



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 159 OF 2014

JOYCE WAIRIMU.....CLAIMANT

VERSUS

TIARA LIMITEDRESPONDENT

JUDGMENT

The Claimant Joyce Wairimu filed this claim against the Respondent Tiara Limited by a Memorandum of Claim dated 10th and filed on 11th February 2014 through Kimandu Gichohi & Company Advocates. The Claimant alleges unfair termination by the Respondent and seeks the following reliefs:

- a. Kshs.1,395,271.85 being amount due to her for the employment services provided to the defendant for a period of 5 years 2 months.
- b. Costs and interest of this suit at court rates.
- c. Any other relief this Honourable court may deem just and fair.

The Respondent filed a Defence on 13th March 2014 in which it denies unfairly terminating the Claimant's employment and avers that the Claimant absconded duty without notice. The Respondent further avers that while in employment of the Respondent the Claimant breached the terms of her employment by addressing Respondent's customers in a rude manner in total disregard of the interest of the Respondent and employment ethics. The Respondent denies owing the Claimant the sum claimed. The Respondent prays that the claim be dismissed. The Respondent was represented by Kiarie, Kabita, Kihunyu & Associates Advocates. The case was heard on 16th September 2014. The Claimant testified on her behalf while the Respondent called its Director Florence Dan Ndambuki who testified on its behalf. The parties thereafter filed written submissions.

The Claimant was represented by Mr. Kimani while Ms. Abidha appeared for the Respondent.

The main facts of the case are not contested. The Claimant was employed by the Respondent as a sales girl in its shop on or about October 2009. The items she sold included clothes, shoes, pants, suits and handbags. She worked in the Respondent's shop at Taveta Road, and Bruce House. Her starting salary was Kshs.8,000/= and her last salary was Kshs.16,000/=. The salary was increased gradually over the years.

According to the Claimant, she worked from 8.30 am and sometimes up to 9.00 pm although her working hours were supposed to be from 8.30 am to 5 pm. She worked from Monday to Saturday. She was not paid any other benefits. The Claimant was a member of NSSF and NHIF. She worked on 6 public holidays including Kenyatta Day and Labour Day.

The Claimant testified that on 31st December 2013, Florence (RW1) called her on her cellphone and told her to return the keys to the office on 2nd January 2014 and not to go back to her shop again. Florence called her later to the office and they discussed about the Claimant's terminal dues. She was never told the reasons for termination of her employment.

RW1 Florence Dan Ndambuki testified that the Claimant was first stationed at the shop on Taveta Road. Later on she was moved to the shop at Bruce House. The shop at Taveta Road started performing badly and she moved the Claimant back to Taveta Road shop. When the claimant was moved back to Taveta Road RW1 noticed from her attitude that she did not like working there. RW1 sent a friend of the Claimant by the name Monica to talk to her but the Claimant did not change. RW1 waited to know what the Claimant was upto before 31st December 2013 and called the Claimant when she was told that the Claimant did not sell but the Claimant told her she was in a matatu. RW1 asked the Claimant where the keys to the shop were and she said she took them to Taveta Road. RW1 asked the Claimant if she wanted to know why RW1 was asking for the keys to the shop and she replied that the shop belonged to RW1. The Claimant did not report for work after that day.

The issues for determination are whether the Claimant absconded duty or was terminated and whether she is entitled to her prayers.

1. Whether the Claimant was dismissed or absconded duty

The Claimant's case is that she was called on phone and told to hand over the keys to the shop and never to go back there. The Respondent on the other hand testified through RW1 that the Claimant was told to hand over the keys to the office and did not show up for work after that date.

From the evidence on record it is not clear whether the Claimant was terminated or she absconded duty.

Section 47(5) of the employment Act places the burden of proving unfair termination of employment or wrongful dismissal on the employee. The employer on the other hand is supposed to justify the grounds of termination or dismissal.

I find that in this case the Claimant has not proved on a balance of probabilities that her employment with the Respondent was unfairly terminated.

2. Whether the Claimant is entitled to her prayers

The Claimant prayed for the following:

- a. Underpayments
- b. Overtime
- c. Accrued unpaid leave
- d. Public holidays
- e. House allowance
- f. Pay in lieu of notice

The Claimant further prayed for costs and interest.

I will now consider the reliefs sought.

a. Underpayments

The Claimant stated that her salary was paid as follows:

From October 2009 to March 2010 Kshs.8,000/=

From April 2010 to June 2010	Kshs.10,000/=
From July 2010 to December 2010	Kshs.13,000/=
From January 2011 to December 2012	Kshs.15,000/=
From January 2013 to December 2013	Kshs.16,000/=

The Claimant states that for the respective period she was entitled to payment as follows:

From October 2009 to April 2010	Kshs.13,833/=
From May 2010 to April 2011	Kshs.15,216/=
From May 2011 to April 2012	Kshs.17,118/=
From May 2012 to April 2013	Kshs.19,360.50/=
From May 2013 to December 2013	Kshs.22,070.95/=

In order to establish whether or not the Claimant was underpaid, the court has to look at the schedule for minimum wage rates. Before doing this the court has to establish what grade the Claimant was employed in.

