



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1846 OF 2017

FANICE OWELA AMINO NDENGU.....CLAIMANT/RESPONDENT

VERSUS

TRIDENT PLUMBERS LIMITED.....RESPONDENT

JUDGMENT

1. The suit filed on 14th September, 2017 by the claimant is undefended since the respondent despite having filed a memorandum of reply on 8th November, 2017 did not attend the hearing of the suit to adduce any evidence in defence of the claim.

2. The matter proceeded to formal proof on 26th October, 2021 and the claimant (C.W.1) testified in support of particulars of claim. C.W.1 testified that she was formally employed by the respondent as a Cleaner/Tea Lady/Messenger. That she was paid Kshs 13,041.60 per month. That she worked from the year 2010 and she worked continuously until 25th June, 2017 when her employment was terminated by a letter dated 25th May, 2017. That the termination was without prior notice and/or any hearing and was unlawful and unfair.

3. That the claimant was a permanent employee since she worked continuously and without a break from the year 2010 to the year 2014, but from the year 2015, the respondent introduced unlawfully fixed term contracts per year. That the employment of the claimant was terminated on grounds of redundancy while the last contract was due to end in December, 2017. That the respondent did not pay National Social Security Fund for the claimant from 2010 to 2014. That the claimant stated she worked overtime in that she reported at 5 A.M in the morning and left office at 3 P.M. That official time was 8.00 A.M. to 5 P.M. That the claimant was never paid overtime.

4. That the claimant was never given leave, but only closed for Christmas and reported back on 27th or 28th December after Christmas.

5. That the claimant prays for the reliefs set out in the statement of claim including: -

(a) Overtime payment at Kshs 97.90 per hour from July, 2010 to June, 2017 Kshs 542,757.

(b) Accrued leave days from January, 2010 to June 2010 in the sum of Kshs 98,595.

(c) Service pay Kshs 46,011.00 for the period 2010 to 2014 when National Social Security Fund (NSSF) was not paid.

(d) General damages for unlawful and unfair dismissal.

(e) Interest and costs.

6. In terms of the letter of termination dated 5th May, 2017, the respondent stated that the termination of employment was due to ***'prevailing business conditions in the company.'***

7. Clearly, the claimant was declared redundant in terms of Section 40 of the Employment Act, 2007.

8. The claimant was required to serve one-month notice from 25th May, 2017 up to 25th June, 2017. The notice was not copied to the labour office. The claimant was not given the opportunity to discuss why she should not be targeted for redundancy. The claimant was not informed or paid in respect of leave dues owed to him; the claimant was also not paid any severance pay as demanded by Section 40 of the Act.

9. On the face of the notice itself, and the evidence by C.W.1, the termination of employment of the claimant on grounds of redundancy violated the provisions of Section 40 of the Employment Act and was therefore unlawful and unfair.

10. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Employment Act, therefore, since a termination that violates Section 40 of the Act also violates Section 41 and 45 of the Act, and is unlawful and unfair.

11. In this respect, the claimant was not paid terminal benefits upon termination.

12. The claimant was for a long time not paid overtime. The claimant also never went on leave for a long time. However, the claims in respect of overtime and leave pay are limited to the last three (3) years of service by dint of Section 90 of the Employment Act, which bars the claimant to file claims which are older than three years.

13. Accordingly, the Court finds that the claimant did not contribute to the termination and is now unemployed and has suffered loss and damage.

14. The court relies on the case of **Felister Ayoti Ambale and Bharat Raval- Cause No. 26 of 2016** and the factors above to award the claimant the equivalent of Ten (10) months' salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs (13,146 x 10) 131,460. With respect to the terminal benefits, the Court awards the claimant as follows: -

(a) Payment in lieu of three months' untaken leave – Kshs 39,438.

(b) Payment for 3 years' unpaid overtime – Kshs. 232,608.

(c) Severance pay for the period served of 7 years – 46,011.

Total award - Kshs 449,517.

(d) Interest at Court rates from date of judgment till payment in full.

(e) Costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2022.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Wesonga for claimant

Mr. Weru for Respondent

Ekale – Court clerk



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