



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 285 OF 2013
(Originally Nairobi Cause No. 1459 of 2011)

MARY RHOB

CLAIMANT

v

ANNAN BHAMANIA

RESPONDENT

JUDGMENT

1. Mary Rhobi acting in person (Claimant) filed a Statement of Claim against Annan Bhamania (Respondent) in Nairobi on 30 August 2011. The issue in dispute was stated as *unlawful termination and lack of payment of terminal dues*.
2. The Cause was mentioned before Rika J on 14 February 2012 but none of the parties was present. The matter was stood over generally. In the meantime, the Claimant served the Respondent with a mention notice dated 21 August 2012 advising him that the matter would be mentioned on 8 October 2012. The Cause was therefore mentioned before the Judge on 8 October 2012 when Ms. Talam held brief for Ms. Mbogo for the Claimant, but the Respondent was absent and Rika J ordered that the Cause proceed to hearing on 28 November 2012 (Kituo Cha Sheria filed Notice of Appointment of Advocate on behalf of Claimant on 28 November 2012).
3. It is not clear from the record what transpired on 28 November 2012, but on 28 January 2013 the Cause was again placed before Rika J but none of the parties was in attendance and the matter was stood over generally.
4. On 24 July 2013 the Claimant wrote to the Registrar of the Court seeking the transfer of the Cause to Mombasa because an Industrial Court station had been established in Mombasa. As a result, the Cause was placed before the Principal Judge on 31 July 2013 and he directed that the file be transferred to Mombasa.
5. Through a letter dated 31 July 2013 and copied to the parties, the Deputy Registrar transmitted the file to the Deputy Registrar Mombasa. On 9 October 2013, the Deputy Registrar wrote to the parties notifying them to appear for directions on 11 November 2013.
6. On 11 November 2013 only the Claimant appeared and the Court directed her to serve the Respondent with a copy of the Statement of Claim and Notice of Summons. This was because there was no evidence on record that the Respondent had been served with the primary pleadings and summons. Mention was set for 3 December 2013.
7. On 3 December 2013 only the Claimant appeared and the Court confirmed that the Respondent had been served with Notice of Summons and copy of Statement of Claim through an affidavit sworn by Timothy Kiringi Kitsao and filed in court on 2 December 2013. As a result, the Court fixed the Cause for hearing on 26 February 2014 with an order that the Respondent be served.
8. When the cause was called for hearing on 26 February 2014, only the Claimant was present. On

record was an affidavit of service sworn by Nzaro Nguwa deposing that he had served the Respondent with a hearing notice on 19 February 2014. Being satisfied with the service, the Court directed the Cause to proceed.

Claimant's pleadings and case

9. In the Statement of Claim, it was pleaded that the Claimant was employed by the Respondent as a house help on 15 February 2008 at a monthly salary of Kshs 2650/- and that she was unlawfully terminated on 7 February 2011. It was further pleaded that the Respondent had no valid reasons to terminate the services of the Claimant and that the termination was contrary to Part VI of the Employment Act, and that the Claimant had not been subjected to any disciplinary process during service and that she was being paid below the prescribed statutory minimum wages.
10. The Claimant gave oral evidence and more or less repeated what was pleaded. Regarding her termination the Claimant stated that on 28 January 2011 she fell ill and sought treatment from a hospital. She further stated that when she reported back to work the Respondent gave her time off until 5 February 2011 but on this day the Respondent told her to return on 8 February 2011, when she was told there was no work for her.
11. Further, the Claimant stated she was not issued with a letter of employment, never went on leave during the employment period and that she was not housed by the Respondent but would report to work in the morning and leave in the evening
12. The Claimant testified that consequently she requested for her terminal dues but was not given any. The Claimant prayed for the reliefs set out in the Statement of Claim.

Evaluation

13. The Respondent, despite service ignored to file a Response or attend the hearing. In effect the Claimant's case is unchallenged. There are no factual or real disputes arising from the pleadings in this regard. A real dispute arises where a Respondent denies one or more material allegations made by a Claimant or produces evidence to the contrary; admits a Claimant's averments/evidence but allege facts which the Claimant disputes or lastly, where he puts the Claimant to proof.
14. A bare denial cannot lead to a dispute of fact. The Respondent has failed to engage the facts presented by the Claimant. The Court therefore is constrained to find that the Claimant was employed by the Respondent as a house help on 15 February 2008 at a salary of Kshs 2,650/- per month and that she was not issued with a written contract of service contrary to sections 7, 9 and 10 of the Employment Act and that she did not take annual leave during the period of employment.
15. The Court further finds that the termination of the Claimant was verbal and contrary to sections 35 of the Employment Act, in that no written notice was given; contrary to section 41 of the Act in that the Claimant was not notified and heard prior to the termination; and by the Respondent failing to file a Response and or attend the hearing he has failed to establish that the reasons for the termination were valid and fair reasons.
16. Further, the Court finds that the Claimant was being paid wages below the statutory minimum wages set out in law.

