



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 127 OF 2013**

**IRENE CHEPNGENO.....CLAIMANT**

**-VERSUS-**

**HI-TECH OPTICIANS.....RESPONDENT**

(BEFORE HON. JUSTICE BYRAM ONGAYA ON FRIDAY 20<sup>TH</sup> DECEMBER, 2013)

**JUDGMENT**

The Claimant **Irene Chepngeno** filed the memorandum of claim on 13.09.2011 through Gordon Ogolla & Associates. The claimant prayed for:

- a. **Underpayments of Kshs.208,018.20.**
- b. **Pay in lieu of notice Kshs.13,264.00.**
- c. **Overtime on Saturdays Kshs.39,164.20.**
- d. **Annual leave for 3 years and 9 months Kshs.35,484.75.**
- e. **3 months maternity leave Kshs.31,336.35.**
- f. **Salary for June 2011 Kshs.13,264.00.**
- g. **Compensation of 12 months under section 49(c) of Employment Act, 2007 Kshs.183,043.20.**
- h. **Total claim of Kshs.523,574.70.**
- i. **Respondent to bear costs of the suit.**
- j. **Respondent to issue the claimant with a certificate of service under section 51 of the Act.**
- k. **The honourable court to grant any relief it may deem necessary.**

The respondent **Hi-Tech Opticians** filed the memorandum of response on 8.03.2012 through Obura Mbeche & Company Advocates. The respondent prayed for the suit to be dismissed; a finding that the claimant had absconded duty; costs and interest of the suit; and any other relief that the honourable court may deem fit to grant. The claimant filed the memorandum of response to the respondent's response on 29.05.2013.

The case was heard on 3.10.2013. The claimant gave testimony to support her case. The respondent called three witnesses namely Jayaram Ankala, the respondent's optometrist (**RW1**); Lilian Njeri Ndungu, the respondent's shop attendant (**RW2**); and Nangesh Ramajapua, also the respondent's Optometrist (**RW3**).

The claimant was employed by the respondent on 6.9.2007 orally and without a letter of appointment. She testified that she was a sales lady dispensing and selling spectacles. Her monthly salary increased from Kshs.6,000.00 since 6.9.2007 to Kshs.8,000.00 by around January, 2009 to Kshs.9,000.00. Her evidence was that throughout her service, she was not accorded annual leave or paid in lieu of the annual leave. On 14.04.2009 to 1.6.2009, she took a maternity leave

The claimant testified that on 14.05.2011, she received the transfer letter being **exhibit II** on the memorandum of claim. She did not proceed on the transfer because the respondent failed to facilitate her in terms of transport and an allowance to settle down. She was only paid Kshs.4,000.00 which she treated as her pay for the 14 days worked in May 2011. She continued to report at the Nakuru office because RW1 promised he was going to provide the facilitation for transfer but, she was not assigned any duties. She testified that her last date to report was on 4.06.2011 after which she received the letter dated 28.06.2011 being **exhibit VIII** on the memorandum of claim. The letter conveyed that the claimant's explanation for not proceeding on transfer on account of lack of facilitation was not acceptable, RW1 had given instructions to RW3 that the claimant should not work and any employee could be transferred and the issue could not be discussed with the claimant's husband. The letter was attached to an email and sent at a time RW1 was out of Kenya. The claimant later received the letter **exhibit IX** on the memorandum of claim directing her to get her own transport and report as transferred on or before 7.07.2011. Her testimony was that she did not have money to enable her report to Eldoret as transferred. The agreed facilitation was Kshs.5,000.00 before travel and a further Kshs.5,000.00 after travel and the respondent failed to honour the arrangement. She stopped reporting at the Nakuru office and failed to report as transferred. She further testified as follows:

- a. **During the maternity leave she was not paid and she claimed 3 months pay during the maternity period.**
- b. **She was underpaid as a sales lady in view of legal notice No. 38 of 1.5.2006. It was her testimony that the claimant paid Kshs.6,000.00 per month unilaterally and without any agreement.**
- c. **She worked from 9.00 am to 7.00 pm Monday to Friday and was not paid overtime for 1 extra hour worked since her employment.**
- d. **She had demanded pay for overtime while in service but RW1 had neglected to act.**
- e. **She received a commission over and above the salary and the more she worked the higher the commission she was paid. At some point, commission was paid at Kshs.3,000.00 and the commission system was acceptable to her. She admitted working through lunch hour voluntarily so as to earn more commissions. In December 2010, she confirmed her salary was Kshs.10, 000.00.**
- f. **She was on unpaid maternity leave so that she was constrained to resume duty on 15.04.2009 before end of maternity period and as at 20.05.2009 her monthly pay was Kshs.9,000.00.**

