



REPUBLIC OF KENYA

Industrial Court of Kenya

Civil Suit 1444 of 2011

REHANA MOHAMMED.....CLAIMANT

VERSUS

MM MOBILE LIMITED.....RESPONDENT

JUDGEMENT

By a statement of claim dated 16th August, 2011 the claimant seeks declaration that the respondent unlawfully withheld and or failed to pay her accrued salary arrears in the sum of Kshs. 1,046,666/-, statutory deductions in the sum of Kshs. 623,912/- and the sum of Kshs. 7,000/- on account of expenses she incurred on behalf of the respondent in purchasing compact discs.

When the case came up for hearing before Honourable Justice Kosgey, on 26th June 2012, there was no appearance for the respondent though there was proof of service on record. The Honourable Judge then proceeded to hear the case. It is also note worthy that the respondent never filed any response to the claim.

In her short testimony to the Court, the Claimant stated that she was employed by the respondent on 17th January, 2011 vide a written contract of the same date (appendix 1). She stated that her salary was Kshs. 200,000/-. The payment was through bank transfer to her account. Her bank statement annexed as appendix 3 showed that she received payment twice for the month of February and March. It was her evidence that she was never paid for April and subsequent months. In June, she stated that she quit the job when she realised no payment was forthcoming. She did so by tendering her resignation through an email sent on 4th July, 2011 (Appendix 7).

It is clear that the claimant and the respondent were in an employment relationship. By law it is a contractual obligation on the part of the employer that while the employee is performing the duties assigned by the employer, to pay wages to the employee.

Although the claimant is claiming salary arrears in the sum of 1,046,666/- no evidence was tabled before the trial court in support of this. From her evidence she stated that she did not receive salary for April, May and June when she decided to quit her job in July. In her statement of claim, the responded claims the sum of Kshs. 46,666/- which appears to be the balance of salary for January. If the claimant resigned her job at the beginning of July, 2011, she cannot claim salary for that month and August. This part of the claim is therefore disallowed. The claimant further did not produce any document in support of her claim that she spent Kshs. 7000/- to purchase compact discs on behalf of the respondent. This part of the claim also fails.

Section 35(1)(c) of the Employment Act as read together with section 36, obliges employer's to give notice of termination of employment or payment in lieu thereof. Failure by an employer to pay an employee salary is a fundamental breach of contract and can be construed as constructive dismissal of such employee.

The resignation of the claimant was conditioned by the failure on the respondent's part to pay her salary. A reading of the claimant's letter of resignation- Appendix 2 clearly shows that her resignation was conditioned and not voluntary. In the circumstances the court treats it as unlawful termination and hereby awards her one month's salary in lieu of notice as stipulated in her contract and as provided for under section 36 of the Employment Act, 2007.

In conclusion the court awards the claimant as follows:

1. One month's salary in lieu of notice	277,989
2. Salary arrears for April, 2011 through to June, 2011.....	833,967
3. Arrears of salary for January, 2011.....	<u>46,666</u>
	<u>1,158,622</u>

This award is subject to statutory deductions.

The claimant will have costs of the suit.

Delivered this 25th day of October 2012

Abuodha J

Judge

**Delivered in open Court in the presence of for
the Claimant and for th**