



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 111 OF 2014

BETWEEN

1. KATHRA HUSSEIN NOOR

2. BISHAR HUSSEIN NOOR.....CLAIMANTS

VERSUS

KADERDINA HAJEE ESSAK LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Miss Katu Advocate instructed by Siocha Okemwa & Company Advocates for the Claimants

Mrs. Ali Advocate instructed by Y.A. Ali & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimants filed their joint Statement of Claim on the 17th March 2016. The Court directed on the 9th June 2014, that the Claim by the 2nd Claimant be severed from the Cause, and filed as a separate Cause, as the facts in dispute are fundamentally distinctive. The Claim herein therefore involves Kathra Hussein Noor, Bishar Hussein Noor's Claim having been withdrawn.

2. Kathra states she initially was employed by the Respondent in an oral contract, on the 2nd February 2009. She was employed as a Counter Salesperson, earning a monthly salary of Kshs. 8,650. She was granted a written contract on 1st August 2011.

3. She received a letter of termination dated 27th February 2014 from the Respondent. Termination was effective from 31st March 2014. She was not given reasons for the termination decision. She requested to be given reasons for the decision; she was given none. She was instead advised to collect her salary for February 2014 from the Cashier. She was underpaid throughout. She demanded to be paid the arrears of salary accrued in underpayment. There was no response from the Respondent. She prays for the following

orders against the Respondent:-

- a) 1 month salary in notice pay.
 - b) Underpayment of gross salary for the period 1st May 2010 to 30th October 2011 at [Kshs. 14,531- Kshs. 8,650] x 12 months = Kshs. 70,576.80.
 - c) Underpayment of gross salary for the period 1st May 2011 to 30th October 2012 at [Kshs. 18,490.60 – Kshs. 8,650] = Kshs. 92,380.
 - d) Underpayment of gross salary for the period 1st May 2012 to 30th April 2013 at [Kshs. 18,490.60 – Kshs. 8,650] = Kshs. 118,080.50.
 - e) Underpayment of gross salary for the period 1st May 2013 to 30th October 2013 at [Kshs. 21,078.60 –Kshs. 8,650] = Kshs. 74,571. 80.
 - f) Underpayment of gross salary for the period 1st November 2013 to February 2014 at [Kshs. 21,078.60 – Kshs.11,260] = Kshs. 39,274.60
 - g) 12 months' salary, at the rate of Kshs. 21,078 per month, in compensation for unfair termination at Kshs. 252,936
- Total... Kshs. 668,898.30
- h) Certificate of Service.
 - i) On costs, the Claimant pleads: "costs of the application be provided against the Respondent."

4. The Respondent filed its Statement of Response on the 17th April 2014. The Respondent is a registered Company, involved in selling of *Khangas* [Colourful African Garments]. The Respondent concedes to have employed the Claimant as a Counter Salesperson, through an oral contract in February 2009, and the written contract dated 1st August 2011. The Claimant applied to be employed by the Respondent on 25th October 2003. She was issued a proper termination notice dated 27th February 2014, to take effect on 31st March 2014. She was given sufficient reasons for the decision. The contract allowed either Party to end the relationship through issue of 1 month notice, or payment or 1 month salary in the absence of notice. The Claimant is a standard 6 graduate, unskilled and was not entitled to the sums claimed as underpayment. She was overpaid. Her contract was terminated fairly and lawfully. She was issued warning letters in the years 2005, 2008 and 2012. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

5. Kathra testified, and closed her case, on the 3rd December 2015. The Respondent's Director testified on 9th March 2016, when the hearing closed. The matter was last mentioned in Court on the 29th June 2016 when Parties confirmed the filing of their Submissions, and the Decision of the Court reserved for 30th September 2016.

Claimant's Evidence and Submissions.

