



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1035 OF 2012

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS (KUDHEIHA).....CLAIMANT

VERSUS

FATUMA MOHAMED.....RESPONDENT

JUDGEMENT

1. The issue in dispute is the unfair termination of the grievant Fanice Omusula Njeka a member of the claimant union.
2. The memorandum of claim was filed on 18th June 2012. Despite service with summons the respondent did not enter appearance or reply to the claim. A hearing notice was served and requisite Affidavit of Service filed on 20th July 2015 but the respondent did not attend or seek to defend the suit.
3. The claim is that the grievant was employed by the respondent on 1st July 2008 as a House Help at a monthly wage of kshs.3, 900.00. She would report to work at 7.30am before the respondent would leave for her work station and only depart after the respondent came back and after 6.00pm. She was not given any leave, off days and had to work on public holidays without any allowances or payment in lieu of taking her rest or leave. The monthly wages were not inclusive of her house allowance. The grievant was made to travel with the respondent to her upcountry home in Garissa where she was made to work particularly during public holidays. Over the years her salary was increased to kshs.4, 500.00.
4. The claim is that on 4th December 2009 the grievants services were terminated without notice or being given any reason. The grievant got late to report for work in the morning due to unavoidable circumstances and since she had to travel from the residence to the respondent's residence she delayed by ½ an hour when she found the respondent who terminated her services without giving her a chance to state her case.
5. The claimant is seeking notice pay that is due to the grievant; underpayments as the respondent did not follow or pay the minimum wage guidelines, house allowances, leave allowances, pay for work during public holidays and payment due for not taking off duty. The respondent did not remit statutory dues to the NSSf and the claimant is seeking service pay.
6. The grievant testified in support of the claim noting that she served the respondent diligently until her termination on 4th December 2009. She reported to work at 8.00am due to heavy traffic on the road as she

had to travel along distance, she would normally report to work before her due time at 7.30am and was never compensated for her overtime. The respondent refused to hear her out as to the reasons for reporting to work at 8.00am and terminated her services on the spot and without any notice or due regard to her rights or payment of any terminal dues. The grievants made efforts to have the respondent hear her out, she reported the matter to the area chief and to her union but the respondent was adamant and refused to reinstate her or make the terminal dues payments. The grievant supported the claims outlined in the memorandum of claim.

Determination

7. Article 41 of the Constitution now protects all employees/workers and makes such protection as a fundamental rights under the Bill of Rights. This is further espoused under the Employment Act, which outline the rights due to all employees irrespective of their status, standing, social or nature or work. There are now rule and regulations relating to the application of minimum wage due to any employee that include the wages payable to House Helps, domestic workers or house servants. Such employees are protected under the constitution, by statute and the minimum wage is applicable to them as protected employees.

8. It is trite that all employee should be issued with a contract of service that outline the terms and conditions of work that the employer and employee wish to apply in their relationship of employment. however where such a contract of service is not issued immediately upon employment section 10 of the Employment Act requires that such a contract should be issued to the employee by the employer within two (2) months of such employment thus;

10. (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment—

9. The duty is vested upon the employer to issue the contract tot eh employee. Where such a contract tis not issued, the verbal assertions of the employee where a dispute occurs must suffice in the absence of any written agreement stating otherwise. It is therefore imperative upon all employers to issue the contract of service as from it each party is able to appreciate their terms and conditions therein.

10. As held in the case of **Robai Musinzi versus Safdar Mohamed, Cause No. 267 of 2012;**

It is now settled law under the Employment Act that a verbal contract is a contract that can confer rights and can be enforced.

8. The provisions of this Act shall apply to oral and written contracts.

Further that all employers should seek at the earliest opportunity to reduce oral contracts of employment into writing. This would help in spelling out the terms and conditions of engagement between the parties.

11. Even where there is a written agreement, where the employee is protected such as the claimant was as a House Help with a minimum wage, the contract issued to her should not go below the minimum wage. Such a contract should seek to entrench the basics minimum standards by a provision of what is legally due and regulated by the wage guidelines. In this regard the claimant has applied the applicable wage guidelines for the various year the grievant served under the respondent.

