claimant did not work continuously for the stated period, the Court rejects the Respondent's assertion that the Claimant was a casual employee. I must add that it is the responsibility of the employer to issue a contract of employment and an employer who fails in this duty cannot be allowed to use their failure to advance their case.

### **The Termination**

13. The Claimant states that she was unlawfully and unfairly terminated and in response, the Respondent states that the Claimant deserted duty. Desertion is a serious offence that renders an employee liable to summary dismissal. However, an employer who alleges desertion must demonstrate efforts made towards tracing the whereabouts of the deserting employee. In this regard, an employer who relies on desertion as a defence must demonstrate that a show cause letter has been issued to the deserting employee. In the absence of any such notice, the Court rejects the Respondent's defence and adopts the Claimant's testimony that she was unfairly terminated.

14. According to the Claimant the reason given by the Respondent for her termination was reduction of work. This would fall under what is commonly known as redundancy. While redundancy is a lawful means of termination, Section 40 lays stringent conditions to be met. There was no evidence that the Respondent met any of these conditions and the termination was therefore both substantively and procedurally unfair.

**Remedies**

15. From the foregoing findings I award the Claimant six (6) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction. I also award the Claimant one (1) month's salary in lieu of notice. The Respondent admitted that the Claimant did not go on leave and the claim for leave pay therefore succeeds and is allowed. Similarly, the Claimant was not a member of the National Social Security Fund (NSSF) and she is therefore entitled to service pay.

16. Cumulatively I make an award in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 41,400
  - b) 1 month's salary in lieu of notice.....6,900
  - c) Leave pay for 3 years & 4 months (6,900/30x21x3+6,900/30x1.75x4).....16,100
  - d) Service pay for 3 completed years (6,900/30x15x3)..... 10,350
- Total.....74,750**

17. The Claimant will have the costs of this case. The award amount will attract interest at court rates from the date of the award until payment in full.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF MAY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Mulaku for the Claimant

Mr. Kimeto for the Respondent