



**Mwangi v Superiofone Holdings Ltd (Cause 173 of 2018)
[2023] KEELRC 1430 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1430 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 173 OF 2018
DN NDERITU, J
JUNE 15, 2023**

BETWEEN

PAULINE MUTHONI MWANGI CLAIMANT

AND

SUPERIOFONE HOLDINGS LTD RESPONDENT

JUDGMENT

i. Introduction

1. In a memorandum of claim dated 23rd June, 2021 and filed in court on 22nd May, 2018 through Munene Chege & Co Advocates the Claimant prays for: -
 - a. A declaration that the Claimant's dismissal was unlawful, unjust and discriminatory and the same amounts to unfair dismissal.
 - b. Accrued and outstanding payments in terms of house allowance, severance pay, sums deducted from Claimant's salaries but not remitted to N.H.I.F. and N.S.S.F, overtime and compensation as particularized above.
 - c. Cost of the suit and interest thereof at court rates.
 - d. Any other relief that this court may deem fit to grant.
2. The quantified prayers as claimed are as follows –
 - a. House Allowance - Kshs. 37,800/=
 - b. Salary in lieu of Notice - Kshs. 12,000/=
 - c. Compensation - Kshs.144,000/=
 - d. Overtime - Kshs.141,600/=



- e. Public Holidays - Kshs. 14,769.28
 - f. Contributions - Kshs. 14,500/=
 - g. Severance Pay - Kshs. 6,000/=
- Total Kshs.370,669.28
3. Together with the statement of claim was filed a verifying affidavit, statement by the Claimant, and a list and bundle of the listed documents in support of the claim.
 4. On 24th November, 2021 the Claimant filed a further list of documents and a bundle of the listed documents.
 5. On 27th January, 2020 the Respondent entered appearance through Muigai-Gatei & Co Advocates and filed a response to the claim on 18th February, 2020. In the said response the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
 6. On 8th March, 2022 the Respondent filed a witness statement by Monica Mwangi (RW1) together with a list and bundle of the listed documents.
 7. This cause came up in open court for hearing on 19th May, and again on 9th June, 2022 when the Claimant (CW1) testified and closed her case. The defence was heard on 13th July, 2022 when RW1 testified and the Respondent's case was closed as well.
 8. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Miss Daye, filed her written submissions on 2nd September, 2022 while Counsel for the Respondent, Miss Barmao, filed on 25th October, 2022.

ii. The Claimant's Case

9. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by her Counsel and the same is summarized as hereunder.
10. In her memorandum of claim, the Claimant pleaded that she was engaged by the Respondent as a room-keeper or room-stewardess on 5th June, 2015 at a gross monthly salary of Kshs.12,000/=. She was based at Lake Naivasha Resort, a facility owned and operated by the Respondent. She alleges that she worked until 26th March, 2017 when she was unlawfully, wrongfully, and unfairly terminated by the Respondent.
11. The Claimant alleges that she took a sick leave to seek medical services but on reporting back to work the Respondent accused her of absconding duty and sent her away without any other or further communication or contact.
12. In her oral testimony in court, the Claimant stated that her net monthly salary of Kshs.11,300/= was normally paid through her Equity Bank account and she produced bank statements in support.
13. She stated that while she was supposed to work between 8am and 5pm, she used to work till 9pm and sometimes up to 11pm.
14. She alleged that while at work on 26th March, 2017 she was summoned by the manager, Mr. Mburu, and was told to go home till further notice. She alleges that she was not informed why she was sent away, no disciplinary hearing was held, no warning was issued, and no letter of dismissal or termination was issued.



