



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO 250 OF 2011**

**LEAH KHAYECHA LUTSILILI.....CLAIMANT**

**VS**

**NIZAM UDDIN.....RESPONDENT**

**AWARD**

**Introduction**

The Claimant's claim brought by way of Memorandum of Claim dated 18th February and filed in Court on 23rd February 2011 seeks compensation for unfair termination of employment. The Respondent filed a Memorandum of Response on 17th March 2011. The Claimant testified on her own behalf but the Respondent did not call any witnesses. Both parties filed written submissions.

**The Claimant's Case**

According to the Claimant, she was employed by the Respondent as a house help effective 19th September 2009 at a monthly salary of Kshs.5,000.00. On 19th September 2010, the Claimant sought permission to take her sick child to hospital upon which her employment was terminated by the Respondent's wife.

The Claimant claims that during the entire period of her employment with the Respondent, she did not go on leave and did not take any off day. She also claims to have worked overtime without compensation. The Claimant therefore claims the following:

- a. A declaration that the termination of her employment was unlawful
- b. One month's salary in lieu of notice.....Kshs. 5,000.00
- c. 12 months' salary in compensation for unfair termination.....Kshs.60,000.00
- d. Overtime compensation .....Kshs.59,976.90
- e. Compensation for public holidays worked.....Kshs. 3,666.66
- f. Compensation for rest days worked.....Kshs.16,000.00
- g. Leave pay.....Kshs. 5,000.00
- h. Service pay.....Kshs.2,500.00
- i. Costs

**The Respondent's Case**

In his Memorandum of Response, the Respondent admits having employed the Claimant by verbal

agreement. The Respondent however denies that the Claimant worked beyond the agreed working schedules and states that she worked for two weeks after which she took two days off.

With regard to the Claimant's exit from employment, the Respondent states that she left voluntarily after securing a better paying job with an expatriate European.

### **Findings and Determination**

The issues for determination in this case are as follows:

- a. Whether the termination of the Claimant's employment was lawful and justifiable;
- b. Whether the Claimant is entitled to the reliefs sought

### **Termination of Employment**

The Claimant states that her employment was terminated when she asked for permission to attend to her sick child. The Respondent on the other hand denies the Claimant's averment and states that the Claimant left employment on her own volition to take up another employment. In her testimony, the Claimant denied the Respondent's assertion which was not supported by any evidence. The Court found the Claimant's evidence in this regard credible and rejected the Respondent's allegation that she left employment voluntarily.

Section 45 (2) of the Employment Act, 2007 provides that:

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***(i) related to the employees conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer and***

***(c) That the employment was terminated in accordance with fair procedure.***

Section 41 of the Act establishes the procedure to be adopted in terminating employment on grounds of misconduct, poor performance or physical incapacity. The Respondent did not establish any reason for termination of the Claimant's employment and there was no evidence that due process was followed in effecting the termination. The Court therefore finds the termination unfair for want of substantive justification and procedural fairness.

### **Reliefs**

In the submissions filed on behalf of the Respondent, it is submitted that because there was no written contract between the parties, the Claimant's case has no basis. With much respect, this is a complete misunderstanding of employment law.

Section 9(2) of the Employment Act, 2007 places the responsibility of drawing an employment contract on the employer and an employer who fails to discharge this mandate cannot use their failure as a defence to an employee's claim. Moreover, Section 10(7) of the Act provides that where an employer fails to produce a written contract, the burden of proving or disproving an alleged term of employment rests with the employer.

It was therefore incumbent upon the Respondent to document the terms of the Claimant's employment and in the face of abdication this duty by the Respondent, the Court adopts the terms of employment as

presented by the Claimant.

Having found the termination of the Claimant's employment unfair both substantively and procedurally, I award her three months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination of the Claimant's employment.

I further award the Claimant one month's salary in lieu of notice as provided under Section 35(1) of the Employment Act, 2007. The Respondent did not produce any leave records to prove that the Claimant had taken her leave and the claim for leave pay therefore succeeds.

Similarly, there was no evidence that the Claimant was a contributing member of the National Social Security Fund (NSSF) and the claim for service pay is allowed. The Claims for overtime, public holiday and off day compensation were not proved and are dismissed.

In the final analysis I make an award in favour of the Claimant in the following terms:

- a. 3 months' salary in compensation for unfair termination.....Kshs. 15,000.00
- b. One month's salary in lieu of notice.....Kshs.5,000.00
- c. Leave pay (5,000/30x21 days).....Kshs.3,500.00
- d. Service pay (5,000/30x15 days).....Kshs.2,500.00

**Total.....Kshs.26,000.00**

The Respondent will meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 1ST DAY OF OCTOBER 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Maondo for the Claimant

Mr. Esuchi for the Respondent