



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 463 OF 2012

JANE WAMBUI.....CLAIMANT

VS

JOSEPH GATHIRWA T/A MUGA AUCTIONEERS.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by Memorandum of Claim dated 20th March and filed in Court on 21st March 2012 seeks relief for unlawful termination of employment. The Respondent filed a defence on 10th May 2012. Both the Claimant and the Respondent gave *viva voce* evidence and also filed written submissions.

The Claimant's Case

2. The Claimant pleads that she was employed by the Respondent in the position of Office Secretary first from February 1996 to June 2000 and subsequently from March 2002 to 14th December 2011.

3. On 14th September 2011, the Claimant wrote to the Respondent asking for a salary increment. Upon receipt of the Claimant's letter the Respondent notified the Claimant that the volume of work had decreased and that she had therefore been rendered redundant. The Respondent undertook to pay the Claimant's terminal benefits in due course.

4. The Claimant continued working until 14th December 2011 when her employment was terminated. Upon termination, the Claimant was paid Kshs. 20,000 as part of her benefits. On 16th December 2011, the Claimant submitted a tabulation of her total claim to the Respondent. The Respondent did not honour the Claimant's claim and a dispute was reported to the Ministry of Labour. Attempts to resolve the matter at the conciliation stage did not bear fruit hence this claim.

5. It is the Claimant's case that the termination of her employment was unprocedural and unfair. She claims the following:

- a. 12 months' salary in compensation for unlawful

termination.....Kshs. 292,222

b. One month's salary in lieu of notice.....	11,684
c. Leave pay for three years.....	28,311
d. Severance pay for 9 years.....	60,667
e. Underpayment.....	71,272
f. Certificate of service	

The Respondent's Case

6. In his defence filed on 10th May 2012 the Respondent admits having employed the Claimant first between 1996 and 2000 when the Claimant voluntarily resigned. The Respondent further admits having re-employed the Claimant between March 2002 and 14th December 2011. The Respondent however denies that the Claimant worked in the position of Secretary, stating that she was a general hand.

7. Regarding the Claimant's claim that she was unfairly terminated, the Respondent states that the Claimant herself gave notice of her unwillingness to continue working and that she was paid Kshs. 27,000 in full and final settlement of her claim. The Respondent denies that the Claimant's salary would have been Kshs. 11,684 as she was not a Secretary.

8. In response to the claim for leave pay, the Respondent states that the Claimant only worked five (5) days a week and that she would take two weeks leave in the month of December.

9. The Respondent further states that this dispute was the subject of conciliation by the District Labour Office whereupon the Claimant was offered Kshs. 28,309 in full and final settlement but she declined. The Respondent denies the Claimant's entire claim.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

11. The Claimant pleads that she was unfairly terminated after she sought a salary increment. The Respondent on the other hand states that the Claimant herself gave notice of her unwillingness to continue working.

12. What is common between the parties is that there was a dispute regarding the Claimant's salary. The Claimant contends that the salary paid to her was below the applicable salary for the position of Secretary and the Respondent's response is that the Claimant worked as a general hand and not a Secretary.

13. In support of her case, the Claimant produced a recommendation letter dated 30th July 2000 in which the Respondent states that the Claimant had been employed in Secretarial responsibilities. The Respondent did not deny the authenticity of this letter and there was no document indicating the Claimant's position as that of a general hand.

14. The Court therefore adopts the Claimant's evidence that she was employed in the position of Secretary and thereby rejects the Respondent's defence that the Claimant worked as a general hand.

15. The Court further finds that following the Claimant's request for a salary increment her employment was terminated and this being an invalid reason, the termination was substantively

unfair. Additionally, there was no evidence that the Claimant was subjected to any disciplinary process and the termination was therefore procedurally unfair as well.

Remedies

16. I have already found that the Claimant's position was that of Secretary and she claims that she was underpaid in this position. In advancing this claim the Claimant produced the Regulation of Wages (General) Amendment Order, 2011 which set the minimum wage (exclusive of house allowance) for positions similar to that held by the Claimant at Kshs. 11,684.

17. Loading house allowance at 15% would place the Claimant's salary at Kshs. 13,437 from 1st May 2011 and the claim for underpayment from this date up to the date of termination therefore succeeds and is allowed. The Court also adopts the correct figure of Kshs. 13,437 for purposes of tabulating the Claimant's claim.

18. On the claim for unlawful and unfair termination of employment, I award the Claimant nine (9) months' salary in compensation. In making this particular award, I have taken into account the Claimant's length of service, in the second instance, 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.

19. In the absence of any leave records to prove that the Claimant had taken her leave, the claim for leave pay succeeds and is allowed. The Respondent admitted that the Claimant was not a member of any pension scheme and the claim for service pay must also succeed.

20. In the final analysis I make an award in favour of the Claimant in the following terms:

a) 9 months' salary in compensation.....	Kshs. 120,933
b) 1 month's salary in lieu of notice.....	13,437
c) Underpayment (1st May-14th December 2011).....	48,278
d) Leave pay for 3 years (13,437/30x21x3).....	28,218
e) Service pay for 9 years (13,437/30x15x9).....	<u>60,467</u>
Total.....	271,333

21. I further direct the Respondent to issue the Claimant with a certificate of service. 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.

22. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF JULY 2016

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JUDGE

Appearance:

Mr. Nyabena for the Claimant

Mr. Thuo for the Respondent