



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 223 OF 2015

CECILIA WANJIRU NDERITU..... CLAIMANT

V

ONESMUS NJIINU T/A IVORY MACHINERIES SERVICESRESPONDENT

JUDGMENT

1. Cecilia Wanjiru Nderitu (Claimant) sued Ivory Machineries Services on 30 July 2015 and she stated the issues in dispute as

1. Wrongful dismissal and unfair termination of the Claimant from employment
2. Salary in lieu of notice, Severance pay, underpayment and compensation under section 49(1) of the Employment Act.
2. The Claimant filed an *Amended Statement of Claim* on 8 September 2015, which introduced *Onesmus Njiinu* as the substantive Respondent.
3. The Respondent filed a Response on 14 September 2015, and the Cause was heard on 24 February 2016, when the Claimant testified.
4. The Respondent was not present during the hearing and because there was an affidavit of service (filed on 16 February 2016) on record attesting to service of a hearing notice which was acknowledged by stamping, upon the firm of Wakuraya, Mureithi & Co. Advocates, the Court allowed the hearing to proceed.
5. The Court has considered the pleadings, evidence and submissions and adopts the issues as framed in the Claimant's submissions filed in Court on 14 March 2016.
6. The Claimant's testimony remains largely untested and unchallenged and all things being equal, the Court will assume the same as truthful and honest.

Whether Claimant was employed by the Respondent on permanent basis

7. The Claimant contended that she was employed by the Respondent as a receptionist in 2010, a plea which the Respondent denied in its Response. In fact, the Respondent denied any employer-employee relationship with the Claimant in the Response, though in the filed witness statement, it was stated that the Claimant used to be hired on a temporary basis.
8. The Respondent filed documents showing that the business name was registered on 19 July 2013.

9. The Claimant testified that she was employed by the Respondent on 16 October 2010, as a Receptionist but was not issued with a written contract.
10. This testimony was not challenged as the Respondent failed to attend the hearing.
11. The Employment Act, 2007 envisages both oral and written contracts of employment, but where the contract extends beyond 3 months there is a statutory obligation to draw up a written contract.
12. It appears none was drawn up by the Respondent and in view of the provisions of sections 9, 10(3) & (7) and 37 of the Employment Act, 2007, the Court can only conclude that the Claimant was engaged as a Receptionist from 16 October 2010 on term contract/contract of indefinite nature.

Whether termination of contract was unfair

13. The Respondent advanced the position in its Response that if at all there was termination of employment, then, it was on account of redundancy as the business had collapsed.
14. Assuming that was indeed the position, and that it is the employer who is privy to the reasons for dismissing an employee, then, there is nothing on record to suggest that the Respondent complied with the conditions outlined in section 40 of the Employment Act, 2007.
15. The Claimant in her testimony asserted that she was verbally informed by the Respondent of the termination of her employment and the reason given was low business.
16. The Court would find such termination of employment on account of redundancy to be procedurally unfair.
17. Similarly, assuming that the termination was on account of *misconduct, poor performance or physical incapacity* on the part of the Claimant, and subject to the peremptory requirements of section 41 of the Employment Act, 2007 there is nothing to indicate that the Claimant was afforded an opportunity to be heard.
18. The Court would even on that respect find the termination of employment was procedurally unfair.

Whether Claimant is entitled to pay in lieu of notice

19. Either in terms of section 35(1) of the Employment Act, 2007 or section 40(1)(f) of the same Act, the Claimant was entitled to at least payment of 1 month pay in lieu of notice.

Whether Claimant was underpaid

20. Underpayment may arise on account of payment below the contractually agreed remuneration or payment below the prescribed minimum wages.
21. The Claimant annexed to the Statement of Claim, Legal Notice(s) No. 71 of 2012 but did not disclose the location where the contract was performed or the industry/sector the Respondent was operating in, and the Court is therefore unable to concede to her contention that she was underpaid.
22. In the view of the Court, the plea in the Statement of Claim that the Respondent's postal address was in Njoro is not enough disclosure of area the contract was performed.

Annual leave

23. The Claimant sought Kshs 48,668/31 in the *Amended Statement of Claim* on account of annual

leave and which figure shot to Kshs 59,521/18 in the submissions.

24. During testimony, the Claimant stated that she did not go on leave for the 4 years of employment.

25. With the testimony unchallenged and leave records not on record, and considering sections 10 and 74 of the Employment Act, 2007, the Court finds the Claimant has established a case for award of pay in lieu of leave in the pleaded sum.

Overtime

26. The Claimant did not disclose the contractually agreed working hours or the prescribed minimum working hours either in the Statement of Claim or testimony.

27. Merely stating that she was working from 8.00am to 5.30 pm in the view of the Court is insufficient to found a case for an award or payment of overtime.

Salary arrears

28. The Claimant's testimony that she had a balance of salary arrears of Kshs 9,600/- remains undisputed fact and she is entitled to the same.

Severance pay

29. On account of severance pay, the Claimant sought Kshs 34,763/- in the *Amended Statement of Claim* which increased to Kshs 36,550/- in the submissions.

30. The Respondent's documents suggest the separation was due to redundancy and by dint of section 40(1)(g) of the Employment Act, 2007, the Claimant is entitled to severance pay as pleaded.

Compensation

31. An award of compensation pursuant to section 49(1) of the Employment Act, 2007 is discretionary.

32. Considering the Claimant's length of service and that the Claimant has been awarded severance pay, the Court is of the view that the equivalent of 4 months gross wages as compensation would be appropriate and fair.

Conclusion and Orders

33. The Court finds and holds that the termination of the Claimant's employment was unfair and awards her and orders the Respondent to pay her

(a) Pay in lieu of notice Kshs 12,000/-

(b) Commuted leave Kshs 48,668/31

(c) Salary arrea Kshs 9,600/-

(d) Severance pay Kshs 34,763/08

(e) Compensation Kshs 48,000/-

TOTAL **Kshs 105,079/45**

34. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 22nd day of July 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Chege instructed by Munene Chege & Co. Advocates

For Respondent Wakuraya, Mureithi & Co. Advocates (did not attend hearing)

Court Assistant Nixon