



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 43 of 2010**

**JACKLINE ANYEMPO ..... CLAIMANT**

**-VERSUS-**

**SOMIT SHAH ..... RESPONDENT**

**AWARD**

The Claimant herein filed a dispute against the defendant alleging unlawful, wrongful and/or illegal termination of her employment by the Respondent on 31<sup>st</sup> October 2009. She prays for the following orders:-

1.	a)	One month in lieu of notice	-	Kshs.4,500
	b)	Two months leave, earned but not paid	-	Kshs.9,000
	c)	Compensation (10 months)	-	Kshs.45,000
	d)	Rest days	-	Kshs.68,700
	e)	Public holidays worked	-	Kshs.68,700
		<b>TOTAL</b>		<b>Kshs.197,900</b>

2. General damages for causing the Claimant mental anguish and pain.

3. Employment terminal dues and benefits.

4. Costs of the dispute and interest on (1) and (2) and (3) hereof at Court rates.

5. Any other relief that this Court may deem fit to grant in the circumstances.

The case was heard by Hon. Justice Chemmutut on 13<sup>th</sup> July 2010 and Award was reserved to be on notice.

The file was allocated to me to prepare the Award and the parties were directed to file written submissions in view of the very sketchy notes on record.

I have gone through the record and I must express my disappointment with pleadings as filed including

the written submissions which do not explain the circumstances under which the Claimant left employment.

The issues for determination in my opinion are:-

1. Whether the Claimant was unfairly terminated.
2. Whether the Claimant is entitled to the prayers sought.

**1. Whether the Claimant was unfairly terminated**

From the pleadings and record, there is no evidence of the circumstances under which the Claimant was terminated. The Memorandum of Claim merely states that she was terminated illegally, unlawfully and wrongfully.

It is trite law that he who alleges must prove. The Claimant did not call any witness or attach any documents to support her claim of unfair termination.

I find that the Claimant has not proved that she was unfairly terminated.

**2. Whether the Claimant is entitled to the reliefs sought**

The Claimant has prayed for the following reliefs:-

- i) 1 months' salary in lieu of notice.

The Respondent admitted during the hearing of the case that the Claimant was a cook and was paid a salary of Shs.4,500/= per month. The Respondent did not submit any evidence as to the circumstances under which the Claimant left employment. Instead of submitting their evidence the Respondent merely put the Claimant to strict proof.

It is the duty of the employer to keep employment records and to submit such records to Court to confirm that the employer is compliant with the legal requirements relating to employment.

Section 10(7) of the Employment Act provides that in any proceedings where an employer fails to produce the written particulars prescribed under Section 10(1) the burden of proving or disproving an alleged term of employment in the contract shall be on the employer.

In the circumstances, I find that the Respondent has failed to prove that it either gave notice to the Claimant as prescribed in Section 35 of the Employment Act or paid in lieu, or that the circumstances under which the Claimant left employment were such that she was not entitled to notice.

For these reasons I find that the Claimant is entitled to 1 months' salary in lieu of notice in the sum of Shs.4,500/=.

- ii) 2 months leave

Again as in the case of notice above, the Respondent failed to discharge its responsibility to prove or disapprove that the Claimant took annual leave or was paid in lieu thereof as prescribed by law. I therefore find that the Claimant is entitled to leave for the 2 years and 4 months that she worked for the Respondent at the rate of 1.75 days per month worked as provided for in Section 28 of the Employment Act. This adds up to 49 days.

This translates to Shs.7,350/= which I award to the Claimant.

- iii) Compensation

As already stated above the Claimant has not proved that she was unfairly terminated.

The claim for compensation is therefore dismissed.

iv) Rest days

No evidence was submitted in respect of rest days.

The Claimant has therefore not proved that she was entitled to any rest days or how the figure of Kshs.68,700 claimed was tabulated.

The claim is dismissed.

(v) Public Holidays

No evidence was submitted in respect of the claim for public holidays or how the sum of Kshs.68,700 claimed was arrived at.

The claim is dismissed.

(vi) General damages

The Claimant also prayed for general damages for causing the Claimant mental anguish and pain. No evidence was submitted in respect of the claim. The same is dismissed.

(vii) Employment terminal dues and benefits

No evidence was adduced in respect of this claim. The claim is dismissed.

In summary the Court awards as follows:-

- (a) Notice – Kshs.4,500
- (b) Annual Leave - Kshs.7,350
- (c) Compensation – dismissed
- (d) Rest days – dismissed
- (e) Public holidays – dismissed
- (f) General damages - dismissed
- (g) Employment terminal dues – dismissed

**Total awarded – Kshs.11,850/=**

Each party shall bear its costs.

Orders accordingly.

Read in open Court and signed on this 24<sup>th</sup> day of April 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO  
JUDGE**

No appearance

In the presence of:-

\_\_\_\_\_ Claimant

Mrs. Rawal

\_\_\_\_\_ Respondent