



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

**CAUSE NO. 2119 of 2011**

**THERESIAH WAYUA KING'OO .....CLAIMANT**

**VERSUS**

**NODOR KENYA EPZ LIMITED .....RESPONDENT**

**JUDGMENT**

By a Memorandum of Claim dated 15<sup>th</sup> December 2011 and filed in court on 20<sup>th</sup> December 2011 the claimant THERESIAH WAYUA KING'OO alleges wrongful dismissal, refusal, failure and neglect by the respondent to pay her terminal dues. She alleges that she was employed by the Respondent NODOR KENYA EPZ LIMITED in January 2006 at a basic salary of Kshs.8,372/= with other benefits and was terminated from employment on 19<sup>th</sup> November 2010. The claimant alleges that on 19<sup>th</sup> November 2010 she was diligently performing her duties when she was served with a termination letter, and subsequently at the Respondent paid her the salary for November 2010, 1 month's salary in lieu of notice, severance pay of 60 days and 2.5 days pay in lieu of leave for November. She now claims the following;

- a. Payment in Lieu of leave for 5 years at Kshs.57,272/=.
- b. Travelling allowance of Kshs.209,000/=
- c. House allowance of Kshs.137,452/=.

The Respondent filed a memorandum of Response dated 2<sup>nd</sup> November 2012 and filed in court on 5<sup>th</sup> November 2012. The Respondent admits employment and termination of the claimant as alleged in paragraph 3 of the Memorandum of claim but contends that it met all contractual obligations to the claimant and specifically that it paid the claimant salary for November 2010, one month's salary in lieu of notice, 60 days severance pay for 5 completed years of service and 2.5 days pay in lieu of leave. The Respondent further contends that it paid the Respondent her welfare fund.

In respect of the claim for Shs.403,724/= the claimant avers as follows;

That the claimant had only 2.5 days of leave not taken which was paid at the time of termination.

That travelling allowance was not part of the claimants terms of employment and she was paid a consolidated salary.

That in respect of the claim for house allowance the claimant's salary was consolidated, there was no provision in her contract for payment of a separate house allowance and the same had never been paid from the date of her appointment.

The respondent prays that the claim be dismissed with costs.

The case was first mentioned before Justice E.K. Mukunya (now retired) on 2<sup>nd</sup> March 2012 when the court gave directions that the Respondent files its response to the claim on or before 16<sup>th</sup> March 2012 and fixed the case for hearing on 3<sup>rd</sup> July 2012. The Registrar was directed to notify the Respondent who did not attend court about the directions on filing of response to claim. The case was on 3<sup>rd</sup> July 2012 rescheduled for hearing on 14<sup>th</sup> August 2012 when it was again rescheduled to 5<sup>th</sup> November 2012.

The case came before me for hearing on 5<sup>th</sup> November 2012. The claimant was represented by Mr. Sang while the Respondent was represented by Mr. Gitonga Mureithi. The claimant testified in her behalf while the Respondent did not call any witness. The parties thereafter filed written submissions.

In her testimony the claimant testified that she was employed by the Respondent on 27<sup>th</sup> September 2005 as a casual worker for 3 months. That on 1<sup>st</sup> January 2006 she signed an employment contract. Her starting salary was shs.8372/=. She was employed as a cleaner. She rose through the ranks due to her hard work and at the time of termination of employment she was a quality controller. Her responsibility as a quality controller was to ensure the customer gets what they need. She served as a quality controller for about three and a half years. She was terminated on 19<sup>th</sup> November 2010 on grounds that she cannot explain. She was issued with a certificate of service.

The claimant further testified that she used to sit in the committee responsible for workers welfare and discuss terms and conditions of employment with the employer. The employer had offered a wage increase of 2.5% which she objected to as too low and she thinks this was the reason for her termination. That for the entire period of her termination she was never paid house allowance, travelling allowance or leave allowance. She only got off days at the convenience of the employer. She is claiming Shs.57,272 in lieu of leave, Shs.209,000 for travelling allowance and Shs.137,832 for house allowance making a total claim of Shs.403,732/=.

Under cross examination the claimant stated that her level of education is college, that she signed an employment contract and understood its contents, that the contract provided that the salary included all allowance and that she did not sign any other document apart from the contract. She stated that she claimed house allowance for travelling from Athi River to Kitengela on the basis of Shs.100/= bus fare per day. She stated at the time she left employment she was earning a salary of Shs.20,000/=, that she was never required to travel on company business.

On the claim for house allowance the claimant stated that she calculated her claim of Shs.137,452/= based on a figure of Shs.4,000 per month for the duration of her employment, that this was not in her contract. On the claim for leave days the claimant stated she was entitled to 21 days leave per year and she took her leave every year, and at the time she was leaving work she had taken around 14 days leave for year 2010. That she had 7 days remaining, that when she was leaving she was paid the unused leave days, and was also paid her salary. She stated that the company closed 3 times a year and everybody proceeds on off days this is during Easter, summer in August and Christmas holidays and everybody takes leave during those periods, that she was paid her salary during those leave days. In reference to annual leave the claimant admitted that she signed the leave acknowledgment form annexed to the Respondents Memorandum of Response at page 19 which is an acknowledgment that she took 30 days leave in 2009. She also confirmed that she was paid all overtime and was issued a certificate of service. She admitted that she did not ask for the money claimed in her memorandum of claim at the time of leaving employment. She first made a demand 4 months after leaving employment.

I have read the pleadings by the parties, considered the oral evidence of the claimant and the written submission of the parties.

