



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 78 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 25<sup>th</sup> May, 2015)**

ZUHURA NYOKABI.....CLAIMANT

VERSUS

REIMAN COMPANY LIMITED .....RESPONDENT

**JUDGMENT OF THE COURT**

1. The Claimant herein filed her Memorandum of Claim on 23/1/2012 through the firm of Khalwale & Company Advocates. She is a female adult of sound mind residing in Nairobi.

The Respondent on the other hand is a Limited Liability company duly incorporated in Kenya under the Provisions of Cap 486 Laws of Kenya with its office in Nairobi.

The Claimant has filed this case and contends that the issue in question is her wrongful dismissal from and termination of employment and refusal to pay her terminal dues by the Respondent.

**Claimant's case**

2. The Claimant's case is that she was employed by the Respondent as a worker at Respondent's company on 12<sup>th</sup> September 2011 at a basic monthly pay of Kshs.12,000/=. She avers that she worked from 7.40 am to 7 pm daily and she was not housed by her employer nor paid house allowance.

She stated that on 15/10/2012 her boss sent her on a 21 days leave. She reported back to work on 10/11/2012 and was informed by her boss that her services were no longer needed and that she had been terminated. No reasons were given. She avers that she was not accorded any hearing nor was she paid any terminal dues.

3. She reported to the Labour Office and the Labour Officer wrote a letter to the Respondents summoning them to a meeting to discuss the issue. The Respondents didn't attend the meeting. She then instructed her advocate to make a demand. She had been employed for 14 months and seeks to be paid as per her claim. She avers that she was a member and contributor of NSSF for only 3 months but for 9 months her contribution was not made. She has attached Appendix 1 – her salary voucher showing her salary was 11,800/= on 30/6/2012.

**Respondent's case**

4. The Respondents filed their response to the Memorandum of claim on 17/5/2013 through the firm of Kiriba & Company Advocates. They denied unlawfully and wrongfully terminating the Claimant. They however admit that the Claimant was in their employment on probation from 1<sup>st</sup> June 2012 to end of September 2012 when she was summarily dismissed. That during the said period, she was being paid Kshs.11,540/= salary and an allowance of Kshs.6,000/= as per Appendix 1 al totaling 17,540/=.

They contend that the Claimant worked in accordance to the terms and conditions provided for under the Employment Act 2007 from 8 am to 5 pm and as such the issue of overtime does not arise.

The Respondent further stated in their response that the Claimant was summarily dismissed after breaching conditions set out in Section 44 of Employment Act 2007.

5. They also aver that the Claimant is not entitled to any claim for NSSF and NHIF contribution, the same having been duly paid for the period the Claimant was under probation. They submitted that even the issue of house allowance will not arise as the Claimant was paid 6000/= allowance. They want this case dismissed accordingly.

### **Issues for determination**

6. Having considered the evidence of the parties plus the supporting documents and pleadings filed, the issues for determination are:

***(1) During which period did the Claimant serve the Respondents employment?***

***(2) Whether there were valid reasons to terminate the services of the Claimant.***

***(3) Whether due process was followed before Claimant was terminated.***

***(4) What remedies the Claimant is entitled to.***

7. On the first issue, the Claimant gave evidence that she was employed by the Respondent on 12/9/2011 and was terminated on 11<sup>th</sup> November 2012. No employment letter was exhibited in court though.

The Respondents on the other hand contend that the claimant only worked on probation from 1/6/2012 to end of September 2012 when she was summarily dismissed.

The Claimant filed a further list of documents on 30/1/2014. The list contained petty cash vouchers showing payments made to her from October 2011 to July 2012. The Respondents did not give any evidence to counter these payment vouchers nor a rejoinder to refute the same.

I therefore find that the contention by the Respondent that the Claimant worked from June 2012 to September 2012 is false. I make a finding that as submitted by the Claimant, she worked for the Respondent from September 2011 to September 2012.

8. On the 2<sup>nd</sup> issues, whether there were valid reasons to warrant termination of Claimant's services. From the termination statement of response filed by the Respondents, the Respondents aver that the Claimant committed acts of gross misconduct enumerated under Section 44 of the Employment Act 2007. This statement is very general and does not meet the requirement of Section 43 of the Employment Act 2007 which provides that the reasons for termination must be given. The Section states that:

***“ (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the***

***time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”***

The Respondents have not proved any of the reasons for the alleged summary dismissal. I therefore find the dismissal unfair.

9. The Claimant came to work after leave and was send away. She was not given a hearing nor any notice. Provisions of Section 41 of Employment Act which states:

***“ (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”***

were flouted.

No notice was also given to her as envisaged under Section 35(1) of the Employment Act 2007 which provides as follows:

***(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be –***

***(a) where the contract is to pay wages daily, a contract terminable by either property at the close of any day without notice;***

***(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either property at the end of the period next following the giving of notice in writing; or***

***(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.***

It is therefore the finding of this court that the Claimant was unfairly dismissed and I therefore declare so and award her as follows:

**(1) 1 month salary in lieu of notice = 17,540/=**

**(2) 12 months salary as compensation for unlawful termination = 17540 x 12 = 210,480/=**

**(3) Unpaid leave for 1 year = 17,540/=**

**(4) NSSF contribution not remitted = 11 months x 400 = 4400/=**

**(5) House allowance at 15% of salary x 14 months = 36,834/=**

**TOTAL DUE = 286,794/= less statutory deductions.**

**(6) The Claimant should also be issued with a Certificate of Service.**

**(7) The Respondent will meet costs of this suit.**

Read in open Court this 25<sup>th</sup> day of May, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Khalwale for Claimant

No appearance for Respondent