6. Kathra confirmed she was employed by the Respondent as a Salesperson. Her contract was terminated by the Respondent on the 27th January 2014. Her salary on termination was Kshs. 11,260. She was not paid in accordance the various Regulation of Wages [General] Amendments Orders attached to her Statement of Claim. She received the Certificate of Service on demand. Cross-examined, she testified she was a Salesperson, selling *Lesos* and *Vitenge* [African Wear]. She did so from inside the Respondent's shop. Her Father worked for the Respondent before her, for a long time. Other Members of her Family worked there. She studied up to standard 6. She was not trained in sales. She claims underpayment of

salary from 1st May 2010. She filed her Claim in 2014. Over 3 years had passed from 2010. The claims for underpayment for 2012 are repeated. She complained to her Employer by word of mouth about the underpayments. Termination was on 27th February 2014 and effective on 31st March 2014. She went to work on 28th February 2014. Her boss, Mr. Munir, told her she had been sacked the previous day. Bishar, who is her Brother, also had his contract terminated the same day. Kathra was not able to say why her Brother's contract was terminated. Redirected, Kathra testified the Wage Orders were effective 1st May of each year. Her Brother told her his terminal dues were settled by the Respondent.

7. The Claimant submits she was entitled to be paid minimum rates of remuneration applicable to Salespersons, in accordance with Section 47 of the Labour Institutions Act 2007. She was entitled to be paid the minimum rates for basic salary, and house allowance, for the specified periods falling between 1st May 2011 and February 2014. She was underpaid as shown in her Pleadings and Evidence. It is submitted for Kathra that Section 4 of the Regulation of Wages and Conditions of Employment Act Cap 229, entitled her to provision by the Respondent of free housing accommodation, or in its absence, to house allowance the equivalent of 15% of her basic wage. She was employed as a Salesperson by the Respondent upon making a job application. The Respondent cannot turn around and justify its failure to meet the demands of minimum wage, on the assertion that the Claimant did not meet the job qualifications. The warning letters had lapsed by the time of termination, and could not be used to justify termination. No reason for termination was given in the notice of termination. No hearing was given. The Claimant submits her prayers are merited.

Respondent's Evidence and Submissions

8. Mohamed Hussein Abdulkeder, Director of the Respondent, testified for the Respondent. He told the Court Kathra was Respondent's Employee, and a Daughter to Respondent's long serving Employee. She was a Counter Salesperson. Kathra schooled up to Standard 6. She applied to work with the Respondent. She was offered a written contract dated 1st August 2011. It was for 2 years, ending November 2013. It was renewed on lapse. The contract allowed either Party to terminate with 1 month notice, or payment of 1 month salary in default. Hussein, who is the Claimant's Father, served the Respondent for long. Through him, his 2 Daughters and a Son were employed by the Respondent. The Claimant's Brother received damaged goods from Customers for replacement contrary to the Respondent's instructions. Brother and Sister manipulated receipt of damaged goods and replacements. The Respondent terminated the Claimant's contract, based on the ground that the Claimant stole from the Respondent, and cheated the Respondent. Termination was fair. Cross-examined, Abdulkeder testified the Claimant did not give her qualifications to the Respondent upon employment. She stated she was schooled up to standard 6. The Respondent was at liberty to employ. She received a last warning in January 2012. Termination was in February 2014. No reasons were given in the notice of termination. She was issued warning letters, which nonetheless, did not contain the elements of cheating and stealing. Redirected the Witness concluded his evidence with the statement that stealing and cheating came to the Respondent's attention in the year 2014.

9. The Respondent submits the Claimant received a notice of termination of 31 days. She does not merit notice pay. Her claim for underpayment of wages from 2010 is barred under Section 90 of the Employment Act 2007. Her computation of underpayment should be from 2011. She was not a Salesperson; she was a Counter Salesperson. A Salesperson applies skills to get Customers to buy goods. A salesperson moves out into the field, looking for Customers. The Claimant was an unskilled Employee, whose duty was confined to guide Customers who shopped with the Respondent. She would properly be a General Clerk. Her underpayments if any should be based on the rate applicable to a General Clerk, not a Salesperson. Alternatively, if the Court is convinced she was a Salesperson, computation ought to start in the year 2011 as argued above, not the year 2010. On compensation for unfair termination, the Respondent relies on the High Court decision in **Joseph Muthama Ndambuki & 4 others v. Delmonte Kenya Limited [2012] e-KLR**, which held that a contracting Party does not have to rely on misconduct, in order to terminate a contract of service, and that a Party can terminate such a contract without giving any reason. Lastly, the Respondent submits that the claims for house allowance are based on the Regulation of Wages and Conditions of Employment Act Cap 229 the Laws of Kenya. This law was repealed through

the Labour Institutions Act 2007. The Claimant cannot be granted a relief based on non-existent law.

The Court Finds:-

10. There is common evidence that the Claimant was employed by the Respondent *Khanga* business as a Counter Salesperson. She is shown to have applied for the job as early as the year 2003. Her Father and Brothers worked for the same Employer. She has had a long association with the Respondent. She states in her Pleadings that she was first employed by word of mouth on 2nd February 2009. She was later granted written contracts, first in 2011 and second in 2013. Her last salary was Kshs. 11,260.

11. In issue is:

- i. Whether the Claimant was a Salesperson or General Clerk.
- ii. Whether she was paid a monthly basic salary and house allowance in accordance with the law.
- iii. Whether her contract was terminated fairly and lawfully.
- iv. Whether she merits the remedies sought.

12. Salesperson or General Clerk? The contract of employment indicates the Claimant was employed as a Counter Salesperson. The designation is given in the contract. She applied for the position of Salesgirl. She did not apply to work as a General Clerk, and was not employed as such. In ***Industrial Court at Nairobi Cause Number 43 [N] of 2009 between Crispol Ngugi Kimani & 24 others v. Yako Supermarket & another***, the Court held that: job categorization is a fundamental component of the contract of employment; job categorization in Kenya is still based on the parameters set under the colonial regime and therefore deficient; the International Labour Organization has developed the International Standard Classification of Occupations [ISCO-08] which comprise a dictionary of occupations; a Salesperson under this dictionary is a Person who sells a range of goods and services directly to the Public on behalf of retail and wholesale establishments and explains the functions and qualities of these goods and services; and lastly, held that a General Clerk performed a variety of tasks, preparing day to day documents, and filing documents for the Employer. The Court is of the view that the Claimant was properly described as a Salesperson in the contract of employment. She sold African Wear to Customers on behalf of the Respondent. Her role was specific, not generalized. It was not necessary that she had training in the job, or that she went beyond standard 6. It was not necessary that she went out into the field selling khangas, to be deemed to be a Salesperson. If the Respondent intended her to be anything else other than a Salesperson, the contract of employment would have given that other designation. She was recruited as a Salesperson, and employed based on the qualities the Respondent found in her. The Respondent's assertion that she ought to be treated as a General Clerk, and denied the minimum rates of pay applicable to Salespersons under the Wage Orders, is incorrect.

13. The Respondent does not deny the rates paid to the Claimant were below the minimum wage for a Salesperson. The rates contained in the Wage Orders attached to the Statement of Claim for the different years are not disputed. It is disputed whether the Wage Orders should be applied from the year 2010 based on the statute of limitation under Section 90 of the Employment Act.

14. The position of this Court on underpayments and arrears of salary, in relation to the statute of limitation of time, was expressed in ***Industrial Court at Nairobi, Cause Number 1813 of 2011 between David Wanjau Muhoro v. Ol Pajeta Ranching Limited [2014] e-KLR***: where the salary of an Employee remains in arrears, or remains underpaid, recovery of the arrears or the underpayments, is not to be defeated by limitation under Section 90 of the Employment Act; all accrued benefits must be paid to the Employee on termination; arrears of salary and underpayments of salary involve a default of a continuing nature by the Employer, and time would only start running from the date of cessation of the continuous default; every month there is a default, the time for accrual of the cause of action resets with regard to the cumulative obligations; and so long as the whole Claim is not time-barred, there is no reason to bar claims for arrears of salary, salary discrimination and underpayments, occurring during the period in