The evidence on record which is not contested is that the claimant was employed by the respondent on 1<sup>st</sup> January 2006 and was terminated on 19<sup>th</sup> November 2010. She was paid terminal benefits as indicated in her last payslip attached to the Respondents Memorandum of Response at page 18 which included basic pay, overtime, severance for 60 days, leave days, welfare refund and one month's salary in lieu of notice.

The claimant's employment contract was governed by the terms of her employment contract which is attached to her memorandum of claim as appendix 1.

The issues for determination according to the claim are therefore whether the claimant is entitled to her prayers as follows.

- a. Payment in lieu of leave of 5 years.
- b. Travelling allowances
- c. House allowance
- d. Damages for Unfair termination
- e. Costs and interest.

I will consider the prayers separately in the order in which they are listed.

**a. Payment in lieu of leave of 5 years.**

The claimant stated under cross examination that she was entitled to 21 days annual leave every year, that she took her leave every year, that the company had three holidays during Easter, seminar holidays during Easter, Summer holidays in August and during Christmas holidays. She admitted signing the leave acknowledgement at page 19 and 20 of the respondents memorandum of response. She also admitted having taken 14 days leave for year 2010 and having been paid for leave days not taken. This is reflected in her last payslip at page 18 of the Response at kshs.2,160/=.

I find that the claimant has not proved that she did not take leave for the whole of the 5 years as alleged in the claim and that her oral evidence contradicted her claim.

The claim is dismissed.

**b. Travelling allowances**

The Claimant explained during her examination in chief that the claim of Shs.209,000/= is based on bus fare of Shs.209,000 is based on bus fare of shs.100 per day which she spent during the period of her employment. In the written submissions, this figure is stated as shs.150/= per day. The claimant did not explain how she translated any of these figures to arrive at the sum of Kshs.209,000/= that is claimed. No evidence was submitted to prove that she spent either shs.100/= daily as she alleged or shs.150 daily as submitted in her written submissions. The legal basis for the claim has also not been established as the benefit is neither provided for by law nor in her employment contract.

I find that the claimant has not proved the claim and dismiss the same.

**c. House allowance**

Section 31 of the Employment Act provides that an employer shall in addition to basic salary either provide housing to the employee at or near the place of work or pay the employee a reasonable house allowance to enable the employee obtain reasonable accommodation. Subsection 31 (2) (a) provides that the provision does not apply to an employee whose employment contract contains a provision which consolidates as part of the basic wage or salary of the employee an element intended to be used by the employee as rent or which is otherwise intended to be used by the employee to provide himself with housing accommodation. The claimant contract's provided that her salary included all allowances such as house allowance and bonus etc.

For this reason the claimant is not entitled to house allowance.

The claim is therefore dismissed.

**d. Damages for unfair Termination**

The claimant did not make any reference to damages for unfair termination in her testimony and neither has the same been made in the written submission by her counsel which completely ignores the prayer which was made in the Memorandum of claim. The claimant however stated in her evidence in chief that she was just issued the letter of termination and paid according to the letter and her last payslip for her termination but suspected that her termination was due to her agitation for better salaries for workers during the meetings of the welfare committee which she was a members. She also stated that she had never been involved in any disciplinary issues since her employment.

In the written submissions the respondent has submitted that the claimant's contract did not provide for the giving of reasons for termination by either party. He has cited the following authorities in support of his claim;

- i. Povono V the Presiding Bishop of the Church of the Latter Say Saints (Samoa) (2002) WSSC 27,
- ii. Kepha Otwana v Standard Group Limited; civil Case no. 395 of 2009.
- iii. Koech v African Highlands & Produce Board (2006) 2EA.

In all these cases the court's decision was that in accordance with common law principles the employer is entitled to terminate employment without reason provided it gives notice or payment in lieu.

Respectfully, these cases are not relevant to the present situation as is prevailing in Kenya. As stated in all the decisions, these cases were interpretations of the common law principles on termination of employment.

In Kenya, the position of the common law has been changed by statute law. As pointed out in the POVONO case "legislation supersedes the somewhat harsh common law position". Section 41 of the Employment Act provides that an employer must give reasons for termination and must give an employee an opportunity to be heard. Section 43 and 45 provide that the reasons must be valid and fair procedure must be followed failing which the termination will be unfair.

In the present case the Respondent did not comply with sections 41, 43 and 45. The 2 Kenyan authorities cases relied upon by the Respondent were for cases whose causes of action arose before the enactment of the Employment Act 2007 which commenced on 2<sup>nd</sup> June 2008.

For the foregoing reasons the termination of the Claimant's Employment was unfair and she is entitled to damages. I find that damages of 4 months salary is reasonable in the circumstances taking into account the circumstances under which the claimant left employment, the payments made to her at the time of leaving employment, the length of her employment which was just under 5 years and the fact that she did not make any attempt to persuade the court on how much she was demanding on account of damages under this head.

I therefore award the claimant shs.80,000/= being 4 months salary as compensation.

The final judgment of this court is that

- i. The claim for shs.403,724/= is dismissed.
- ii. The Claimant is awarded damages for unfair termination in the sum of Kshs.80,000/=.
- iii. Having substantially failed in her claim, there shall be no order for costs.

Orders accordingly.

Read in open Court this 29<sup>TH</sup> day of JULY 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**MUNENE** \_\_\_\_\_ for Claimant

**MUNENE HMB for GITONGA** \_\_\_\_\_ for Respondent