RW1 testified that he established the respondent company in 2005 as one of the directors. The claimant was paid commission and a salary as was agreed between the parties. Commission was introduced in October 2007, 2 months after her appointment and training. He testified that as per the pay documents the claimant could earn up to Kshs.12,000.00 and sometimes Kshs.16,000.00 per month and she was a sales assistant. RW1 stated that the transfer to Eldoret was normal and advantageous to customers because the claimant was fluent in the customers' Kalenjin language. In contradictory testimony, RW1 stated the transfer was on disciplinary grounds in view of the prior misconduct by the claimant involving rendering services without job card therefore leading to losses of revenue; the transfer was in lieu of punishment. RW1 testified that the claimant never asked for pay during the maternity leave and she voluntarily reported back on duty before lapsing of her maternity leave. He testified that he personally handled late customers as sales ladies left work at 6.00 pm.

RW2 confirmed that as a shop attendant the respondent paid both commissions and fixed salaries and they left for the day's work at 6.00 pm. RW3 confirmed while the RW1 was away he stopped the claimant from reporting on duty.

The main issue for determination in this suit is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The claimant has prayed for underpayments of Kshs.208,018.20. The court has considered the evidence and finds that the parties agreed upon a fixed salary and a commission. The claimant testified that she was satisfied with the commission and salary system of remuneration. The claim shall therefore fail. In view of the commission system, the more the claimant worked extra hours

- and voluntarily to make more sales, the more she earned. Thus, in view of the commission arrangement, the court finds that the claims for overtime will similarly fail.
- b. The claimant has prayed for annual leave for 3 years and 9 months at Kshs.35,484.75. The court has considered the evidence and finds that the respondent has failed to establish that the claimant was accorded annual leave or paid in lieu of the leave and the claimant is found entitled as prayed for. The court awards the claimant **Kshs.33,333.30** at Kshs.10,000.00 per month.
  - c. The claimant has prayed for 3 months maternity leave. RW1 admitted that the claimant was not paid during maternity and she was not accorded the three months statutory maternity leave and the court finds that the claimant is entitled as prayed for. The claimant is awarded **Kshs.30,000.00** at Kshs.10,000.00 per month; the last fixed monthly pay.
  - d. The claimant did not justify and submit on the claim for salary for June, 2011 Kshs.13,264.00 and the court finds the claim was abandoned as not justified.
  - e. The claimant has prayed for compensation of 12 months salaries under section 49(c) of Employment Act, 2007. The claimant was terminated on account of a grievance relating to facilitation to proceed on transfer. RW1 testified that the transfer was on disciplinary grounds. The court finds that transfer is a term of contract and the evidence on record shows the claimant was employed to specifically serve at the respondent's Nakuru office. Invoking transfer was therefore an unfair labour practice because it was the respondent's unilateral action that was never agreed upon between the parties. Further, the court finds that the valid grievance the claimant advanced was genuine and could not constitute a valid ground for termination in view of the provisions of section 46 (h) of the Employment Act, 2007. The court finds the oral termination was unfair as it was not procedural without notice and a hearing as per section 41 of the Act. The claimant is entitled as prayed and further entitled to one month pay in lieu of notice. She is awarded **Kshs.130,000.00** at Kshs.10,000.00 per month; the claimant's last fixed monthly pay.
  - f. The claimant is entitled to an order for the respondent to issue the claimant with a certificate of service under section 51 of the Act.

In conclusion, judgment is entered for the claimant against the respondent for:

1. the respondent to pay the claimant **Kshs.193,333.30** by 15.2.2014, failing, interest to be payable at court rates from the date of the judgment till full payment;
2. the respondent to deliver to the claimant the certificate of service by 15.2.2014; and
3. the respondent to pay costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 20<sup>th</sup> December, 2013.**

**BYRAM ONGAYA**

**JUDGE**