



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 494 OF 2012

BETWEEN

EUNICE ENDOVERIA JAMWAKA

..... CLAIMANT

VERSUS

TRADE HOUSE AFRICA LIMITED

..... RESPONDENT

Rika J

CC. David Kipsang'

Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates for the Claimant

Mr. Njuguna instructed by Wainaina Ireri & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

DATE FILED: 7TH MAY 2012

DATE PROCEEDINGS CLOSED: 26TH FEBRUARY 2013

DATE DETERMINED: 12th July 2013

AWARD

1. Eunice Endoveria Jamwaka claims that on or about 7th August 2010, the Respondent employed her as a Cleaner, at a monthly salary of Kshs. 8,500. Around 1st January 2011, the Respondent raised her salary to Kshs. 9,067, and then reduced it to the initial Kshs. 8,500 from February 2011. On 2nd January 2012, her contract of employment was terminated by the Respondent, without notice, warning or reason. She has approached the Court, seeking:-

- a. 12 months' salary in compensation for unfair termination at Kshs. 125,124;
- b. One month salary in lieu of notice at Kshs. 10,427;
- c. Pro-rata leave of 5 months at Kshs. 10,702;
- d. House rent allowance at 15% of her salary at Kshs. 22,695;
- e. Salary deductions irregularly made at Kshs. 6,237;
- f. Service gratuity at Kshs. 5,213;
- g. Overtime worked at Kshs. 54,000;
- h. Refund of Kshs. 380 per month for 17 months at Kshs. 6,480;

Total..... Kshs. 241,078

She prays for a declaration that termination was unfair; any other order the Court may deem fit to grant; costs; and interest.

2. The Respondent filed its Statement of Reply on 7th May 2012. It replies that the Claimant was engaged by the Respondent on 7th August 2010 as a Learner Cleaner, stationed at Yaya Centre. She was paid a consolidated salary of Kshs. 8,500 per month. Her contract as a learner terminated on or about 30th November 2010. She was paid her terminal dues. She was re-employed as a Cleaner at Yaya Centre, effective from 30th December 2010. The contract was to last as long as the Respondent's cleaning contract with Yaya Centre would. She deserted work from January 2012. She did not notify the Respondent before terminating her contract. The Respondent seeks to have the Claim dismissed, and counterclaims Kshs. 8,500 as one month salary due from the Claimant.

3. The Claimant gave evidence on 5th December 2012. She testified that she was not issued a letter of employment; was not paid house rent allowance; and her employer reduced her salary from Kshs. 9,067 to Kshs. 8,500. She reported to work at 5.45 a.m. and left at 6.00 p.m. She worked for about 12 hours, and was paid overtime of just about Kshs. 200 monthly, as reflected in the pay slips. She never went on leave. Susan Mburu the proprietor of the Respondent told the Claimant to leave. The Claimant was dismissed. She did not desert. She was only paid for the days worked

4. In cross-examination, the Claimant testified she worked at Yaya Centre as a Cleaner. The Centre is not owned by the Respondent. The Respondent stated it had a contract of 3 years with Yaya. She was employed in August 2010, at Kshs. 8,500 per month. She did not agree this to be the totality of her pay. She was not forced to take this rate. In 2010, she worked for three months August, September and October. She was advised by her employer that the work had diminished. She did not sue then. She returned on 30th December 2010. She conceded that two days' salary for December 2010 was carried

over to her January 2011 salary, giving the figure of Kshs. 9,067. She agreed there was a notice at the Yaya Notice Board, put out by the employer, saying work was coming to an end. She disagreed however, that she deserted work to look for work elsewhere. She did not check the records with the N.S.S.F before filing the Claim.

5. Jackline Wanjiku Kabuchio and John Mburu, Supervisor and Managing Director of the Respondent respectively, testified for the Respondent on 11th February 2013. Kabuchio told the Court that the Respondent had a tender for cleaning services with the Yaya Centre. Her work was to ensure the execution of work in accordance with the terms of the tender. Jamwaka asked to go off duty for three days close to Christmas of 2011. This period is the peak season at Yaya Centre, and the Supervisor did not approve. She malingered and was referred to a dispensary for medical attention. She insisted she wanted to go home, and left on 23rd December 2011 without the authorization of her employer. She returned on 26th December 2011. When called upon to explain her absence, she did not do so, but was instead rude to the employer. She told the Supervisor she was not her employer. Kabuchio reported the matter to her boss. Jamwaka left on 30th December 2011 never to return. Overtime worked was compensated every end of month. Kabuchio did not know if the Claimant's salary was ever raised.

6. Answering questions from the Claimant's Advocate, Kabuchio stated she has served for three years with the Respondent. There were eleven employees. They signed attendance register. The witness was not familiar with the Claimant's terms of employment. The pay slip showed a column for house rent allowance. There was no figure stated in the column. The Claimant last worked on 30th December 2011. Kabuchio could not say why she left. She was not sent away. The Respondent retained her phone contact. It was not the responsibility of the Respondent to call the Claimant after she left. She testified on redirection that the Claimant had the Supervisor's contact. She did not contact her Supervisor.

7. John Mburu has worked for the Respondent for thirteen years. The company is seventeen years. The core business of the company is manufacturing of detergents and importation of cleaning machines. The company supplied Yaya with cleaning material. Yaya insisted the Respondent does the cleaning also. The Respondent acceded. The contract with Yaya was coming to an end at the close of 2011. All employees were notified. The Claimant decided not to wait; she quit to pre-empt termination. Yaya however, renewed its contract with Trade House in February 2012. Jamwaka was employed in August 2010, at a monthly consolidated salary of Kshs. 8,500.

