



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 338 of 2012

AUGUSTINA KATUKU ISENZE.....CLAIMANT

-VS-

GURSHARAN LALRESPONDENT

JUDGMENT

ISSUE IN DISPUTE: *Unfair termination and failure to pay statutory employment dues as per employment Act*

By a Memorandum of Claim dated 1st March 2012, the Claimant AUGUSTINA KATUKU ISENZE avers that she was employed by the Respondent GURSHARAN LAL on 3rd February 2006 as a house help. She worked as such until 31st January 2012 when the Respondent terminated the contract. She avers that the Respondent did not comply with the Employment Act as she was not allowed to proceed on annual leave, was not paid overtime, house allowance, off duty and that she was underpaid. She has tabulated her claim at paragraph 7 of the Memorandum of Claim as follows:-

- (a) One month salary in lieu of notice 7,586.00
- (b) Severance pay of 15 days per one completed year
- Thus 15 days x 291/- per day 4,376.00
- (c) Annual leave for one year @ 7,586/-
- Plus leave traveling allowance for one year @
- 3,000/- thus 7,586/- + 3,000/- 10,586.00
- (d) Housing allowance of 15% of the basic pay
- Thus $\frac{7586/- \times 15 \times 19}{100}$
- (d) Under payment of the basic pay
- Thus paid 4,000/- as opposed to 7,586/-
- Thus $7,586/- - 4,000/- \times 19 \text{ months} =$ 68,134.00

(e)	Off duties for 19 months @ 19 months x 291/- per day x 2 @ double rate	44,232.00
(f)	Saturdays overtime thus worked from 3.00 am to 7.00 p.m. = 8 hrs x 4 x 19 months x 36/- phr	21,888.00
(g).	Sundays Overtime thus worked from 6 a.m. to 9.a.m. = 3 hours x 4x19months x 36/- per hour x 2@ Double rate =	16,416.00
(I)	12 months salary compensation @ 7586/- Thus 7,586/- x 12 = 91,032.00	
	Total Amount of Kshs	194,858.00

The Claimant's claim against the Respondent is 194,858.00 plus 12 months compensation of salary @ 7,586.00.

She prays to the Court to award as follows:-

- | | | | |
|-----|--|---|-----------|
| (a) | Sum amount as calculated on paragraph 7 | = | 194858.00 |
| (b) | 12 months salary compensation @ 8,496/- | | 91032.00 |
| (c) | Cost of the claim | | |
| (d) | Interest on (1) (II) (III) above | | |
| (e) | Any other relief as Court may deem just. | | |

The case was on 2nd March 2012 fixed for mention on 30th April 2012 and the Registrar directed to notify the parties. On 30th April 2012 the Claimant was present in person while the Respondent was absent. The Court fixed the case for hearing on 25th July 2012 at 10.00 a.m. and directed that the Respondent be served with a hearing notice.

On 25th July 2012 the Claimant was present in person but the Respondent was again absent. The Court confirmed from the record that the Respondent had personally been served with a copy of the summons and Memorandum of claim on 29th March 2012 and was again served with a hearing notice on 14th May 2012. The Respondent did not file any reply to the Memorandum of Claim, nor attend Court for the hearing of the case.

On the hearing date on 25th July 2012, the Claimant gave evidence that she was employed by the Respondent on 25th May 2010 until 31st January 2012 and was paid a salary of Kshs 4000/- per month. She was working without going off duty. She was not housed by the employer. She worked from 8.00 a.m. to evening on all days except on Sundays when she worked from 6.00 a.m. to 9.00 a.m. Her tasks were washing dishes, washing and ironing clothes and cleaning the car. She prayed for judgment as claimed.

The Court notes that the Respondent was served with both the summons and hearing notice but failed to defend the claim or attend court.

The Claimant has stated that there was no written contract of employment between her and her employer. In such a situation we must turn to the law for guidance on terms and conditions that are

presumed to apply to every contract of employment. Section 26 of the Employment Act Cap 226 provides that the provisions of Part VI of the Act shall constitute basic minimum terms and conditions of contract of service unless there are more favourable terms contained in any regulations, collective agreement, contract, written law, decree or judgement award or order of the Industrial Court. A contract of service is defined in Section 2 of the Employment Act as an agreement whether oral or in writing, and whether expressed or implied to employ or to service as an employee for a period of time.....”.