employment. The underpayments to the Claimant were carried over from the year 2010. Every time the correct rate was not applied, the accrual date reset. At the time of termination there were underpayments, accrued from 2010. It is not disputed that the main Claim was filed within the time prescribed under Section 90 of the Employment Act. Accrued benefits stretching back beyond a period of 3 years, are not to be severed and treated as having gone stale. As correctly submitted by the Claimant, Section 48 of the Labour Institutions Act 2007 requires that the minimum rates of remuneration established in a Wages Order, constitute a term of employment of any Employee to whom the Wages Order applies. If the contract of employment provides for payments below the minimum rates, the minimum rates under the Wages Order are inserted in the contract in substitution of those inferior terms. An Employer found guilty of paying below the minimum wage commits an offence, and may in addition to any other penalty pay the Employee the difference between what is paid and what ought to have been paid. It cannot be the intention of Parliament in enacting Section 90 of the Employment Act that, Employees are inhibited in recovery of wage arrears and underpayments, while there are no inhibitions in making such recovery in a criminal process, under Section 48 of the Labour Institutions Act 2007. The objection by the Respondent on the period of computation of underpayments is rejected. The Claimant's adoption of the year 2010 as the first year of underpayment is accepted.

15. The Regulation of Wages and Conditions of Employment Act Cap 229 the Laws of Kenya was repealed under Section 63 [1] of the Labour Institutions Act 2007. Section 63 [2] of the latter states that any regulation or other instruments made or issued under the repealed Act, shall continue to have effect as if such regulation or other instrument, were made or issued under the repealing Act. The Regulation of Wages [General] Order is one such instrument made under the repealed Act, and which is saved under Section 63 [2] of the repealing Act. It is not correct that the Regulation of Wages and Conditions of Employment Act, has been invoked incorrectly by the Claimant. Regulation Number 4 of the Regulation of Wages [General] Order, requires an Employer to provide the Employee with free housing accommodation, or in default, pay the Employee housing allowance equal to 15% of the Employee's basic salary. This Regulation is to be read together with Section 31 of the Employment Act 2007. The submission by the Respondent that the inclusion of housing allowance in computing underpayments is based on a non-existent law is incorrect.

16. There should be no misunderstanding on the periods of underpayment. The Wage Orders issued annually, running from 1st May every year, to the end to April of the subsequent year. They are traditionally made effective on Labour Day, 1st May. The periods under review should therefore be:

i. 1st May 2010 to 30th April 2011. The applicable minimum rate of basic pay under Legal Notice No. 97 of 2010, for Salespersons in Nairobi, Mombasa and Kisumu, was Kshs. 12,636. 15% of this amount in house allowance is Kshs. 1,895. The gross monthly salary which the Claimant ought to have been paid is Kshs. 14,531. She was paid a total of Kshs. 8,650. She was underpaid by an amount of Kshs. 5,881 which for 12 months, translates into a figure of Kshs. 70,576.

ii. 1st May 2011 to 30th April 2012. This falls under Legal Notice No. 64 of 2011. The minimum rate of basic pay is shown at Kshs. 14,216. Adopting the same method as above, the underpayment amounts to Kshs. 92,380.

iii. 1st May 2012 to 30th April 2013. The minimum rate of basic pay is Kshs. 16,078 under Legal Notice No. 71 of 2012. The total underpayment is Kshs. 118,076.

iv. 1st May 2013 to 31st March 2014 [11 months]. The relevant instrument is Legal Notice No. 197 of 2013, setting the minimum basic remuneration at Kshs. 18,329. During these last 11 months, the Claimant earned a monthly salary of Kshs. 11,260. Adopting the formula shown above, she was underpaid by a total of Kshs. 108,001.

In total the Court finds the Claimant was underpaid to the amount of Kshs. 389,033. She is granted Kshs. 389,033 as underpayment of salary.

17. There is evidence to show the Claimant received a written notice of termination of 1 month. It is not clear if she served during notice period. She states she was told by the Respondent when she reported to work after the notice issued, that she had been dismissed the previous day, and should not continue working. The Respondent alleges that the Claimant abandoned her work and did not serve the notice period. There is a written notice nonetheless, whose presence was not disputed by either Party. There is no reason strong enough to justify payment of notice pay to, or by either Party. The claim for notice pay is rejected. There was no prayer made for annual leave pay as far as the Court can tell. It is not clear why Parties went on to give evidence on the Claimant's annual leave record, while there is no relevant prayer calling for production of this evidence. Abdulkeder gave evidence about the Claimant's annual leave utilization. The Court shall disregard the evidence relating to annual leave.