15. She testified that she subsequently reported the matter to the Sub-County Labour Office, Naivasha, and was issued with a letter dated 25th April, 2017 which she delivered to the Respondent. She stated that the Respondent failed and or refused to respond to the said letter or report to the labour office and as such she decided to file this cause.
16. The Claimant denied signing any declaration relieving the Respondent of the duty to compensate her for the unlawful termination, or receiving any compensation as alleged by the Respondent in its response to the claim. She stated that her last day at work was 25th March, 2017 and that her last salary, for February, 2017, was received in her bank account on 8th March, 2017 and hence she was not paid salary for the month of March, 2017. She stated that even the sum of Kshs.31,508/= that the Respondent was directed to pay to her by the labour office was not paid or even the Kshs.17,200/= that the Respondent alleges to have paid to her on 6th June, 2017.
17. Further, the Claimant alleges that statutory deductions made from her salary were not remitted to NHIF and NSSF.
18. The Claimant maintained the foregoing in cross-examination insisting that the termination was unfair and unlawful. It is on that basis that she is seeking for orders as per the prayers in the memorandum of claim set out in the introductory part of this judgment. The submissions by her Counsel shall be considered in a latter part of this judgment alongside those by Counsel for the Respondent.

iii. The Respondent's Case

19. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel as summarized hereunder.
20. RW1 is a human resource assistant with the Respondent. Her testimony in court was based on her filed statement and the response to the claim.
21. She stated that the Claimant absented herself from duty without seeking prior permission and failed or refused to contact the Respondent thereafter of her whereabouts in total breach and disregard of the terms and conditions of the employment contract and in contravention of the law.
22. This witness stated that in view of those circumstances that the Claimant left the employment, the Respondent had no chance of taking disciplinary action against her or issuing her with a notice of termination. She stated that the Claimant was not terminated but she deserted duty hence ending her employment relationship with the Respondent. She stated that if at all the Claimant was sick as alleged, which is however denied, she failed and or refused to follow the laid down procedure in obtaining sick-off.
23. She stated that in any event, the conduct of the Claimant in deserting duty entitled the Respondent to summarily dismiss her in law.
24. In cross-examination she alleged that the Claimant was paid all her terminal dues amounting to Kshs.17,200/= through her salary bank account. However, in cross-examination she admitted that no evidence of such payment had been availed in court. She stated that the net monthly salary of the Claimant was Kshs.11,300/= and not the Kshs.12,000/= alleged by the Claimant. She admitted that no housing was provided to the Claimant and that house allowance was not paid to her. She also admitted that the Claimant worked overtime and even on public holidays. She produced no records or muster roll to authenticate the hours worked by the Claimant or the leave-days or off-days taken.



25. She admitted that no disciplinary proceedings were conducted and that no notice of dismissal or termination was issued to the Claimant.
26. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The submissions by its counsel shall be considered alongside those of the Claimant's counsel in the succeeding parts of this judgment.

iv. Issues For Determination

27. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel for both parties and the court identifies the following issues for determination –
 - a. Was the Claimant unfairly and unlawfully terminated or wrongfully dismissed by the Respondent? Or
 - b. Did the Claimant desert duty?
 - c. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - d. Who meets the costs in this cause?

v. Dismissal/termination or Desertion?

28. The terms and conditions of employment of the Claimant are not or ought not be contested. The Claimant pleaded and testified that she was employed as a room-stewardess or room-attendant from 5th June, 2015 to 26th March, 2017. Although she stated that her gross monthly salary, without substantiating, was Kshs.12,000/=, neither of the parties availed a contract of service or a pay-slip to authenticate the gross monthly salary. What can be confirmed from the evidence on record is that the monthly net pay for the Claimant was Kshs.11,300/= as this can be authenticated from the monthly salary credits made by the Respondent into the bank account of the Claimant as per the bank statements availed in court as exhibit by the Claimant.
29. However, both parties have taken diametrically opposed positions in regard to the manner of ending of the employment relationship.
30. In paragraph 5 of the memorandum of claim the Claimant pleads that she was on an authorized sick-off and reported back to work on 25th March, 2017. However, in her oral testimony in court she alleged that she had taken off-duty but when she reported back she was accused of absconding duty and on 26th March, 2017 she was sent home by the manager, Mr. Mburu, never to be called back. The Claimant alleges that she was hence terminated as the Respondent did not contact her to go back to work.
31. On the other hand, the Respondent pleaded and alleged that the Claimant absconded duty on 26th March, 2017 and never reported to work again. RW1 testified that the Respondent realized that the Claimant was not reporting to work when it received a letter from the labour office dated 25th April, 2017 demanding for compensation for unfair and unlawful termination.
32. Sections 10 and 74 of the *Employment Act* (the Act) obligates an employer to keep employment records and to avail and produce such records whenever necessary. In this cause the Respondent has opted not to avail any such records. No contract of employment has been availed, no record of attending work or duty roster has been produced, and no leave and off-duty records have been brought to court. Yet, the Respondent was fully aware that those records were necessary to enable and facilitate this court to arrive at a fair conclusion of this matter. The Claimant as a terminated employee did not and is not expected



