



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU

CAUSE NO. 258 OF 2013

JOSEPHINE AKINYI NGESA.....1st CLAIMANT

HALIMA AYIEKO AYUB.....2nd CLAIMANT

v

CENTRUM COMMUNICATIONS LTD.....RESPONDENT

JUDGMENT

1. Josephine Akinyi Ngesa was employed by Centrum Communications Ltd (Respondent) on 24 July 2004, while Halima Ayieko Ayub (Claimant) was employed on 7 March 2012.
2. They both sued the Respondent on 15 August 2013 and the issues in dispute were stated as
 1. Unfair termination
 2. Underpayments on basic pay
 3. Failure to pay housing allowance
 4. Failure to pay overtime and off duties
 5. Failure to give or pay Annual leave as required by the provisions of the Employment Act
 6. Severance pay/gratuity.
3. The Respondent was served and it filed a Response and Counterclaim on 11 September 2013. On 29 October 2013, the Claimants filed a Reply to Response.
4. On 5 March 2014, Mrs. Ndeda informed the Court that Josephine Akinyi Ngesa had filed an affidavit withdrawing her Claim against the Respondent. This judgment is therefore in respect of Halima Ayieko Ayub (Claimant).
5. The Claimant's case was taken by Ongaya J on 18 December 2013, while I took the Respondent's testimony on 2 February 2015. The Claimant filed her submissions on 17 February 2015, while the Respondent filed its submissions on 27 February 2015.

6. The Court has considered the pleadings, documents, testimony of witnesses and the submissions and identified the issues for determination as, *whether the services of the Claimant was terminated or she absconded, if termination, whether it was unfair, whether Claimant was underpaid, whether Claimant worked overtime, whether Claimant has accrued leave, whether the Claimant owes the Respondent Kshs 1,307,000/- and appropriate remedies.*

Whether termination or abscondment

7. The Claimant's pleaded case is that her employment was terminated on 3 April 2013 in violation of the Employment Act, 2007 and ILO Convention No. 158.

8. In her testimony, the Claimant stated that her employment was terminated on 3 April 2013, and she was not given notice or reasons for the termination. She stated that the Respondent's Director told her after paying her March 2013 wages that '*I was no longer needed*'.

9. In cross examination, the Claimant stated that when the Respondent's director terminated her services, there were only the 2 of them present.

10. The Respondent denied terminating the services of the Claimant and pleaded that she deserted work after receiving her wages on 3 April 2013 because she had been promised employment at Nairobi Bottlers as a Sales Representative.

11. The Respondents Director and first witness, Christine Wood stated that she paid the Claimant her wages 3 April 2013, and she did not report to work the next day. She did not communicate the reasons for the absence.

12. The Respondent's second witness was one Rose Mukobi Oriango. She stated that the Claimant was her colleague and that on the night of 3 April 2013, the Claimant called her and informed her she had 'left work' together with Josephine Ngesa.

13. Under cross examination, she stated that the Claimant had called her and informed her that she (Claimant) would not report to work the next day. The next day, she informed the Director about the call.

14. From the testimony of the Claimant and the Respondent's 2 witnesses, the Court must determine where the truth lies.

15. The Respondent's second witness was not challenged on her testimony that the Claimant called her on the phone on 3 April 2013 and told her she would not report the next day. The testimony remained uncontroverted.

16. This testimony, taken with the Respondent's director's evidence that she paid the Claimant her wages on 3 April 2013 and that the Claimant did not report the next day suggests that indeed the Respondent did not terminate the services of the Claimant.

17. The Court therefore finds that the Claimant has failed to satisfy the test in section 47(5) of the Employment Act, 2007 by proving that an unfair termination of employment/wrongful dismissal occurred.

Whether there was unfair termination of employment

18. Because of the finding that the Claimant has failed to discharge the low threshold obligation in section 47(5) of the Employment Act, 2007 that unfair termination/wrongful dismissal occurred, it is not necessary for the Court to examine whether there was unfair termination of employment/wrongful dismissal.

Whether Claimant was underpaid

19. The Claimant pleaded that she was a Shop Assistant and was earning Kshs 9,000/- per month without house allowance and thus she was underpaid.

20. She further pleaded that the prescribed minimum wage from 1 April 2012 to 30 April 2012 was Kshs 9,450/- exclusive of house allowance; from 1 May 2012 to 31 July 2012 was Kshs 10,687/- and between 1 August to 31 March 2013 was Kshs 10,687/- exclusive of house allowance and thus she was underpaid by Kshs 46,070/15.

21. In testimony, the Claimant testified that she was earning Kshs 7,000/- on employment on 7 March 2012, but at separation in April 2013, she was getting Kshs 9,000/- per month. The wage did not include house allowance.

22. The prescribed minimum wages have cycle of 1 year usually running from 1 May to 30 April of the next year.

23. In this regard, the Claimant's pleadings on the underpayment was jumbled although she cited specific Legal Notices. Parties should ensure pleadings accord with the prescribed minimum wage cycles.

24. The Claimant apart from stating the wage on employment and at separation did not disclose when the wage was increased from Kshs 7,000/- to Kshs 9,000/-.

25. Upto 30 April 2012, the prescribed minimum wage for a Shop Assistant in Nakuru exclusive of house allowance was Kshs 9,450/-. The Claimant was employed in March 2012. Upto 30 April 2012, she should have earned Kshs 9,450/- basic wage and not the Kshs 7,000/- (not disclosed when increased to Kshs 9,000/-).

26. It is also correct that the minimum wage exclusive of house allowance for a Shop Assistant in Nakuru from 1 May 2012 to 30 April 2013 was Kshs 10,687/-, pursuant to Legal Notice No. 71 of 2012.

27. From 1 May 2012 to 31 March 2013, the Claimant should have earned a total of Kshs 117,557/-.

28. But with nature of pleadings presented here and evidence, the Court is put in a difficult task. Underpayments should be capable of precise mathematical calculation.

29. In the circumstances of this case, it is not possible for the Court to vouch for the mathematical accuracy of the underpayments except to find that the Claimant was underpaid (although in the submissions it was stated that the wage was increased to Kshs 9,000/- in August 2012, this is not borne out by the record of proceedings).

30. The Court also notes that in her submissions, the Claimant asserted that she was a cashier and not a Shop Assistant though in her pleadings and evidence she had given her position as a Shop Assistant.

31. The submission that the Claimant was a cashier is not based on the pleadings or evidence tendered in Court.

Whether Claimant worked overtime

32. The Claimant pleaded that the employees used to report for work at 7.30 am and leave work at 8.30 pm, 9.00am and leave at 8.30 pm on Sundays.

33. She sought Kshs 108,523/- as normal overtime, Kshs 13,920/50 as overtime for work during public holidays and Kshs 62,702/60 for off duties/rest days.

34. In testimony, the Claimant stated the working hours as 7.30 am to 8.30 pm Monday through Sunday (8.00 am to 6.00 pm at Nakuru Medical Stores), and also during public holidays.

35. The Respondent's director's testimony on the other hand was that working hours were 8.30 am to 6.00 pm and Saturdays 9.00am to 12 noon (9.30 am to 4.00 pm at Nakuru Medical Stores) and that attendance records were not kept.

36. In the submissions, the Claimant contended that ILO Convention No. 158 limited the hours of work to 8 hours in a day and 48 hours in a week.

37. Working hours should be contractual but should not exceed the statutory prescribed minimum number of hours spread over the week.

38. Instead of relying on the ILO Convention, had the Claimant done just a little bit more, it would have brought to the attention of the Court the relevant Order prescribing the minimum working hours. But this was not done.

39. From the incoherent evidence on overtime by both sides, it appears that the Claimant worked overtime but was not remunerated. The Respondent did not interrogate the amount claimed by the Claimant nor the formula.

40. The Respondent did not also keep records. In this respect the Court finds that the Claimant worked overtime but was not remunerated accordingly.

Annual leave

41. The Claimant sought Kshs 7,481/- on account of annual leave. It is common that she served the Respondent for slightly over a year and pursuant to section 28 of the Employment Act, 2007 was entitled to at least 21 days leave with full pay.

42. Pursuant to section 10(3) of the Employment Act, 2007 the Court would find that the Claimant had accrued leave at time of separation.

The Counterclaim

43. The Respondent did not produce any evidence to prove that the Claimant owed her the amounts counterclaimed.

Appropriate relief

One month pay in lieu of notice

44. Because of the finding that the Claimant has failed to prove there was unfair termination of employment, this head of claim is rejected.

Underpayments

45. For the reasons given above, the Court declines to make an award under this head.

Overtime (normal, off duties and public holidays)

46. The Court would find in favour of the Claimant and award Kshs 181,268/-.

Severance pay

47. The Claimant sought Kshs 5,344/- as severance pay. She was not declared redundant and this head of claim is misplaced.

Compensation

48. Compensation pursuant to section 49(1)(c) of the Employment Act, 2007 is a discretionary remedy and only where there is a finding of unfair termination of employment/wrongful dismissal. It is not applicable in the circumstances of this case.

49. Before concluding, the Court once again exhorts parties to make use of the legal powers, expertise and experience of Labour Officers to calculate such claims as underpayments and overtime on the assumption of the pleadings and then such report can be produced and submitted on by the parties instead of leaving it to the Court to calculate what should be the correct amounts due.

50. Pleadings should also succinctly set out the facts constituting the cause of action and should not be overloaded with unnecessary details.

Conclusion and Orders

51. From the foregoing, the Court finds and holds that the Claimant has failed to prove that there was unfair termination of her employment/wrongful dismissal and dismisses the cause of action based on unfair termination of employment.

52. The Court further finds and holds that the Claimant worked overtime and is also entitled to pay in lieu of outstanding leave and awards her

a. Overtime	Kshs 181,268/-
b. Leave	Kshs 7,481/-
TOTAL	Kshs 188,749/-

53. The heads of claim for pay in lieu of notice, underpayments, severance pay and compensation are dismissed.

54. The Counterclaim is also dismissed.

55. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 20th day of March 2015.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mr. Olonyi instructed by Olonyi & Co. Advocates