



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 2016 OF 2011

KEZIA IJAI LUGARIA CLAIMANT

-VERSUS-

JOYCE KAGEHA WAFULARESPONDENT

Claimant in person.

Ms. Achieng Nyaidho for Respondent.

JUDGMENT

The Claimant seeks payment of terminal benefits including:

1. *One month's salary in lieu of notice*
2. *Three years severance pay.*
3. *Leave travelling allowance.*
4. *House allowance.*
5. *Overtime pay.*
6. *Off duty pay.*
7. *Public holiday pay.*
8. *Saturdays and Sundays overtime pay.*
9. *Underpayment of basic salary for the period worked and;*
10. *Compensation of twelve months from January for unlawful termination.*

The Memorandum of Claim dated 24th November, 2011 was filed on 29th November, 2011.

The allegations constituting the basis of the claims made may be summarised as follows:

That the Claimant was employed by the Respondent in the position of a domestic servant in December, 2000 at a basic salary of Kshs.3000/= . She was based in Kakamega until 2006 when the Respondent relocated to Nairobi.

That in Nairobi she doubled-up as an office cleaner and house help. She told the court that her actual salary was Kshs.4,000/= but the Respondent had opted to save Kshs.1,000/= for her, hence she received Kshs.3,000/=.

She explained that the Respondent housed a **Non-Governmental Organisation** (NGO) within her compound hence the requirement to work in the house and at the office. She stopped working at the office in 2007 when the Respondent employed an office attendant. During the time she was paid Kshs.5,500/= per month.

That she had hired a house at Kawangware but was not paid house allowance.

That she was not registered with the National Social Security Fund (NSSF) and the National Hospital Insurance Fund (NHIF) and therefore the employer is bound to pay severance pay for every year of service.

She told the court that she worked seven days a week from 7 a.m. to 5 p.m. and also worked during public holidays. She was only allowed Christmas off on 25th and 26th December, each year.

That by the time she left she was paid Kshs.8,000/= per month but the statutory minimum salary was Kshs.14,750/= plus house allowance at 15% of the basic salary.

Furthermore, she was not given any annual leave for three years and claims payment in lieu of leave days not taken at the statutory rate of seven days annually.

She was given a certificate of service dated 15th July, 2009 confirming her testimony that she had worked for three years at Kilimani in Nairobi and for four years in Kakamega as a house help. It is also confirmed that her monthly salary inclusive of house allowance was Kshs.8,000/= by the time she lost her employment. She however told the court that she actually received Kshs.5,500/= until the end of her employment.

She seeks payment as prayed in her statement of claim

The Claimant explained that she was unable to demand these payments while she worked as the Respondent was harsh and would have terminated her employment.

She added that her employment was terminated for no reason at all and without any notice.

She said that she suffered immensely upon termination because she lost income to take care of her children and other four children she takes care of on behalf of deceased relatives.

The Respondent filed a Memorandum of Reply dated 10th January, 2012 on the same date.

The Respondent admits the particulars of employment in Kakamega and Nairobi and adds that the Claimant was earning Kshs.8,000/= monthly salary at the time of her termination.

The Respondent further states that the Claimant went on annual leave in December of every year for twelve days and the remainder of the nine days was taken at different intervals of the year with her consent.

That the Claimant took one day of rest every week on Sunday as her off duty.

That she resided and was accommodated by the Respondent in her house for and during the currency of the employment contract and she was provided with adequate food and water and medical attention as and when the same was necessary.

The Respondent denies that the Claimant worked any overtime and during public holidays. Furthermore, the employment of the Claimant was terminated due to her neglect of duty on various occasions and offering herself to serve the neighbours especially when the Respondent was travelling outside the country.

Mrs. Joyce Kageha Wafula, the Respondent made a sworn testimony before court in support of her defence to the claim.

She praised the Claimant as a good worker whilst they were in Kakamega and that she had treated the Claimant like family at all material times.

That her work greatly deteriorated from 2008 when she started working for neighbours without authority during the Respondents frequent travel.

She retaliated that the Claimant was not owed payment in lieu of her leave as she had taken all annual leave days including extra days when she attended funerals.

That she was paid one month's salary in lieu of notice upon termination and that she only worked six days a week from 8 a.m. to 5 p.m. and thus was not owed any overtime. That she never worked on Sundays and during public holidays as alleged or at all.

She admits that the Claimant was not registered with NSSF and NHIF and offers to pay her severance pay for the years 2007, 2008 and 2009 as claimed because that is the period covered by the Employment Act 2007 which introduced compulsory severance pay where an employee is not registered with NSSF.

The court agrees with this offer and grants the Claimant Kshs.25,515/= being severance pay at the rate of 15 days salary for three years.

The court finds that no sufficient particulars and evidence has been placed before court to establish the claims for payment of any overtime, house allowance, leave travelling allowance, payment in lieu of leave and under payments.

The court gives the Claimant the benefit of doubt in respect to the claim for payment of one month's salary in lieu of notice because the Respondent failed to produce any evidence of such payment. The court therefore awards the Claimant Kshs.8,000/= in lieu of one month's notice.

With regard to the claim for compensation for unlawful dismissal, the court notes that the Respondent employed the Claimant for a period of seven years. That the Respondent had moved with her from Kakamega to Nairobi and kept her in employment even when she had travelled out of the country.

The court is satisfied with the reason provided by the Respondent for terminating the services of the Claimant in that she had without any authority started offering her services to neighbours whilst neglecting her work at the Respondent's house. That she had persisted in this misconduct inspite of verbal warnings by the Respondent.

The court finds that the Respondent had satisfied the onus placed on her under **Section 43 (1)** and **47 (5)** of the **Employment Act**, in that she has provided to the satisfaction of the court a reason for the termination and has shown that the reason for the termination was justified taking all the circumstances of the case into account.

Accordingly the Respondent is to pay the Claimant:

- a. *Kshs.25,515/= being severance pay for three years.*
- b. *Kshs.8,000/= in lieu of one month notice. Total **Kshs.33,513/=.***
- c. *Interest on the amount at the court rates from the date of termination to the date of payment*

d. *Costs of the suit.*

Dated and delivered at Nairobi this 13th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE