



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 334 OF 2014

EUNICE WANJIRU WAITHAKA

CLAIMANT

v

THOMSON FALLS LODGE

RESPONDENT

JUDGMENT

1. Eunice Wanjiru Waithaka (Claimant) sued Thomson Falls Lodge (Respondent) on 30 July 2014 alleging unfair and wrongful termination of employment and seeking underpayments, maternity leave pay, pay in lieu of notice, house allowance, travelling allowance and gratuity/severance pay.
2. The Respondent filed a Response on 17 October 2014 which prompted the Claimant to file a Reply on 24 October 2014.
3. The Cause was heard on 19 May 2015.
4. The Court has considered the pleadings and evidence and identified the issues for determination as, *whether the Claimant's contract lapsed or her employment was unfairly/wrongfully terminated, whether Claimant was underpaid, whether Claimant was entitled to maternity leave and appropriate remedies (including Claimant's statutory and contractual entitlements arising out of the employment relationship.*

Lapse of contract or unfair/wrongful termination of employment

5. The Claimant in her testimony stated that she was on fixed term renewable contracts of 3 months duration. The first contract was dated 28 May 2011.
6. She also produced a letter dated 28 June 2012 renewing her contract for 2 months. This contract was to expire on 31 July 2012.
7. According to the Claimant, on 20 July 2012 she applied for a renewal of the contract which she gave to a secretary but there was no response from the Respondent and thereafter she proceeded for maternity leave on 31 July 2012, the same day she gave birth.
8. The Respondent on the other hand contended that the Claimant's contract expired on 31 July 2012 without the Claimant applying for extension.
9. The Respondent exhibited 2 applications for renewal of the contract by the Claimant dated 8 February 2012 and 19 June 2012.
10. It also exhibited a contract dated 26 June 2012 set to run until 31 July 2012. This contract had a termination clause but no provision on renewal.
11. The Court has looked at the initial contract dated 28 May 2011. It indicated the duration of the contract but it did not have an express provision on what would happen on expiration.
12. The renewed contract produced by the Respondent dated 28 June 2012 was time bound. It did not have express provision for renewal. The application for renewal was endorsed with a note

renewed up to 30 August 2012, but the contract the Claimant signed indicated *renewed for 2 months*. The contract, in the view of the Court supersedes the endorsement in the application letter.

13. In cross examination, the Claimant stated that she had been applying in writing for renewal but that she did not apply for renewal towards the expiry of the last contract.
14. Considering that the Claimant was on a time bound contract and which she served until the last day and that she did not seek for renewal, the Court reaches the conclusion that the contract lapsed by effluxion of time.
15. Therefore the case at hand is not one of unfair termination/ wrongful dismissal from employment.

Whether Claimant was underpaid

16. It is not disputed that the Claimant earned Kshs 5,769/- per month from employment on 28 May 2011 until separation on 31 July 2012. According to the contracts exhibited, the Claimant was a Gardener and a Candy Shop Attendant.
17. The work the Claimant was doing fall under the occupation of general labourer/worker, as she pleaded.
18. And during the material period, the prescribed minimum wage for general labourers pursuant to Legal Notice No. 64 of 2011, and in respect of the area the contract was performed was Kshs 6,999/- exclusive of house allowance. With 15% house allowance the monthly wage should have been Kshs 8,048/-.
19. During the 14 months, the Claimant was underpaid by Kshs 31,906/-

Whether Claimant was entitled to maternity leave

20. The commencement of the Claimant's maternity leave commenced on the expiry of her contract and therefore she has no legally tenable claim against the Respondent in this respect.

Travelling allowance

21. The Claimant did not provide any evidentiary, contractual or legal basis for travelling allowance.

Leave earned

22. The Claimant served the Respondent from 28 May 2011 to 31 July 2012.
23. Pursuant to section 28(1) (b) of the Employment Act, 2007, the Claimant would be entitled to 21 days annual leave and 4 days *pro rata* leave for June and July 2012, equivalent to 24 days.

Gratuity/ Severance pay

24. Severance pay is applicable in cases of redundancy. The Claimant was not declared redundant and therefore the head of claim for severance pay is misplaced.
25. Gratuity is contractual and the Claimant did not demonstrate any contractual basis for the same.
26. If she meant service pay by virtue of section 35(5) of the Employment Act, 2007, she would not be entitled because her pay slips clearly show she was a member/contributor to the National Social Security Fund.

Appropriate remedies

Underpayments

27. The Court has reached a conclusion that the Claimant was underpaid by Kshs 31,906/- and she is entitled to the same.

House allowance

28.The Claimant's testimony that she was not getting house allowance and that she was housed by the Respondent for only 1 month was not challenged or controverted.

29.She sought Kshs 39,000/- on account of house allowance at the rate of Kshs 3,250/-.

30.The Court finds in her favour less the equivalent of 1 month house allowance.

Maternity leave, travelling allowance and gratuity/severance pay

31.The Claimant did not prove any contractual or statutory basis for these entitlements and they are dismissed.

Compensation

32.The Claimant's employment was not terminated and she is not entitled to compensation.

Conclusion and Orders

33.The Court finds and holds that

- i. The Claimant's employment lapsed by expiry of time and therefore she is not entitled to pay in lieu of notice or compensation.
- ii. The Claimant is not entitled to maternity leave pay, travelling allowance and gratuity/ severance pay

34.The Claimant was underpaid, and is also entitled to house allowance and is awarded and the Respondent is ordered to pay her

- i. Underpayments Kshs 31,906/-.
- ii. House allowance Kshs 35,750/-

TOTAL **Kshs 67,656/-**

35.Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 24th day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mr. Otieno instructed by Geoffrey Otieno & Co. Advocates

Court Assistant Nixon