The facts of this case as pleaded by the Claimant disclose that there was an oral contract and since no terms were agreed on, would be covered by section 26 of the Act.

The law requires that every person who makes a claim must prove their case. In this case the Claimant gave oral testimony in support of her case. She did not submit any evidence to support her claim that she was in the employment of the I now consider the specific claims made by the claimant at paragraph 7 of the memorandum of claim and the prayers. I will address them in the order of importance.

(a) Underpayment of basic salary.

The Claimant alleges that she was paid shs 4,000/- per month for the 19 months that she worked for the Respondent when she should have been paid shs 7586/- per month and claims shs 68,134.00 as underpayment of salary.

In Section 48(1)(a) and (b) of the Labour Institutions Act, the statutory minimum rates of remuneration are presumed to apply to every contract of service which provides less remuneration. The Regulation of Wages and Conditions of Employment (General) Order 2010 provides for minimum wages of a househelp at shs While the General order 2011 provides in the minimum wage for the grade at shs per month. By virtue of Section 26 of the Employment Act and section 48(1) of the Labour Institutions Act, these rates are presumed to have been inserted into the Claimants employment contract in substitution of the lower rate paid by the Respondent.

The Claimant is thus entitled to the difference between what was paid to her and the minimum statutory wage. The actual amount due to the Claimant is therefore the sum of shs

(b) House allowance

The Claimant has prayed for housing allowance of 15% of basic salary. This is provided in the schedule of statutory minimum rates which provides that the monthly rates are exclusive of house allowance. Section 34 of the Employment Act provides that an employer shall provide housing or pay the employee a sum to enable the employee obtain accommodation. The Claimant is therefore entitled to the sum of kshsbeing the amount she would have earned as house allowance for the 19 months she was employed by the Respondent.

(c) Severance Pay

Severance pay is payable under section 40 of the Employment Act where an employee has been declared redundant. The Claimant has not pleaded that she was declared redundant. This Claimant therefore fails.

(d) Annual Leave for 1 year at Kshs.586 plus traveling allowance . In one year at kshs 3000/-

The Claimant was entitled to annual leave at 21 days for each year worked. The law does not provide for leave traveling allowance. The annual leave would be at the rate of 7586 divided by 30 (days) x 21 which would amount to kshs 5310.10.

(e) One months salary in lieu of notice. Having been terminated without notice, the Claimant is entitled to 1 months' remuneration in lieu at Kshs. as provided in Section 36 of the Employment Act.

(f) Saturdays overtime

The Claimant is not entitled to Saturday overtime as the law provides for employees to work for 6 days a week and she has not shown how many hours she worked each day or that the hours she worked up to Saturday exceeded the maximum 52 hours per week as provided in Rule 6 of the Regulation of Wages and Conditions of Employment (General) order. The claim therefore fails.

(g) Sunday Overtime

The law provides that every employee is entitled to one rest day every week and any hours worked on a rest days is compensated at double the hourly rate of pay. The Claimant is therefore entitled to payment of 3 hours at double the hourly rate for days worked on Sundays. This will add up to shs

H. Off duties for 19 months at 4 days per month

This is a duplication of Sunday overtime and therefore is not payable.

(I) 12 months salary compensation

The Claimant has not pleaded that she was terminated unfairly. I have taken into account the circumstances under which the Claimant left employment as given in her oral testimony to the effect that she opted to leave when her employer told her that he would reduce her salary after the work she was doing reduced. I have also considered the nature of her work which is available in abundance as it consisted only washing dishes, washing and ironing clothes and cleaning the car. I have also taken into account her length of service of less than 2 years and all the other factors provided for in section 49 of the Employment Act as well as the payments she is receiving in this award. In consideration of all these factors, I decline to grant compensation for unfair termination.

From the foregoing I award the Claimant the sum of shs..... as detailed above to be paid within 30 days from the date of award failing which the Claimant is free to apply for execution.

There shall be no orders for costs.

Orders accordingly

DATED AND DELIVERED AT NAIROBI THE 17TH DAY OF OCTOBER 2012

HON. JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:-

For Claimant:

For Respondent: