



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1609 OF 2013

**BETWEEN**

CATHERINE MBITHE MAINGI..... CLAIMANT

**VERSUS**

MR. SHAH ..... RESPONDENT

*Rika J*

*CC. Edward Kidemi*

*Claimant Catherine Mbithe Maingi in Person*

*No appearance for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. This Claim is brought by Mbithe Maingi against her former Employer who is simply known to her as Mr. Shah. She claims she was employed by Shah as a Cleaner, from 17<sup>th</sup> March 2005. She cleaned his Office. Throughout, up to the 2<sup>nd</sup> June 2013 when Shah abruptly dispensed with her services, she was paid a total of Kshs. 2,000 per month as her salary. She fell ill for 1 month and was unable to work. When she was sufficiently mended and returned to work in June 2013, Shah told her to leave, as he had filled her position with another Cleaner. She holds that termination was unlawful and unfair. She was not paid any terminal benefits. Through the Statement of Claim filed on 7<sup>th</sup> October 2013, she seeks to be paid 12 months' salary in compensation for unfair termination; notice pay the equivalent of 1 month salary in lieu of termination notice; arrears of house rent allowance; service pay; annual leave pay; underpayment of salaries; salary arrears for the Months of April and May 2013; and salary for 2 days worked in June 2013. She claims from Shah, a total of Kshs. 332,800. She also seeks the Court to declare that termination was unlawful, she is paid costs and interest, and the Court considers granting any other suitable remedies.

2. The Claimant has filed Affidavits of Service sworn by a Process-Server, indicating that Shah was served with the Summons to Appear and with the Hearing Notice. He signed both processes in acknowledgement of receipt. He did not file any Response to the Claim, or attend Court when the Claimant gave evidence and rested her case on 9<sup>th</sup> April 2014. The Claim comes for determination on the sole pleadings and evidence of the Claimant.

3. The Claimant testified she approached Kituo Cha Sheria [The Centre for Legal Empowerment] upon termination, who wrote a letter of demand to Shah dated 26<sup>th</sup> August 2013, asking Shah to pay the Claimant her dues. There was no response, necessitating the resort to Court. She was not given notice or notice pay on termination; she was not granted annual leave or pay in lieu of leave for the entire period worked; she was paid below the statutory minimum wage; the Respondent failed to register the Claimant with the N.S.S.F; she was denied house rent allowance; she was not availed service pay; she was denied salary for April and May 2013; and was not paid for the days worked in June 2013. She prays the Court to allow her Claim.

*The Court Finds and Awards:-*

4. The Court finds the unchallenged evidence of Catherine Mbithe Maingi, that she was employed by one Mr. Shah as a Cleaner at his Office on 17<sup>th</sup> March 2005 to 2<sup>nd</sup> June 2013, credible. She earned a shocking Kshs. 2,000 per month over a period of 8 years. The contract was terminated at the instance of the Respondent, after the Claimant fell sick, and failed to report to duty. Shah engaged another Cleaner.

5. The Claimant did not come out clearly on her illness and sick leave. She appears not to have informed Mr. Shah of her sickness. She did not tell the Court if she sought sick leave from her Employer. The Court understood her to say she was sick, left without the leave of the Employer, and returned after a full month, only to find her job allocated to another Cleaner. She made no attempt to justify her absence. Sickness on its own, does not allow Employees the liberty to absent themselves from the workplace, without the leave of their Employers. The Claimant did not even indicate if she made attempts to contact her Employer, and inform him about her situation; she just vanished and returned unannounced.

6. Employees who fall sick, and wish to exercise their right to take sick leave, have certain statutory obligations to their Employers under Section 30 of the Employment Act 2007 which include:

- Production of a certificate of incapacity to work signed by a duly qualified Medical Practitioner, or a Person acting on the Practitioner's behalf in charge of a Dispensary or Medical Aid Centre.
- Notification to the Employer as soon as practicable, of the Employee's absence and the reasons for it.

The Claimant appears to have exercised her right to take sick leave, without observing these provisions.

7. The Respondent would in the view of the Court, and based on this narrative given by the Claimant herself, have valid and fair reason, in terminating the Claimant's contract of Employment. She did not obtain the leave of her Employer, or communicate to the Employer a lawful cause for the absence. In the view of the Court, her claim for compensation for unfair termination is not well grounded on both fact and the law. Her prayer for compensation is rejected, as is her prayer for notice pay.

8. The Respondent was obliged to honour the Claimant's minimum statutory employment standards during her time in employment, and on termination. There is sufficient evidence to show Mr. Shah did not meet these standards that were thrust upon him by the law. The most glaring standard which he failed to observe is the minimum wage. He paid the Claimant a shocking Kshs. 2,000 per month, from 2005. She seeks an order to enforce her rightful rate of remuneration as prescribed by the law.

9. The Claimant seeks salary underpayments from May 2009 to May 2013, under the various Regulation of Wages [General Amendment] Orders. She does not go back to the year 2005. She did not explain to the Court if the underpayments for the period before May 2009 were recovered. The Court shall focus its mind to what is sought by the Claimant under the item.

10. The minimum wage for the period May 2009 to May 2010 for a Cleaner based in Nairobi was Kshs. 6,130. Less Kshs. 2,000 paid to the Claimant, she is entitled and is granted underpayment of salary at Kshs. 4,130 x 12 = **Kshs. 49,560**. For the period May 2010 to May 2011, the applicable rate was Kshs. 6,743 per month. Less Kshs. 2,000, for 12 months, the Claimant merits **Kshs. 56,916 as prayed**. From May 2011 to May 2012, the correct minimum wage was Kshs. 7,586, justifying the claim for underpaid

salary at a total of **Kshs. 67,032**. The last period claimed stretches from May 2012 to May 2013, when the minimum wage was Kshs. 8,579. Less Kshs. 2,000 for 12 months, the total payable to the Claimant comes to **Kshs. 78,948**. ***In total the Court allows the claim for underpayment of salary at Kshs. 252,456.***

11. The claims for house rent allowance at Kshs. 29,700; service pay at Kshs. 8,250; annual leave pay at Kshs. 11,550; salary arrears for April 2013 at Kshs. 1,500 and for May 2013 at Kshs. 2,000; and the unpaid salary of 2 days worked in June 2013 at Kshs. 133 are reasonable and in the absence of evidence from the Respondent, well founded in law and fact. ***The Court grants the Claimant these prayers, all added up to the sum of 53,133.*** In all, the Court Orders:-

- a. ***The Respondent shall pay to the Claimant, within 30 days of the delivery of this Award, the sum of Kshs. 305,589 as terminal benefits, in full and final settlement.***
- b. ***No order on the costs and interest***

Dated and delivered at Nairobi this 4<sup>th</sup> day of July 2014

James Rika

Judge