



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 34 OF 2014**

**MARY MURUGI NDWEKA.....CLAIMANT**

**- VERSUS -**

**MOSES MANG'ERE NGUITUI.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 23<sup>rd</sup> May, 2014)

**JUDGMENT**

The claimant **Mary Murugi Ndweka** filed the memorandum of claim on 12.02.2014. The claimant prayed for judgment against the respondent for:

- a. **One month wage in lieu of termination notice Kshs.16,614.10.**
- b. **Wages for 10 days worked in October, 2012 Kshs.6,613.60.**
- c. **3 years annual leave at 21 days per year Kshs.40,257.20.**
- d. **12 months' gross salaries for unfair termination at Kshs.16,614.10 per month making Kshs.229,273.00.**
- e. **Salary arrears of Kshs.373,250.00 due to underpayments.**

The respondent **Moses Mang'ere Nguitui** filed the statement of response on 28.02.2014 through Musembi Ndolo & Company Advocates. The respondent prayed that the claim be dismissed with costs.

The case was heard on 8.05.2014 and both parties gave evidence to support their respective cases.

The claimant's case is that she was employed by the respondent as a cashier on 28.07.2010. The claimant testified that she served for 5 months working from 8 am to 6 pm at a monthly salary of Kshs.5,000.00. In January 2011, the claimant testified that she was moved from the office, deployed to the field and added the duties of a caretaker. She collected rent from the tenants the respondent managed as an estate agent and undertook cleaning of the plots being residential areas assigned to her. It was her testimony that from January 2011 to May 2012, her monthly salary was Kshs.7,000.00. Her testimony was that in July 2012, her monthly salary increased to Kshs.8,500.00 till termination.

The claimant testified that on 11.10.2012, the respondent terminated her services by a telephone call about 3 pm. The testimony was that the respondent conveyed on phone that effective that time she was fired.

The claimant testified that Mary Wanjohu Kang'ethe who served the respondent as the manager received a receipt book, 2 padlocks and keys from the claimant in the short handover and paid the claimant Kshs.3,000.00 for the 11 days worked in October, 2012.

On 17.10.2012, the claimant testified that she reported a dispute to the District Labour Officer called David Njagi in Athi River EPZ. A letter was issued by the officer, the claimant delivered it to the respondent but the respondent declined to act. Subsequent efforts by the labour officer to resolve the dispute did not yield positive outcome. The claimant further testified that shortly before her termination, there had been a dispute in which the respondent inflated the amount of rent beyond the actual amount the claimant had collected and accounted for.

The claimant admitted that the written contract designated her as office assistant. The contract was for 3 months from 28.07.2010 to 28.10.2010 and when the time lapsed, the claimant testified that she continued in employment till the date of termination.

The respondent's case was that the 3 months contract lapsed, was not renewed and the employment relationship ended on 28.10.2010. The respondent suspected that the claimant had stolen the relevant employment records.

The first issue is whether the employment relationship continued beyond 28.10.2010. The court has carefully revisited the evidence. The respondent alleged that the claimant was suspected of stealing the office records but took no action in that regard. The respondent's testimony was that the claimant relieved his permanent secretary Mary Wanjugu Kangethe for three months. The said Mary was listed as a witness but was never called to testify. The other employees listed as witnesses were also not called to testify. The court has examined the consistent and coherent account of the relationship and events by the claimant and finds that the employment relationship persisted and was terminated in accordance with the claimant's account. The court has searched but not found a reason to doubt the claimant's evidence.

The 2<sup>nd</sup> issue for determination is whether the claimant was unfairly terminated. The court finds that the claimant was unfairly terminated by the telephone call without reason, notice and hearing. The court has considered the length of service and the respondent's expected continued employment. In the circumstances, the court awards her **Kshs.25,500.00** being three months gross salaries at Kshs.8,500.00.

The 3<sup>rd</sup> and last issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes the following findings:

- a. As the termination was unfair, the claimant is awarded **Kshs.8,500.00** being one month pay in lieu of the relevant termination notice.
- b. The claimant testified that she was paid Kshs.3,000 for wages of 11 days worked in October, 2012 and the claim of Kshs.6,613.60 will fail.
- c. The court finds that the claimant is entitled to 3 years annual leave at 21 days per year and is awarded **Kshs.25, 500.00**.
- d. The court finds that the salary arrears of Kshs.373,250.00 due to underpayments as claimed are not justified. The claimant testified that throughout the employment, the salary was agreed upon, was paid, and there was no dispute on salary. The claim will therefore fail.
- e. The court finds that the claimant is entitled to costs of the suit fixed at **Kshs.20,000.00**.

In conclusion, judgment is entered for the claimant against the respondent for the respondent to pay the claimant **Kshs.79,500.00** by **1.7.2014**, in default interest at court rates to be payable from the date of the judgment until full payment.

**Signed, dated and delivered** in court at **Nakuru** this **Friday 23<sup>rd</sup> May, 2014**.

**BYRAM ONGAYA**

**JUDGE**