- to have access to such records and as such it was upon the Respondent to set the records straight on the allegations made by the Claimant by way of availing and producing the relevant employment records in court.
33. If the Claimant absconded duty as alleged by the Respondent, what efforts did the Respondent make in trying to trace her and establishing why she was not reporting for duty? There is no evidence that any efforts were made or that the absence was reported to the labour office. There is no evidence of phone calls made to contact the Claimant or letters addressed to her informing that the Respondent was considering dismissal or termination on the basis of her alleged desertion.
 34. This court shall presume that the Respondent opted and or failed to avail and or produce the relevant records of employment of the Claimant for the reason that either no such records were kept as required by the law or that if such records were produced they would have been against the position taken by the Respondent in this cause.
 35. In the circumstances, this court is inclined to believe the evidence of the Claimant in this regard, that on 26th March, 2017, after reporting back to work from off-duty, the Respondent through the manager sent the Claimant away and promised to contact her later. That the Respondent did not thereafter contact the Claimant within reasonable time and the Claimant rightly reported her dismissal or termination to the labour office hence the letter by the labour officer to the Respondent dated 25th April, 2017 demanding compensation. RW1 admitted that the said letter was received by the Respondent but no action was taken.
 36. If indeed the Claimant deserted duty as alleged, why did the Respondent not reply to the letter from the labour officer explaining the circumstances under which the Claimant had left employment? This court comes to the logical and reasonable conclusion that the Respondent unlawfully and unfairly terminated the Claimant without notice and without affording her both substantive and procedural fairness as envisaged by the law under Sections 41, 43, 45, and 47 of the *Act*.
 37. No notice of termination or dismissal was issued to the Claimant, no disciplinary hearing was held, and no compensation was made to the Claimant. That cannot be fair and lawful dismissal or termination under any circumstances envisaged in law. This court agrees with counsel for the Claimant on the submissions made on this issue and the authorities cited including *Anthony Makala Chitavi V Malindi Water & Sewerage Company Limited* (2013) eKLR, *Kenya Commercial Food & Allied Workers Union V Meru North Farmers Sacco Limited* (2014) eKLR, and *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* (2014) eKLR.
 38. In regard to issues (a) and (b) for determination, this court returns that the Respondent terminated the Claimant unfairly and unlawfully denying her both substantive and procedural fairness. It is so declared.

vi. Reliefs

39. Having held that the Claimant was unfairly and unlawfully terminated by the Respondent, this court shall now consider each of the reliefs sought as hereunder.
40. Prayer (a) is for house allowance in the sum of Kshs.37,800/= calculated at 15% of the gross monthly pay of Kshs.12,000/= for the 21 months worked. Now, the net monthly pay credited by the Respondent into the bank account of the Claimant is Kshs. 11,300/=. Logically, the gross pay must have been above this sum. While the Claimant has pleaded and testified that her gross monthly salary was Kshs.12,000/= the Respondent has failed and or refused to supply any records to dispute or



dislodge that evidence by the Claimant. In the circumstances this court shall go by the evidence of the Claimant that her gross monthly salary was Kshs.12,000/=.