I have noted that the grade upon which the Claimant based the claim for underpayment is that of salesman driver. The Regulation of Wages (General) Order (hereinafter referred to as the General Order) defines salesman driver in the Third Schedule as “*an employee whose duties in addition to promoting sales of his employer’s merchandise on wholesale or retail basis, is in charge of a motor vehicle carrying such merchandise*”. The Claimant’s job description does not fall under this category as she was not using a motor vehicle for her sales nor was she promoting sales of the Respondent’s merchandise. The Claimant was selling in a shop. Under the General Order the Claimant’s proper grade was that of Shop Assistant.

The salary for Shop Assistant between 1st May 2011 and 30th April 2014 were as follows:

From 1st May 2011 was Kshs.10,239/=.

From 1st May 2012 it was Kshs.11,580.30/=.

From 1st May 2013 it was Kshs.13,201.55/=.

With 15% house allowance these wages translated to the following:

From 1st May 2011 Kshs.11,774.85/=.

From 1st May 2012 Kshs.13,317.35/=.

From 1st May 2013 Kshs.15,181.80/=.

From the foregoing, the Claimant was not underpaid from 1st May 2011 as she was consistently paid wages above the consolidated statutory minimum wages.

The Claimant’s prayer for underpayment of wages must therefore fails and I dismiss the same.

b. Overtime

The Claimant stated that she was supposed to work from 8.30 am to 5.00 pm. She however stated that sometimes she worked from 8.30 am to 8.30 pm and occasionally past 9 pm. Her claim for overtime is based on 18 hours per week. It was not clear either from the Memorandum of claim or the submissions how the 18 hours was arrived. It is also not clear whether the rate of pay used is that for salesman driver or shop assistant.

According to the General Order the Maximum working hours per week are 52 hours spread over a maximum of 6 days a week.

RW1 did not rule out working overtime. However since this was a continuing injury and the Claimant did not demonstrate that at any time she asked to be paid for overtime work done, I will allow her prayer for overtime based on work from 8.30 am to 8.30 pm for only 12 months. This would amount to 11 hours a day or 66 hours per week (excluding lunch break) or 14 overtime hours per week. For 52 weeks (12 months) she worked for 728 hours. Overtime is paid at the rate of 1.5 hours so she is entitled to payment for 1092 hours. Based on the Claimant's salary of Kshs.16,000/= and using the formula for overtime in the General Order of one two-hundred-and-twenty-fifth, the Claimant is entitled to Kshs.77,653.30 which I award the Claimant.

c. Unpaid leave

The Respondent did not specifically contest the Claimant's contention that she never took annual leave for the entire period she worked for the Respondent. Having worked from October 2009 to December 2013, she is entitled to 89.25 days based on 21 days annual leave based on 21 days annual leave per year. She is entitled to Kshs.47,600 which I award her.

d. Public holidays

The Claimant in her testimony stated that she worked for 6 public holidays every year. In the Memorandum of claim she has claimed 10 public holidays every year. It is unlikely that the Claimant worked on Christmas and Boxing Day, as well as 1st January. The Respondent's witness did not mention anything about public holidays.

According to the General Order the Claimant is entitled to be paid at double the normal rate for any work done on a public holiday. Basing this on 6 days a year for 4 years the claimant is entitled to Kshs.25,600/=. I award her the said sum.

e. House allowance

The Claimant has in her Memorandum of claim prayed for house allowance at Kshs.8,000/= per month. It has not been explained how this figure was arrived at.

As I have observed under the claim for underpayment, the Claimant was entitled to a consolidated wage of 15,181.80. Consolidated means the basic minimum wage inclusive of house allowance at 15% of basic wage. The Claimant was paid Kshs.16,000/=. She was therefore paid more than her consolidated wage and is not entitled to a separate house allowance. The claim is therefore dismissed.

f. Pay in lieu of notice

I have already stated above that the Claimant has not proved that her employment was unfairly terminated. Pay in lieu of notice is payable under Section 49(1)(a) only where termination of employment is unfair. For this reason I dismiss the claim for payment in lieu of notice.

g. Costs and Interest

The Claimant having been substantially successful in her claim, I award her costs of this suit.

The decretal sum shall attract interest at court rates from date of judgment.

Orders accordingly.

Read in open Court this 18th day of December, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Nganga for Claimant

No appearance for Respondent