



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 33 OF 2012

MARY MKAMBE SHETICLAIMANT

VERSUS

LIGHT ACADEMYRESPONDENT

J U D G M E N T

The claimant filed this suit on 28/4/2011 seeking her employment terminal dues from the respondent. The claimant has blamed the respondent for unlawful dismissal and denial to pay terminal dues.

The respondent did not file defence and never attended hearing dispute being served with summons and hearing notice. The case was heard on 24/6/2013 after several adjournment. The summary of the claimant's case is that she was employed by the respondent on 2/10/2002 as a cook. That her salary was ksh.9000/ per month. That she was working from Sunday to Friday and rested on Saturdays and during school holidays.

She added that during the month of Ramadhan she used to work overtime including serving the respondents guests at the school upto midnight. That she went to raise her concern with the employer which led to her dismissal. That the same grievance was raised by other workers and they were also dismissed one after the other.

Her termination letter was dated 29/12/2008 with an effective date of 30/1/2009. That the said letter offered to pay terminal dues plus one month salary in lieu of notice. That on 7/4/2009 the respondent wrote another letter showing payment of Ksh17875/ as the claimant final dues but without giving a breakdown of the said sum. The claimant has in her pleadings admitted receipt of the said payment. In her view the said sum was little and urged the court to award ksh.200000/ although in her claim she had prayed for ksh.92,700/-.

I have carefully considered the pleadings and the evidence adduced by the claimant. It is obvious that this court's jurisdiction over the dispute is not in dispute. It is also not in dispute that the claimant was employed by the respondent as a cook until 30/1/2009 when her services were terminated by the respondent vide a letter dated 28/12/2008.

The issues for determination are:

1. **whether the termination was wrongful or unfair.**
2. **Whether the reliefs sought ought to issue**

On the first issue the relevant law is Section 35 of the Employment Act which deals with notice for termination of employment, and Section 41, 43 and 45 of the Act which deals with the procedure and the reason(s) for termination of employment.

Section 35(1) provides for a mandatory written notice of 28 days for either the employee or employer to terminate a contract of services. Section 41 provides for a mandatory right of being heard on the part of the employee before termination on grounds of misconduct, incapacity and poor performance. This in my view necessitates the requirement by Section 43 and 45 that before terminating the employment of an employee, the employer must prove the reason for the termination and its validity.

From the foregoing, it is clear that the doctrine of employment at the will of the employer has now been overtaken and overridden by the statutory law. Gone are the days when an employer had the discretion to terminate services of an employee without any reason and due process. It is now a mandatory requirement that an employer must cite the reason for terminating the services of his employees because it helps one to tell whether or not the right procedure was followed.

In the present case, one cannot tell whether the termination was on ground of misconduct, incapacity, poor performance or at all. Luckily the claimant did not pursue the matter along the line of unfair termination and I will not go beyond the finding that employers are now required to state the reason for the termination of services. In addition they are required to prove the validity of the reasons in default of which the termination is deemed to be unfair under Section 45 of the Act.

I will also not find the termination wrongful because the claimant did not dispute that she was served with the termination notice in good time. Although the letter seemed to suggest that one month salary was to be paid in lieu of notice, the claimant did not shed light on the circumstances surrounding the service of the notice dated 28/12/2008. Consequently the court will treat the notice to have been duly served in good time probably after the December holiday. That even if the termination notice was not sufficient, the same was compensated by the one month salary paid in lieu of notice.

The second issue and which seemed to be the concern for the claimant is the amount of terminal dues. She maintains that the amount paid by the respondent was little and without a break down. I agree with her and proceed to reassess her terminal dues based on her salary of ksh.9000/- per month which she quoted during her testimony.

I will however not award her prayer for underpayment and public holidays due to lack of particulars and evidence. In my view she was earning above the minimum wage by earning ksh.9000/- per month in the year 2008.

In summary I award the following and in that regard enter judgment against the respondent:

- a. **One month salary in lieu of notice9000**
- b. **Service pay for 6 years at 15 days**

per year (15/30x9x9000)27000

36000

less the sum paid.....17875

Net due 18125

- c. **The above sum will attract interest at court rate from 30/1/2009 till payment in full.**
- d. **The claimant will also have the costs of this suit.**

Orders accordingly

Signed dated and delivered this 12th July 2013

ONESMUS MAKAU

JUDGE