



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 389 OF 2014**

**MARY MUMBI KARIUKI .....CLAIMANT**

**v**

**THE DIRECTOR,**

**PAMOJA WOMEN DEVELOPMENT PROGRAMME.....RESPONDENT**

**JUDGMENT**

1. Mary Mumbi Kariuki (Claimant) commenced legal action against the Director, Pamoja Women Development Programme (Respondent) on 25 August 2014, and she stated the issues in dispute as

1. Unfair termination and or wrongful dismissal
2. Notice
3. Salary for 19 days (June 2014)
4. Housing allowance
5. Leave.

2. The Respondent filed a Defence on 16 October 2014, and on 18 November 2014, the Claimant filed a Response to Defence. Witness statements and other supporting documents were also filed by both parties.

3. The Cause was heard on 25 May 2015. The Claimant filed her written submissions on 17 June 2015 while the Respondent's submissions were not on file by the agreed and set time.

4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant's wages was inclusive of house allowance, whether the Claimant was/is entitled to leave or pay in lieu thereof, whether Claimant is entitled to wages for June 2014, whether Claimant absconded or her employment was terminated, if termination, whether the termination of Claimant's employment was unfair, whether there is misjoinder of parties, and appropriate remedies.*

**Whether wages was inclusive of house allowance**

5. Section 31 of the Employment Act, 2007 creates an obligation upon an employer to provide housing accommodation to an employee or pay in lieu thereof a reasonable allowance to cover for rent.

6. The Respondent did not suggest that it provided the Claimant with accommodation. It's witness stated that there was no agreement on house allowance but that the wage was inclusive of house allowance.

7. The Claimant was not issued with a written contract of employment and therefore it is not clear whether her remuneration was inclusive of house allowance. Her evidence was that she was not getting house allowance.

8. The Employment Act, 2007 expressly requires an employer to indicate in the contract whether a wage is consolidated (to include house allowance or not). No written contract was produced.

9. The Claimant produced her pay slips. According to the pay slips, she was getting a basic wage of Kshs 15,000/- per month. A basic wage cannot include a house allowance by the stretch of any imagination.

10. Considering the provisions of sections 9, 10(3) and (7) and 31 of the Employment Act, 2007, the Court finds that the wage was not inclusive of house allowance.

11. The Claimant quantified house allowance at Kshs 2,250/- per month being 15% of the basic wage (by practice and tradition this is the formula which is ordinarily applied). She computed the total house allowance as Kshs 40,500/- for 18 months. The Respondent did not interrogate the computation nor controvert the same.

12. The Court therefore finds the claim for Kshs 40,500/- as proved and merited.

### **Leave pay**

13. The Claimant was engaged by the Respondent in November 2012. She served until 19 June 2014. That is a period of 18 months.

14. Pursuant to section 28 of the Employment Act, 2007, she was entitled to at least 21 days annual leave after completion of 12 months service.

15. From November 2012 to October 2013, the Claimant was entitled to 21 days annual leave while from November 2013 to June 2014, she was entitled to *pro rata* leave of 14 days.

16. The Respondent's first witness stated that leave for employees was broken into instalments to be taken in April (one week), August (one week) and December (two weeks) and that the Claimant took leave during the breaks. The Claimant in her cross examination had admitted as much.

17. The Court finds, based on the material placed before it that the Claimant has not demonstrated that she is entitled to any accrued leave or balances for the 18 months.

### **Wages for June 2014**

18. The Claimant sought Kshs 10,925/- on account of wages for 19 days worked in June 2014. She stated that she was not paid wages for the period.

19. The Claimant is entitled to earned wages irrespective of the manner of separation, and because the Respondent did not dispute the computation, the Court finds for her as claimed.

### **Abscondment or termination of employment**

20. The Claimant's case was that her employment was terminated. The Respondent on the other hand contended that she absconded from work from 27 June 2014.

21. The Claimant's testimony was that the Respondent's Nakuru Branch Manager Teresa Wanjiru Ngunyo informed her that the Director had instructed that she go on 3 days leave on 19 June 2014, which

she took, and that when she resumed, the Branch Manager told her she should leave and that she would not be paid.

