



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 2339 OF 2012 CONSOLIDATED WITH

CAUSE NO 2340 OF 2012

EDITH MUTUKU.....1ST CLAIMANT

MARY WAVINYA.....2ND CLAIMANT

VS

KARESH HARDWARE CONSTRUCTION CO LTD.....1ST RESPONDENT

RICHARD KALEMBE NDILE.....2ND RESPONDENT

AWARD

Introduction

1. This consolidated action is brought by the 1st and 2nd Claimants against the 1st and 2nd Respondents seeking relief for unfair termination of employment and payment of terminal dues. The Claimants' claims are contained in separate statements of claim dated 15th November 2012. The Respondents filed separate defences and counterclaims on 4th February and 29th May 2015.

The Claimants' Case

2. The 1st Claimant, Edith Mutuku states that she was employed by the 2nd Respondent to work at the 1st Respondent Company from February 2011. She was not issued with a written employment contract. She was paid a monthly salary of Kshs.8,000.00 exclusive of house allowance but she told the Court that her starting monthly salary ought to have been Kshs.18,219.00 exclusive of house allowance.

3. The 1st Claimant worked until September 2012 when her employment was terminated without notice. She states that the termination was unjustifiable and unfair. Her claim is as follows:

- a. A declaration that the termination of her employment was wrongful
- b. One month's salary in lieu of notice.....Kshs.18,219.00
- c. Leave pay for one year.....14,715.00
- d. Prorata leave for 8 months.....9,814.00
- e. House allowance.....51,924.00
- f. Service pay for 1 year.....10,511.00
- g. Underpayment (1.5.2011-30.4.2012).....122,628.00
- h. Underpayment (1.5.2012-August 2012).....51,095.00

- i. Overtime for 1 year & 8 months.....161,442.00
 - j. Days worked in December 2011, March, June, July, August
and September 2012.....41,412.00
 - k. 12 months' salary in compensation for wrongful
Termination.....218,628.00
4. The 2nd Claimant, Mary Wavinya states that she was employed by the 2nd Respondent to work in the 1st Respondent Company from April 2011. She was not issued with a written employment contract but was paid a monthly salary of Kshs.8,000.00 exclusive of house allowance. She contends that her starting monthly salary ought to have been Kshs.18,219.00 exclusive of house allowance.
5. The 2nd Claimant worked until September 2012 when her employment was terminated without notice. She states that the termination was unjustifiable and unfair. She claims the following:
- a) A declaration that the termination of her employment was wrongful
 - b) One month's salary in lieu of notice.....Kshs.18,219.00
 - c) Leave pay for one year.....14,715.00
 - d) Prorata leave for 5 months.....6,134.00
 - e) House allowance.....51,924.00
 - f) Service pay for 1 year.....10,511.00
 - h) Underpayment (1.5.2011-30.4.2012).....122,628.00
 - i) Underpayment (1.5.2012-August 2012).....64,760.00
 - j) Overtime for 1 year & 5 months.....107,628.00
 - k) Days worked in December 2011.....6,000.00
 - l) Days worked from 1st to 21st August 201241,412.00
 - m) 12 months' salary in compensation for wrongful termination
.....218,628.00
 - n) Costs and interest

The Respondents' Case

6. In response to the 1st Claimant's claim, the Respondents filed a defence and counterclaim on 29th May 2015. While denying the claim for wrongful termination, the Respondents state that the 1st Claimant was a casual employee and that she stopped working out of her own volition.

7. Further, during her employment, the 1st Claimant occasioned loss of company property. The Respondents plead that the 1st Claimant did not work overtime and her claim in this regard is therefore without basis. By way of counterclaim, the Respondents claim notice pay from the 1st Claimant.

8. In response to the 2nd Claimant's claim, the Respondents filed a response and counterclaim on 4th February 2015 stating that the 2nd Claimant was a casual employee and that she left employment out of her own volition. The claim for overtime compensation is denied on the ground that the 2nd Claimant did not work beyond the normal working hours. The Respondents seek notice pay from the 2nd Claimant in counterclaim.

Findings and Determination

9. The issues for determination in this case are as follows:
- a. Whether the Claimants left the Respondents' employment out of their own volition or were terminated and if they were terminated whether the termination was justifiable and fair;
 - b. Whether the Claimants are entitled to the remedies sought;
 - c. Whether the Respondents have made out proper counterclaims against the Claimants.

The Claimants' Separation from the Respondents' Employment

10. The Claimants state that they were terminated unprocedurally without cause and without notice. The Respondents on the other hand state that the Claimants left employment out of their own volition and without giving the requisite notice.

11. The Respondents further state that the Claimants were casual employees and are therefore not entitled to the reliefs sought. Section 2 of the Employment Act, 2007 defines a casual employee as:

“a person the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time”

12. Testifying for the Respondents, Paul Wambua Nzei told the Court that the Claimants were casuals because they did not have written contracts. With respect, this is a misunderstanding of the law on casual employment. An employee does not become a casual employee as defined in law simply because their employment is not evidenced by a written contract. At any rate, it is the responsibility of the employer to issue an employment contract and an employer who fails to discharge this mandate cannot use their failure to advance their case.

13. Additionally, there was no evidence that the Claimants worked intermittently and given the places of their deployment as admitted by the Respondents being, office reception and KCB Agency, the Court was not convinced that the Claimants were casual employees as defined in law.