18. Was termination fair and lawful? The Respondent submits it was, and relies on a curious decision of the High Court, which is to the effect that an Employer can terminate the contract of employment without giving any reason. This decision is of obsolete value, and is a piece of very retrogressive jurisprudence. It propounds the doctrine of employment-at-the will of an Employer. It was accepted then, in the era of master and servant, that an Employer could terminate the master-servant relationship for good cause, bad cause or no cause at all. The doctrine has long been rejected in the decisions of the Industrial Court, and the current Employment and Labour Relations Court. A look into the history of labour law in Kenya would confirm the doctrine has been relegated to the mists of antiquity. The relationship has evolved from that of a master and servant, to a relational contract, where fair dealing between the Employer and the Employee define the relationship. The old doctrine has no place in the Employment Act of 2007, and certainly has no grounding in our Constitution. Substantive justification is a mandatory requirement on the part of an Employer, in all termination decisions, under the Employment Act 2007.

19. The letter of termination is dated 27th March 2014. It is a one-liner. It states: *'this is to inform you that your services are terminated as from 31st March 2014.'* There is no reason given for the decision. Section 43, 45 and 47 [5] of the Employment Act 2007 require the Employer to give the reason, or reasons for termination. These provisions of the law demand termination decision is substantively justified. The Respondent did not justify its decision. There is no evidence in the letter of termination that any attempt was made to justify the decision.

20. Instead the Respondent attempted to rely on obsolete warning letters in justifying the termination, while giving evidence in Court. These letters expired many years before termination. The letters go as far back as the year 2005, and relate to a multiplicity of alleged employment offences such as absence from work and rudeness to customers. These are not reasons given in justifying termination, even assuming the letters were in their validity period. In Court, the Respondent's Director alluded to other reasons underling its termination decision. It was told to the Court that the Claimant and her Brother had been manipulating the return and replacement of garments, and improperly benefiting themselves from the manipulation. There was no such allegation or justification in the letter of termination. Overall the Respondent appears to have no definitive reason in terminating the Claimant's contract.

21. Section 41 and 45 of the Employment Act demand that termination decisions are based on fair procedure. The allegations against the Claimant ought to have been investigated; she ought to have been called upon to show cause why disciplinary action should not be taken against her; she should have been presented with specific charges and asked to respond to those charges; she ought to have been heard, in the company of a Trade Union Shopfloor Representative or Workmate of her choice; and ought to have been given reasons for the decision of the disciplinary panel. These procedural protections were not observed.

22. From the above observations, it can be concluded, and the Court concludes, that termination was unfair, both in substance and procedure. The Claimant is entitled to compensation.

23. Considering the Parties' long association and family ties, and considering other reliefs granted in this Award, the Court is of the view that the prayer for maximum compensation as prayed is not a fair remedy. The grievance with regard to underpayments has been addressed in accordance with the law. The Respondent employed the Claimant, her Father and Brothers. The Claimant was employed despite the

fact that she was of rudimentary educational background. Not many job openings exist in Kenya today, or existed even yesterday, for primary school dropouts. Although the level of education was not shown to be material to the role discharged by the Claimant, Employers nevertheless, do not readily employ primary school dropouts. The Respondent accommodated the Claimant and her family and the Court should therefore not come down on the Respondent too hard, in its grant of the compensatory award. The Claimant is granted 4 months' gross salary at the rate applicable on termination, of Kshs. 21,078. ***She is allowed 4 months' gross salary in compensation at Kshs. 84,313.***

24. The Claimant did not plead for costs appropriately. As pointed out at the outset, the Claimant prays that *"costs of this application be provided for against the Respondent."* This prayer is flawed. This aside, costs are granted at the discretion of the Court. In exercise of this discretion, it is ordered there shall be no order on the costs.

IN SUM, IT IS ORDERED:-

a) Termination was unfair

b) The Respondent shall pay to the Claimant Kshs. 84,313 in compensation for unfair termination, and Kshs. 389,033 in underpayment of salary- total Kshs. 473,346.

c) The full amount shall be paid within 35 days of the delivery of this decision, in default, the amount to attract interest at 14% p.a. from the and of the 35 days, till payment in full.

d) No order on the costs.

Dated and delivered at Mombasa this 29th day of September 2016

James Rika

Judge