41. RW1 admitted in evidence that the Claimant was not housed by the Respondent and that no house allowance was paid to her. In the circumstances this court has no difficulties at all in awarding to the Claimant the house allowance in the sum of Kshs.37,800/= as pleaded.
42. Prayer (b) is for one month's salary in lieu of notice in the sum of Kshs.12,000/=. As noted above the net monthly salary for the Claimant was Kshs.11,300/= and that is the amount awarded under this head.
43. Prayer (c) is for compensation for unfair and unlawful termination equivalent to 12 months gross pay at the rate of Kshs.12,000/= per month. Contrary to the submission by counsel for the Claimant that the law does not provide the criteria to be applied in determining such compensation, this court notes that Section 49(4) of the Act provides a sample of the factors that this court ought to consider in making an award under this head.
44. This court has already found that the termination was unfair and unlawful both in substance and procedure. The parties have not expressed willingness to re-engage and this court cannot order reinstatement as time has expired for such an order to be made. The Claimant had served the Respondent for a period of 21 months as at the time of termination. There is no doubt that the service that the Claimant was offering as a room-stewardess is not a specialized service and opportunities for the said service are to a large extent available in the job market. It is however noted that the Respondent did not make any payments to the Claimant in terminal dues and that necessitated this cause. This court has not detected any undue conduct on the part of the Claimant which might have contributed to the termination.
45. Considering all the relevant factors as enumerated above and in the interest of fairness and justice, this court is of the considered view that an award of six months gross salary is fair and reasonable compensation to the Claimant. The same is calculated as $Kshs.12,000/= * 6 = Kshs.72,000/=$.
46. Prayer (d) is for overtime worked in the sum of Kshs.141,600/=. The Claimant has pleaded and particularized this claim. It was upon the Respondent to produce evidence, and more so by way of records, to dislodge the allegations by the Claimant. No such records or other evidence was adduced by the Respondent during the hearing. In the circumstances, the Claimant is awarded the sum of Kshs.141,600/= as claimed.
47. The claim for Kshs.14,769.28 in prayer (e) for public holidays worked is also allowed for the reasons stated in the foregoing paragraph.
48. Prayer (f) is for deductions made from the salary of the Claimant which were allegedly not remitted to NHIF and NSSF. Those are statutory deductions that once made belong to the public body where they are supposed to be remitted. If and where such a body is not party to the proceedings it becomes legally unsound for this court to order that the funds be released to the employee. It is reasonable to pose this question – If the said funds were ordered to be paid to the Claimant will she submit and remit the same to the said statutory public bodies? For the forgoing reasons, this prayer is denied.
49. Prayer (g) is for severance pay. The submissions by counsel for both parties did not address or even mention this prayer at all. Section 40(g) of the Act identifies severance pay as one of the terminal dues that should be paid to an employee who has been terminated on redundancy. It is also known as redundancy pay. This is not a remedy available to employees who are terminated through other ways or manner. I have a feeling that most litigants and even counsel are confusing severance/redundancy pay for service pay. The latter is a payment made to an employee who has worked for a period of time



yet the employer has not made any remittances or pension payments into a scheme or a public pension scheme or in addition to such pension scheme.

50. In the circumstances of this cause, the Claimant was not declared redundant and hence no severance pay is not awardable and this prayer is hence denied.
51. Although the Respondent alleged that it had paid some terminal dues to the Claimant, no evidence was adduced in support of that allegation. This court holds that no such terminal dues were paid to the Claimant.

vii. Costs

52. The Claimant is awarded costs of this cause.

viii. Disposal

53. In final disposal of this cause, this court issues the following orders: -
- a) A declaration be and is hereby issued that the termination of the Claimant by the Respondent was unfair and unlawful.
 - b) The Claimant is awarded a total of Kshs.278,169.28 made up as follows –
 - i. House allowance Kshs. 37,800/=
 - ii. Salary in lieu of notice Kshs. 12,000/=
 - iii. Compensation for unfair and unlawful terminationKshs. 72,000/=
 - iv) Overtime payKshs.141,600/=
 - v) Public holidays workedKshs. 14,769.28
 - TotalKshs.278,169.28
 - c) All the other claims are denied.
 - d) Costs to the Claimant.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 15TH DAY OF JUNE, 2023.

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DAVID NDERITU
JUDGE