14. Back to the mode of the Claimants' separation from the Respondents' employment. The Respondents' line of defence is that the Claimants deserted duty. Desertion is a serious offence that would render an employee liable to summary dismissal. An employer who asserts desertion as a defence to a claim for wrongful termination must therefore prove that due notification was issued to the deserting employee.

15. In the absence of any trail of a disciplinary process initiated on account of desertion, an employer cannot be heard to say that an employee deserted duty or left employment on their own volition.

16. Even if the Court was to agree with the Respondent's submission that the Claimants left employment because of unpaid salary arrears, that in itself would amount to constructive dismissal. The Respondents' defence that the Claimants left employment without notice is therefore rejected and the counterclaims for notice pay must fail.

17. That said, the Court agrees with the Claimants' contention that their employment was terminated without justification and without due procedure as required under Sections 45 and 41 of the Employment Act, 2007.

Remedies Available to the Claimants

18. The Claimants claim that they were underpaid and in support of this limb, they gave the figure of Kshs.18,219.00 as the agreed monthly salary. This claim was however not supported by any documentary evidence and the Court finds no basis for the claims for underpayment. The claims for overtime compensation were also not proved.

19. The Claimants also claim house allowance. Section 31(1) and (2) of the Employment Act provides that:

1. ***An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

2. ***This section shall not apply to an employee whose contract of service-***

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

20. The Claimants were not issued with employment contracts and as held by **Mbaru J** in **Robai Musinzi Vs Safdar Mohamed Khan [2012] eKLR** where an employer fails to document the terms and conditions of employment, it is left to the Court to interpret these terms. From my analysis of the evidence presented to the Court, I did not find any expressed intention that the Claimant's salary was inclusive of house allowance. The Respondents' witness Paul Wambua Nzei, admitted in cross examination that the Claimants were neither housed nor paid house allowance.

21. Consequently, the inescapable conclusion is that the Claimants' claims for house allowance succeed. I therefore award each of the Claimants house allowance at 15% of their basic salary for the entire period of their employment. The resultant figure of Kshs.9,200.00 will be adopted as the Claimants' monthly salary for purposes of tabulating their claims.

22. Following my finding that the Respondents terminated the Claimants' employment without substantive justification and in total disregard of procedural fairness, I award each of the Claimants the equivalent of four (4) months' salary in compensation.

23. In making this award, I have taken into account the Claimants' length of service as well as the Respondents' conduct leading to the termination and especially, the Respondents' action of withholding the Claimants' salary which was not explained to the Court. I also award each of the Claimants one month's salary in lieu of notice.

24. The Respondents did not produce any leave records to counter the Claimants' claims for leave pay which therefore succeed and are allowed. The claims for service pay are also allowed as there was no evidence that the Respondents made any National Social Security Fund (NSSF) contributions on account of the Claimants.

25. With regard to the claims for unpaid salaries, the Respondents produced a document dated 12th September 2012 written and signed by the 1st Claimant, Edith Mutuku showing that she was

claiming salary balance of Kshs.6,000.00 for December 2011, full salary for June, July and August 2012 as well as salary for days worked in September 2012.

26. The Respondents also produced a document dated 21st August 2012 written and signed by the 2nd Claimant, Mary Wavinya showing salary arrears owed to her standing at Kshs.17,000.00. No credible explanation was given for the adjustment of the figures being claimed under this head and the Court therefore allows the Claimants' claims as tabulated by themselves in August and September 2012.

27. In the final analysis, I make an award in favour of the Claimants in the following terms:

Edith Mutuku (1st Claimant)

a. 4 months' salary in compensation for unfair termination.....	Kshs.36,800.00
b. 1 month's salary in lieu of notice.....	9,200.00
c. House allowance (1,200x 19 months +1,200/30x12 days)	23,280.00
d. Leave pay for 1 year (9,200/30x21).....	6,440.00
e. Prorata leave for 7 months (9,200/30x1.75x7).....	3,757.00
f. Service pay for 1 year (9,200/30x15).....	4,600.00
g. Unpaid salary for December 2011.....	6,000.00
h. Unpaid salary for June, July and August 2012.....	24,000.00
i. Salary for 12 days worked in September 2012.....	3,200.00
Total.....	117,277.00

Mary Wavinya (2nd Claimant)

a) 4 months' salary in compensation for unfair termination....	Kshs.36,800.00
b) 1 month's salary in lieu of notice.....	9,200.00
c) House allowance (1,200x 16 months +1,200/30x21 days).....	20,040.00
d) Leave pay for 1 year (9,200/30x21).....	6,440.00
e) Prorata leave for 4 months (9,200/30x1.75x4).....	2,147.00
f) Service pay for 1 year (9,200/30x15).....	4,600.00
g) Unpaid salary as tabulated on 21st August 2012.....	17,000.00
h) Salary for 21 days worked in August 2012.....	6,440.00
Total.....	102,667.00

28. The award amounts shall attract interest at court rates from the date of the award until payment in full.

29. The Respondents will meet the costs of this case.

30. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS

6TH DAY OF NOVEMBER 2015

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JUDGE

Appearance:

Mr. Nyabena for the Claimants

Mr. Kalwa for the Respondents