Appropriate relief

One month pay in lieu of Notice

17. Section 35 of the Employment Act is implicated in the instant case. The Claimant was on a monthly wage and was entitled to at least twenty eight days written notice which was not given.
18. The Claimant was terminated on 7 February 2011. The applicable law relating to minimum statutory wages at the time of termination was the Regulation of Wages (General)(Amendment) Order, 2010 Legal Notice No. 98 of 18 June 2010.
19. Under the order, the basic minimum monthly wage for a house servant in Mombasa was set at Kshs 6,743/-. The Claimant is therefore entitled to Kshs 6743/- being one month's wages in lieu of notice.

Four months accrued leave

20. The Claimant sought Kshs 7,950 being equivalent to four months accrued leave. Under section 28 of the Employment Act and regulation 9 of the Regulation of Wages (General) Order, the Claimant was entitled to twenty one days annual leave with full pay every year. The Claimant served the Respondent for three years.
21. Under this head, the Claimant is entitled to Kshs 5,195/- for leave year February 2008/2009, Kshs 6,130/- for leave year February 2009/2010 and Kshs 6,743/- for leave year 2010/2011.

Two days off per month for 4 years

22. As stated, the Claimant served the Respondent for three and not four years. She was entitled by law to one rest day per week. There are 52 weeks in a year and therefore the Claimant was entitled to roughly 52 rest days in a year, or 156 rest days for the 3 years. Using the formula referred to in paragraph 25 hereinafter the Claimant is entitled to Kshs 46,488/- in lieu of the rest days.

Service Gratuity of Kshs 15,840/-

23. Section 35(5) of the Employment Act entitles an employee to service pay for every year worked at fixed terms, provided the employee is not excluded under section 35(6) of the Act.
24. The statute has not fixed any terms but the practice has been to pay the equivalent of 15 days pay for each year worked. Using the minimum wage as of February 2011, the Claimant's gross monthly minimum wages was Kshs 7,754/45 and the fact that the Claimant served the Respondent for 3 years she is entitled to the equivalent of at least 45 days pay as service.
25. Using the correct formula of basic wage and house allowance divided by 26 to get the daily wage, which is then multiplied by 45, the Claimant is entitled to Kshs 13,421/- as service pay.

Underpayments for 48 months of Kshs 237,936/-

26. The Court has reached the conclusion that the Claimant was being paid below the statutory set minimum wages.
27. Before delving in the specific amounts of underpayments, it is in order to set out the gazetted statutory minimum wages for the material period.
28. My search has not established a Wages Order for 2007/2008 and, therefore I will work out with Legal Notice No. 38 of 2006. Under this Legal Notice, the basic monthly wage exclusive of house allowance for a house servant was fixed at Kshs 5,195/- House allowance at 15% was Kshs 779/25 making a total of Kshs 5,974/25. For the period 1 May 2009 to 31 April 2010, the basic minimum wage exclusive of housing allowance for a house servant was set at Kshs 6,130/-. House allowance at 15% was Kshs 919/50 making total of Kshs 7,049/50 (Legal Notice No. 70 of 2009). For the period 1 May 2010 to 31 April 2011, the basic minimum wage exclusive of housing allowance for a house servant was set at Kshs 6,743/-. House allowance at 15% was Kshs 1011/45 making a total of Kshs 7,754/45.
29. The Claimant was employed on 15 February 2008. The monthly minimum wage inclusive of house allowance based on Legal Notice No. 38 of 2006 in 2008 was Kshs 5,974/25. From February 2008 to 31 April 2008, the Claimant was entitled to Kshs 14,835/- At the wages pleaded she earned Kshs 6625/- and was thus underpaid by Kshs 8,210/-
30. From 1 May 2009 to 31 April 2010, the statutory minimum wage inclusive of house allowance was Kshs 7,049/50 and the Claimant was entitled to a total of Kshs 84,594/- At the rate she was being remunerated, she was paid Kshs 31,800/- and therefore she was underpaid by Kshs 52,794/-.
31. From 1 May 2010 to January 2011, the minimum wage inclusive of housing allowance was set at Kshs 7,754/45 and therefore the Claimant was entitled to a total of Kshs 69,790/- but was paid a total of Kshs 23,850/- and was thus underpaid by Kshs 45,940/-.
32. In sum total, the Claimant was underpaid by Kshs 106,944/-

Certificate of service

33.A certificate of service is an employee's statutory right under section 51 of the Employment Act and the Respondent is under a legal duty to issue her with one.

Conclusion and Orders

34.In conclusion, the Court holds and finds in favour of the Claimant on the basis of non disputed facts that the termination was unfair and further that she was paid below the statutory minimum wages and awards her

a. One month pay in lieu of Notice	Kshs 6,743/-
b. Accrued leave for three years	Kshs 18,068/-
c. 156 rest days	Kshs 46,488/-
d. Service pay for 45 days	Kshs 13,421/-
e. Underpayments	Kshs 106,944/-

TOTAL

Kshs 191,664/-

35.The Respondent to issue the Claimant with a Certificate of Service within 14 days.

36.There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 21st day of March 2014.

Radido Stephen

Judge

Appearances

Claimant

in person

Respondent

did not appear