



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 338 of 2012**

**AUGUSTINA KATUKU ISENZE.....CLAIMANT**

**-VS-**

**GURSHARAN LAL .....RESPONDENT**

**RULING**

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

By a Memorandum of Claim dated 1<sup>st</sup> March 2012, the Claimant AUGUSTINA KATUKU ISENZE avers that she was employed by the Respondent GURSHARAN LALL on 3<sup>rd</sup> February 2006 as a house help. She worked as such until 31<sup>st</sup> 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  $\frac{7586 \times 15}{100} \times 19$
- (d) Under payment of the basic pay
- Thus paid 4,000/- as opposed to 7,586/-
- Thus 7,586/- - 4,000/- x 19 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 for 194,858.00 plus 12 months compensation of salary at Kshs.7,586.00 per month.

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

On 25<sup>th</sup> 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 29<sup>th</sup> March 2012 and was again served with a hearing notice on 14<sup>th</sup> 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 25<sup>th</sup> July 2012, the Claimant testified that she was employed by the Respondent on 25<sup>th</sup> May 2010 until 31<sup>st</sup> 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 the Court 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 judgment 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 Respondent.

The court is unable to confirm whether the Claimant was actually in the employment of the Respondent as apart from her oral testimony, the Claimant has not submitted any evidence of her employment. It would however be unfair to dismiss her case as she is unrepresented and may not be in a position to understand the technicalities about proof in such cases.

In order to ascertain whether or not the Claimant was in the employment of the Respondent, this case is hereby referred to the Labour Commissioner to appoint a Labour Officer to investigate and file a report in court on or before 20th November 2012. The case will be mentioned on 23rd November 2012 to receive the report of the Labour Commissioner.

**Orders accordingly.**

**DATED AND DELIVERED IN NAIROBI THIS 17TH DAY OF OCTOBER 2012.**

**HON. LADY JUSTICE MAUREEN ONYANGO JUDGE**

**In the presence of:-**

**For Claimant:**

**For Respondent**