



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT Nakuru

CAUSE NO. 405 OF 2014

DAMAKLINE KEMUNTO.....CLAIMANT

V

INTERCITY SECURE HOMES LTD.....RESPONDENT

JUDGMENT

1. For determination are the questions, *whether the dismissal of Damakline Kemunto (Claimant) was unfair, whether the Claimant was underpaid and appropriate remedies or contractual/statutory entitlements due to the Claimant.*
2. The Cause proceeded as an undefended Cause. An affidavit of service sworn by John Kinyanjui Ndungu and filed in Court attested to service of Notice of Summons and Memorandum of Claim, and an affidavit of service of hearing notice sworn by Clive Onyancha and filed in Court on 2 June 2015.
3. The Cause was heard on 3 June 2015 and the Claimant testified.

Whether dismissal was unfair

4. The Claimant stated that she was employed by the Respondent as a day time security guard on 1 November 2013 and was deployed to Egerton University Nakuru town campus until 7 July 2014 when she received a text message from her supervisor called Koech advising her not to report to work.
5. She stated that after 2 days she went to get an explanation and was informed the reason was that on 6 July 2014, she had left 10 minutes earlier.
6. The Claimant also stated that there was no notice of dismissal or a dismissal letter.
7. The Claimant's testimony regarding the circumstances of separation is unchallenged and uncontroverted.
8. Section 41 of the Employment Act, 2007 requires an employer to inform an employee of reasons contemplated for termination of employment and to afford the employee an opportunity to make representations.
9. Further, pursuant to sections 43 and 45 of the Act, the employer has a statutory duty to prove the reasons for dismissal and that the reasons are valid and fair.
10. There is nothing to suggest that the Claimant was informed of the charges before she was told not to report to work or that she was granted an opportunity to make representations. On that score the dismissal was procedurally unfair.
11. The Respondent did not file a Response or attend the hearing to discharge the sections 43 and 45 of the Employment Act, 2007 burden.
12. The Court finds the dismissal as substantively unfair.

Underpayments

13. The Claimant's testimony that she was a day guard and was earning Kshs 8,000/- per month was not disputed.
14. In the submissions, the Claimant cited Legal Notice No. 197 of 2013 which prescribed the minimum basic wage for day security guards as Kshs 9,024/- .
15. The said minimum wage is exclusive of house allowance and were 15% house allowance to be factored, the gross wage was Kshs 10,377/-.
16. The Claimant was therefore being underpaid by Kshs 2,377/- per month. She served from November 2013 to July 2014 and was thus underpaid by a total of Kshs 19,016/- for the 8 months and not the Kshs 124,533/- as urged.

Appropriate remedies

Compensation

17. The equivalent of not more than 12 months gross wages is one of the primary though discretionary remedies for unfair termination of employment.
18. Considering the length of service, the Court would award the Claimant the equivalent of 2 months gross wages (based on minimum wage inclusive of house allowance) as compensation.
19. The same is assessed as Kshs 20,754/-.

1 month pay in lieu of notice

20. The Claimant is entitled to 1 month pay in lieu of notice by operation of section 35 of the Employment Act, 2007 because she was not given a notice of termination.
21. The Court would award her Kshs 9,024/- being the prescribed minimum basic wage at the material time.

7 days wages for July 2014

22. The Claimant is entitled to earned wages for the days worked in July 2014. The same was quantified as Kshs 3,026/- in the demand letter which was produced as exhibit 1.

Overtime (normal and public holidays)

23. The Claimant did not prove the agreed working hours per day or weekly. But it is a notorious fact that guards work 12 hour shifts and also during public holidays.
24. It is also a statutory obligation of employers to keep and produce employment records in Court.
25. The Claimant quantified the overtime as Kshs 8,382/- for normal overtime and Kshs 3,831/- for public holidays.
26. Pursuant to sections 10(3),(7) and 74 of the Employment Act, 2007, the Court finds in favour of the Claimant.

Underpayments

27. The Court has found the Claimant was underpaid by Kshs 19,016/- and awards her the same.

Certificate of service

28. A Certificate of service is a statutory right of an employee and the Respondent should issue one to the Claimant within 7 days.

Conclusion and Orders

29. The Court finds and holds that the termination of the Claimant's employment was unfair and awards her and orders the Respondent to pay her

(a) 2 months gross wages compensation	Kshs 20,754/-
(b) 1 month salary in lieu of notice	Kshs 9,024/-
(c) Earned wages July 2014	Kshs 3,026/-
(d) Overtime	Kshs 12,213/-
(e) Underpayments	Kshs 19,016/-
TOTAL	Kshs 64,033/-

30. Claimant to have costs of Kshs 20,000/-.

Delivered, dated and signed in Nakuru on this 30th day of October 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mburu instructed by Chepkwony & Co. Advocates

Respondent did not appear/file Response

Court Assistant Nixon