



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 408 of 2012**

**RUTH IMBUKA ..... CLAIMANT**

**VS**

**KOBLA AYUI .....RESPONDENT**

**JUDGMENT**

The claimant has files suit against the respondent, his former employer seeking terminal dues for unfair termination and failure to adhere to the Employment Act 2007. The claimant in particular alleges that she was dismissed without notice on 29-2-2012 and any reason being given for the said termination.

In his response, the respondent has denied liability and contended that the termination was on account of redundancy and was therefore fair and lawful. In particular he avers that he complied with the law on redundancy and paid all the necessary dues to the claimant. As regards salary to the claimant, he avers that he paid Kshs.9,000 which was above the minimum wage under the law and even provided her with housing, food and toiletries free of charge.

The case was heard on 11-10-2012 when the claimant testified as CW1 and the Respondent testified as RW1 and called Jackline Mudora as RW2.

CW1 confirmed that she was employed on 22-2-2011 as a house maid to baby sit the Respondent's quadriplets. Her salary was Kshs.9,000 per month and worked until 29-2-2012 when she was terminated without notice, salary or any other dues. That she was never paid house allowance, never went for leave, nor was she given a termination letter.

That her salary ought to have been Kshs.15,000 per month. That she used to work from 6.00 a.m. to 11.00 p.m. every day including Sundays and holidays.

On cross examination she confirmed that there were 3 – day maids on duty and 2 at night. That there was another maid who used to clean the house.

That she had been promised that when the children grow up her duty will change to that of cleaning. That her initial duty was to care for the babies. That she used to live at Kibera and later moved to Ongata Rongai. She also used to stay in the Respondent's servant quarter. That she used to go home some weekends.

That total she worked for 12 months then she was terminated with 3 other maids when the children had

started walking. She denied being paid any salary for February 2012 or any extra one month salary after the termination.

That according to her the law provided for Kshs.15,000 salary for house maid. That on 19-12-2011 to 15-1-2012 the Respondent went away with his children and released her to go for a rest and after paying her salary for December, 2011 and January 2012.

She confirmed that while staying at the Respondent's servant Quarter all the food and other needs were catered for by the respondent. That after dismissal she reported the case to the labour office and was advised to seek amicable settlement with the Respondent.

That the reason for her dismissal was because she refused to work on Sundays because of non-payment for working on the said day. That the Respondent never paid for her NSSF and NHIF.

In defence, the Respondent confirmed that he was an expatriate working for the Coca cola Multinational. That he got quadruplets on top of another 5 years old child and needed the services of 7 maids one of who was to do the cleaning duties while the rest including the claimant cared for the children.

That she was housed in his servant quarters in addition to a monthly salary of Kshs.9,000. That she was efficient but her conduct was not good. That the maids would rest over the weekend except for one who would remain to assist him care for the babies. That each maid worked only one weekend a for month.

That the claimant went for her leave and was paid her salary in advance. That he had informed the claimant that when the children grow up, her services will not be needed but the age at which the services were to be terminated was not agreed.

That when he returned from holiday, he informed the maids that the children were now grown up and he promised to look for alternative jobs for the maids. That he got a job for only one maid and the rest became redundant. That he retained the only maid who he thought had good character. That he paid the claimant the full salary for February 2012 plus a further one month salary not worked for.

He insisted that he declared the claimant redundant but did not pay her any severance pay which he agreed to pay her Kshs4,500. On cross examination he admitted that he did not give the claimant notice before going for leave that he was going to terminate her job.

RW2 was still a maid for the Respondent. She confirmed that she used to work with the claimant for the Respondent and shared his servant quarter. She told the court that she did not know why the claimant was terminated or whether she was paid her terminal dues.

After the close of the hearing both parties filed closing written submissions. The gist of the claimant's submission is that the termination on account of redundancy was unprocedural and prays for her terminal dues as prayed in the claim plus certificate of service.

The respondent's submissions were that the claimant was not under paid, she was provided with housing and food, she never worked on Sundays, she was not terminated but declared redundant and paid one month's salary in lieu of notice. He admits that the only debt due to the claimant was severance pay of Kshs4,500 being 15 days wages for the one year of service.