22. Teresa Wanjiru Ngonyo, who was the Respondent's second witness, denied asking the Claimant to go on leave for 3 days. According to her, the Claimant absconded from work.

23. The Court has 2 inconsistent versions. In the ordinary scheme of things, if an employee fails to report to work without any lawful cause or permission, an employer would give an ultimatum/show cause to the employee through known contacts to explain the absence.

24. In the instant case, the Respondent has not disclosed any action it took, if its version that the Claimant absconded is to be believed. In fact, absence is a reason for disciplinary action which may result in summary dismissal.

25. In the absence of any action by the Respondent and the inconsistent evidence, the Court finds the version by the Claimant more probable and reaches the conclusion that the Claimant did not abscond but was asked to leave.

### **Whether termination of employment was unfair**

26. The Respondent's case was anchored on the fact that the Claimant absconded from work. That line of response has been found without merit.

27. But the Court must still determine whether the termination of the Claimant's employment was unfair.

28. Even if the Respondent's defence that the Claimant absconded duty had been upheld, it still had to follow due process.

29. Abscondment, absence without permission or lawful cause is all grounds for summary dismissal and subject to the procedural fairness requirements of section 41 of the Employment Act, 2007.

30. The Respondent did not attempt to reach the Claimant to explain her whereabouts. It should have issued an ultimatum/show cause to the Claimant through her known addresses to explain her whereabouts. This was not done.

31. Further, failure to appear at the appointed place of work would be a repudiation of contract. Reporting to work is a fundamental term of the employment contract.

32. Where there is repudiation, the authorities are clear that the innocent party must accept the repudiation (*Thomas Marshal (Exports) Ltd v Guinle* (1978) IRLR 174, *Howard v Pickford Tool Co. Ltd* (1951) 1KB 417, *London Transport Executive v Clarke* (1981) IRLR 166) and my decision in *Philimona Aromba Mbalasi v Uni-Truck Ltd* (2015) eKLR).

33. The authorities hold that the employment relationship does not automatically come to an end. The Respondent did not demonstrate or minutely suggest that it took a step to accept the repudiation as the innocent party.

34. Whichever way one looks at it, the Respondent terminated the Claimant's employment unfairly and the Court so finds.

### **Whether wrong party was sued.**

35. The Respondent advanced a position in the pleadings that the Director was wrongly enjoined in the proceedings because Pamoja Women Development Programme was a legal entity capable of being sued in its own name.

36. This line was not taken during the hearing.

37. But this defence also fails because of the definition of employer in section 2 of the Employment Act, 2007.

38. For purposes of the Employment Act, 2007, a *manager, factor, foreman* of the employer is an employer and can be sued.

### **Appropriate remedies**

#### ***One month salary in lieu of notice***

39. The Claimant is entitled to Kshs 15,000/- under this head of claim.

#### ***Wages for June 2014***

40. The Claimant worked until 19 June 2014 and she is entitled to Kshs 10,925/- as claimed.

#### ***House allowance***

41. Claimant has made a case for an award of Kshs 40,500/- on account of house allowance.

#### ***Leave***

42. The Claimant failed to prove this head of claim.

#### ***Compensation***

43. The Court has found the termination of Claimant's employment unfair. Considering her length of service, the Court would award her the equivalent of 2 months gross wages (inclusive of house allowance) assessed as Kshs 34,500/- as compensation.

### **Conclusion and Orders**

44. The Court finds and holds that the Claimant did not abscond from work but her employment was unfairly terminated.

45. The Court awards and orders the Respondent to pay the Claimant

(a) 1 Month pay in lieu of notice                      Kshs 15,000/-

(b) Wages for June 2014                                      Kshs 10,925/-

(c) 18 months house allowance                      Kshs 40,500/-

(d) 2 months wages as compensation              Kshs 34,500/-

TOTAL

**Kshs 100,925/-**

46. Claim for leave is dismissed.

47. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 23<sup>rd</sup> day of October 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                      Ms. Kawira instructed by Korongo & Co. Advocates

For Respondent                      Mr. Kimani instructed by Kimani Charagu & Co. Advocates

Court Assistant                      Nixon