12. In this case also, the grievant was verbally terminated contrary to section 35 of the Employment Act which envisage a written letter of termination stating the reason or reasons for such termination so as to enable the subject employee to challenge the same where she feel aggrieved. Failure to issue notice or written reasons for termination of employment is an unfair labour practice which is contrary to written law and against the principles set out under article 41 of the constitution as to what constitutes fair labour practices as held in the case of **Elizabeth Washeke versus Airtel (K) Ltd 7 Another, Cause No. 1972**

of 2012 thus;

Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public.

13. In this regard therefore, the failure to issue a written notice or the termination letter to the grievant as the employee amounts to an unfair labour practice that is prohibited in law and under the constitution at article 41.

14. In the above cited case, the court went on to hold;

Where an employee is not fairly treated and an employer undertakes processes to defeat the ends of justice this amounts to a labour practice that is fundamentally an unfair labour practice in the meaning of Article 41 of the Constitution and therefore unfair termination as under section 45 of the Employment Act.

15. I therefore find the respondent liable for the unfair termination of the grievant. Compensation is due in this case.

16. On the remedies sought by the claimant where notice is not issued to an employee or the employer fails to hear the employee before termination, this is contrary to the provisions of section 41 of the Employment Act, and payment in lieu of such notice is due as under section 35 of the Act. The due wage to the grievant at the time of termination in 2009 was Kshs.6, 130.00 per month. This shall be awarded a payment in lieu of notice.

17. Based on the regulation of wages and there were guidelines for the position the reinvent held as a House Help, all the underpayment owing are due as part of her terminal dues. These underpayments are confirmed at kshs.26, 194.00.

18. It was the evidence of the grievant that she was not housed by the respondent, she had to travel long distances to be at the place of work. For the position she held, house allowance was due where such housing was not provided by the employer. The allowance herein due is Kshs.14, 240.00.

19. Where leave is due and not taken in pursuant to the provisions of section 28 of the Employment Act, payment in lieu becomes due. This is confirmed at kshs.4, 291.00.

20. The claimant is seeking payment for work during public holidays. Such a right is based. On the provisions of section 10 of the Employment Act. The claimant is seeking payment for 8 days worked during public holidays. Such a claim requires that the claimant must outline as to how such public holidays arose as each year has a different schedule of both known and religious public holidays some dependent on gazettelement. These are not automatic application and must be specifically singled out as to how they arise. This claim is declined as it was not outlined.

21. Off duty days not granted is due as this is a right to an employee. This is confirmed at kshs.9, 864.00.

22. Service pay is due to an employee where the employer fails to remit the statutory dues as under section 35(6) of the Employment Act. In this case the grievant was not registered with NSSF and there is no pay slip or statement issued noting remittance of such deductions and remittances. In such a case the grievant is entitled to service pay. She worked 1st July 2008 to 4th December 2009 a period of a period of over 15 months. In this case and based on the minimum wage due at kshs.6, 130.00 the grievant is entitled to Kshs.3, 065.00 as service pay.

23. Compensation is hereby awarded based on the minimum wage applicable wage due in 2009 for the position of a House Help at Kshs.6,130.00 and based on the application of section 49 of the Employment Act the same is granted at 12 months all being kshs.73,560.00.00.

Judgement is entered for the claimant in the following terms;

- a. **The termination of the grievant by the respondent was unfair;**
- b. **Compensation awarded at kshs.73, 560.00;**
- b. **Notice pay at kshs.6, 130.00;**
- d. **Underpayment awarded at kshs.26, 194.00;**
- e. **House allowances awarded at Kshs.14, 240.00;**
- f. **Leave pay awarded at kshs.4, 291.00;**
- g. **Off days awarded at kshs.9, 864.00;**
- h. **Service pay awarded at kshs.3, 065.00;**
- i. **Costs of the suit.**

DATED and DELIVERED at NAIROBI this 30th day of July, 2015.

M. Mbaru

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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