I have carefully perused the pleadings and considered the evidence and the submissions filed by the two sides. There is no dispute that there existed a contract of service between the parties herein, which contract lasted from 22-2-2011 to 29-2-2012 when the Respondent terminated it without any formal notice.

It is also not in dispute that the salary payable under the contract was Kshs.9,000 on top of housing which the Respondent provided for the claimant in his servant quarters.

The issues for determination are:-

- (a) Whether the termination of the contract by the Respondent was unfair and wrongful.
- (b) Whether the claimant has any remedy in view of (a) above.

To answer the first issue, I have evaluated the Respondent's alleged declared redundancy against the provision of Section 40 of the Employment Act 2007. Section 40(a) above bars an employer from termination employment on account of redundancy unless:-

- (a) Where an employee is a trade union member he notifies the trade union and the area labour officer not less than one month prior to the intended redundancy.
- (b) Where the employee is not a member of trade union, the employer notifies the employee personally in writing and the labour officer.
- (c) The employer has paid off in cash accrued leave days.
- (d) The employer has paid one month's wages in lieu of notice.
- (e) The employer has paid severance pay at the rate of not less than 15 days pay for each completed year of service.

In this case they did not notify the area labour officer and the claimant in writing one month prior to the date of the intended termination on account of redundancy. As I have held elsewhere, Section 40(1)(a) and (b) ought to be read together in order to put into context the termination in case where the employee is a member of a trade union and where he is not. The reason for my foregoing reasoning is that an employee does not lose his right to be notified of an intended redundancy or to be protected by labour office just because he is not a member of a trade union.

In addition, the claimant has denied being paid her salary for February 2012, notice pay or severance pay. The Respondent had admitted not paying the severance pay which he has undertaken to pay. He has however, alleged without proof that he paid the claimant her salary for February 2012 and another one month salary not worked for. The question is what evidence did the employer adduce to prove the latter payments? The answer is that no evidence was adduced to prove the alleged payments.

The custodian of records of employees is the employer on whose shoulder lies the burden of proving or disproving the employees allegations in any disputes arising from their employment contract.

Consequently it is my considered finding that the termination of the claimant's contract of service by the Respondent was not in accordance with Section 40 of the Employment Act and therefore it was procedurally flawed and unfair within the meaning of Section 45 of the said Act.

As regards the second issue of remedy available to the claimant, the answer lies under Section 35, 49 and 50 of the said Act. Section 35(5) provides for service pay for each year service unless the employee is a member of NSSF or other scheme which accrues benefits at the end of employment or retirement.

Section 49 provides for pay in lieu of notice, salary arrears for days worked among other entitlements plus upto a maximum of 12 months' wages for unfair termination.

In the present case prayers for:-

- (a) Three months salaries at the rate of Kshs1,500 – Kshs.4,500.00
- (b) Severance pay for one year (a) 15 days - Kshs8,640.00

(c) Annual leave pay of Kshs15,000 plus travelling allowance of Kshs3,000	– Kshs.1,800.00.
(d) Bed seated for 12 months (a) 1200 per month	- Kshs,374,400.00
(e) Under payment of basic pay (Ksh5,000 – 9,000) x12-	Kshs. 7,200.00
(f) Weekly overtimes	- Kshs.155,520.00
(g) 12 months compensation for unfair termination	–Kshs. <u>180,000.00</u>
Total	- <u>Kshs.853,560.00</u>

The Respondent is only admitting to pay only Kshs4,500 as severance pay for 15 days for the one year of service. In view of my earlier finding on the first issue for determination, I will make the following award based on the agreed salary of Kshs9,000 per month.

- (a) One month's salary in lieu of notice.....Kshs.9,000.00**
- (b) Salary for February 2012 .....Kshs.9,000.00**
- (c) Service pay as 15 days wages per year of service.....Kshs.4,500.00**
- (d) Three months salary for unfair termination..... Kshs.27,000.00**

**Kshs.49,500.00**

The reason for not granting the maximum 12 months' salary is because I believe that the claimant could get another job of a house maid with due diligence within 3 months after termination.

**The claimant will also have costs of the suit to be agreed or taxed.**

**Orders accordingly**

**DATE and DELIVERED** at NAIROBI this 16<sup>th</sup> day of November, 2012.

**Onesmus N. Makau**

**JUDGE.**