



Khayeri v Chuan Wangfu Restaurant & Hotel (Employment and Labour Relations Cause 125 of 2018) [2023] KEELRC 736 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 736 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 125 OF 2018**

**B ONGAYA, J
MARCH 24, 2023**

BETWEEN

MODESTA KHAYERI CLAIMANT

AND

CHUAN WANGFU RESTAURANT & HOTEL RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on February 7, 2018 through Wanam Sale Advocates. Her case is based on the amended memorandum of claim filed on April 30, 2019. The claimant has pleaded as follows. The respondent employed her in June 2015 as a restaurant attendant (waiter). On August 5, 2017 the respondent released all its employees including the claimant for a break in view of the Kenya general elections on August 8, 2017. It was a break for 10 days for work to resume on August 10, 2017. The claimant reported back as scheduled and an employee acting upon the instructions of the Managing Director informed the claimant to go back until recalled as there was no work. She complied and was not recalled until she checked on August 22, 2017 when the respondent's General Manager informed her that her services were no longer needed as she had been replaced. She was asked to hand in her work attire and leave as her employment had been terminated. She states that her termination went against the principle of legitimate expectation because she was not informed of the reason of termination. Her Advocates' demand letter was dated December 8, 2017 for conciliatory meeting but there was no response. The claimant alleges that the termination was malicious, unlawful, illegal, irregular and in contravention of sections 43(1), 44(2) of the *Employment Act*, 2007.
2. The claimant pleaded the particulars of malice and breach as follows:
 - a. Hoodwinking the claimant to stay away from work and in the process hiring someone else.
 - b. Acting in bad faith by applying trickery in the process of terminating the claimant.
 - c. Failure to pay the claimant's dues upon her dismissal despite demand.



- d. Paying the claimant, a lower remuneration, against the minimum wage order as revised from time to time.
 - e. Non-remittance of NSSF and NHIF.
 - f. Non-payment of overtime hours worked.
 - g. Non-payment of house allowance.
 - h. Arbitrary and unilaterally dismissing the claimant without any justification whatsoever.
 - i. Unlawfully dismissing the claimant from work.
3. The claimant prayed for judgment against the respondent for:
- a. A declaration that the decision to dismiss the claimant from her employment amounts to unfair termination and as the same was unprocedural, unlawful, hence illegal.
 - b. One-month salary in lieu of the notice Kshs 11, 000.00.
 - c. 12-months' salary as compensation for unfair termination $11, 000 \times 12 = \text{Kshs } 132, 000.00$.
 - d. Service payment Kshs 5, 500 x 2 completed years of service Kshs 16, 500.00.
 - e. Earned but untaken leave 48 days at Kshs 366 + Kshs 17, 568.00.
 - f. Unremitted NSSF 26-months x Kshs 400.00 = Kshs 10, 400.00.
 - g. Underpayment amounting to Kshs 28, 000.00.
 - h. Unpaid house allowance Kshs 47, 100.40.
 - i. Worked but unpaid overtime 2080 hrs x Kshs 97.80 = Kshs 203, 424.00
 - j. Costs of the suit.
 - k. Interest at Court rates.
 - l. Certificate of service.
 - m. Any such further or better relief as this Honourable Court may deem fit to grant.
4. The respondent filed the reply to the memorandum of claim on December 18, 2018 through M/s Gicheru & Company Advocates. The respondent's amended reply to the amended memorandum of claim was filed on June 26, 2019 through Chege Wainaina & Company Advocates. The respondent denied employing the claimant on or about June 2015 at Kshs 11, 000.00 per month. The respondent denied the claims and prayers and all allegations made for the claimant.
5. The claimant testified to support her case. Despite service, the respondent's advocate and witness failed to attend at the hearing. The Court has considered all material on record and returns as follows.
6. The 1st main issue for determination is whether the parties were in a contract of service. The respondent has denied ever employing the claimant. The claimant has pleaded that the respondent is a private limited liability company established under the *Companies Act* Cap 486, Laws of Kenya. The respondent has admitted that indeed it is a limited liability company. The claimant alleges the respondent employed her in 2015. The claimant has not pleaded whether the employment was in writing or verbal. The claimant has not pleaded or provided evidence to show whoever of the respondent's officials may have employed her. There is no material evidence to show that she ever



worked for the respondent as alleged and that she was ever paid a monthly salary as was alleged. The respondent being a limited liability company, it could not only act through its officers or directors to conclude the alleged contract of service. The Court returns that the claimant has failed to show by pleading and relevant evidence that indeed the alleged contract of service existed as duly entered into between the parties. The respondent failed to attend at the hearing and each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 24TH MARCH, 2023**

BYRAM ONGAYA

PRINCIPAL JUDGE