8. Mburu runs the business with his wife. Jamwaka would take unauthorized off duty days, but Mrs. Mburu was very partial to the Claimant and always took her back. Part of her December 2011 salary was carried over to January 2011. There was no increase in January or decrease thereafter, in the monthly salary paid to Jamwaka. She deserted duty. Her contract was not terminated by the Respondent. The Claimant ought to pay one month salary in notice pay to the Respondent. Mburu conceded Jamwaka did not take leave, but her entitlement should be offset against what she owes the Respondent. Her consolidated salary was Kshs. 8,500 at a time when the minimum wage for cleaners was about Kshs. 6,000. She was subscribed to the N.S.S.S.F. All contributions were remitted, as borne out in the records availed to the Court by the Respondent. She worked on shift, from 1.00 p.m. to 9.00 p.m. She was assigned to the ladies' washroom. Overtime was recorded and paid at the end of the month.

9. On cross-examination, Mburu testified that the Claimant was employed in August 2010. There was no written contract. She was a casual employee. Her pay slips showed basic salary and other allowances. The slot for house rent allowance was left blank. Mburu stated he would not be able to explain the details on the pay slips. She did not raise any complaints on overtime with the Respondent. 30th December 2011 was her last day at work. She deserted work. The Respondent did not contact her after desertion. Mburu testified that in his letter responding to the letter of demand from the Claimant's Advocates, he mentioned that Jamwaka was guilty of gross misconduct. He denied that he dismissed her from employment. Mburu clarified on re-examination that the pay slips were in a standard format. There was no intention to pay house rent allowance separately. She never demanded for overtime pay beyond what was paid to her, during her time in employment. She was paid bonus for December 2011. She enjoyed lunch allowance of about Kshs. 3,000 monthly. Other benefits included medical treatment financed by the employer, at the

Seventh Day Adventist Clinic. The Respondent prays the Court to make the following orders:-

- a. Dismiss the Claim with costs to the Respondent.
- b. Set off the leave due to the Claimant against the one month notice due to the Respondent.

The Court Finds and Awards:-

10. Trade House Africa Limited, a Company in the business of cleaning and supply of detergents, employed the Claimant as a Cleaner at Yaya Centre in August 2010. She was assigned the ladies' washrooms, and paid a total monthly salary of Kshs. 8,500. She worked up to 30th December 2011, when she left employment.

11. The Respondent had a cleaning contract with Yaya Centre, which was coming to an end at the fall of 2011. Notice of this lapse of the contract was given to all employees, including Jamwaka. The Yaya Centre however renewed the Respondent's contract in February of 2012. Jamwaka, the Court is satisfied, left employment of her own volition on 30th December 2011, believing the relationship between Yaya and the Respondent to be over. She made a conscious decision to move on. There is no evidence that the Respondent instigated termination.

12. There is no justification in paying the Claimant one month salary as notice. There is equally no reason why the Respondent should receive notice pay from Jamwaka. The contract with Yaya was coming to an end, and the Respondent had notified employees about this. Both parties understood there would be no work, come January 2012. Why would the Respondent expect to be paid notice by Jamwaka, yet the Respondent had notified all employees that its contract with Yaya was at an end? ***Both claims for notice pay are rejected.***

13. The Claimant's salary was not at any one time slashed or increased. She was paid part of her December 2010 salary in January 2011, resulting in payment of Kshs. 9,067 in January 2011. ***The Claim for unlawful reduction of salary is declined.*** There was no evidence given by the Claimant to justify the claim for refund of Kshs. 380 per month. N.S.S.F records availed by the Respondent cannot be faulted. ***The claim for refund of Kshs. 380 per month is rejected.*** The Court has made a finding that the Claimant left employment of her own volition, on the belief that the contract between Yaya and the Respondent was coming to an end. The Claimant seems to have had a cavalier attitude to her work. She malingered to force the hand of the employer into granting her off duty. She eventually left without much ceremony after receiving salary and yuletide bonus, never to return. ***Termination was not in any way unfair and the prayer for 12 months' salary in compensation is rejected.*** There similarly was no case made out for payment of overtime. The Claimant worked on shift at the ladies' washroom, from 1.00 p.m. to 9.00 p.m. When there was an occasion at Yaya, she could be called upon to extend her working hours. These were compensated as reflected in her pay slips. ***The claim for overtime pay is disallowed.*** No form of service pay is available to Jamwaka. She was subscribed to the N.S.S.F as shown in the pay slips and N.S.S.F records availed to the Court by the Respondent. ***The prayer for service gratuity is fails.*** The Court agrees with the Claimant that the Respondent failed to secure for her reasonable housing accommodation at or near Yaya Centre, or to pay her reasonable house rent allowance to enable her secure such accommodation, in accordance with Section 31 of the Employment Act 2007. The pay slips do not capture the housing element. ***House rent allowance is granted at 15% of 8,500 x 16 months = Kshs. 20,400. The prayer for leave is not opposed, and is allowed for the one year completed, and four months on pro-rata basis, 6,865+2,288= Kshs.9,153.*** In sum the Court Orders:-

[a] Termination was not unfair;

[b] The Respondent shall pay to the Claimant arrears of house rent allowance at Kshs. 20,400, and unused leave days at Kshs. 9,153, total Kshs. 29,553;

[c] The said amount be paid within 30 days of the delivery of this Award; and

[d] No order on the costs.

Dated and delivered at Nairobi this 12th day of July 2013

James Rika

Judge