



REPUBLIC OF KENYA



KENYA LAW
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**Andeche v Machari & another (t/a Double Delight Restaurant and Supermarket)
(Cause 474 of 2016) [2022] KEELRC 13399 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13399 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 474 OF 2016
HS WASILWA, J
DECEMBER 6, 2022**

BETWEEN

DICKSON OMTSULA ANDECHE CLAIMANT

AND

JEROTICH WAKONYU 1ST RESPONDENT

GIDEON M MACHARI 2ND RESPONDENT

T/A DOUBLE DELIGHT RESTAURANT AND SUPERMARKET

JUDGMENT

1. The Claimant filed his claim dated November 30, 2016 on the December 1, 2016 alleging to have been abruptly dismissed from service. He sought for the following prayers;
 - a. One month salary in lieu of notice of Kshs 12,071.40.
 - b. Underpayments of Kshs 45,452
 - c. Normal overtime of Kshs 204,113.5
 - d. Off duties of Kshs 94,781.65.
 - e. Public holidays of Kshs 16,030.50.
 - f. Leave pay for the one year of Kshs 7,347.80.
 - g. Gratuity for one year of Kshs 6,036.20.
 - h. Unpaid salary for one month of Kshs 12,072.40.
 - i. Salary for 10 days in November, 2015 of Kshs 5,029
 - j. Compensation of Kshs 144,868.80.



2. The summary of the claimant's case is that he was employed verbally by the Respondents on the September 3, 2014 as a cook/ butcher/ supervisor earning a salary of Kshs 7,500 which he earned till July, 2015 then it was increased to 9500 for two months and then increased to Kshs 11,700 from October, 2015, an amount which he earned for the month of October only before he was terminated on November 11, 2015.
3. He stated that during the pendency of his employment he reported to work at 7:25 am every day of the week and clocked out at 11pm at night, without receiving any overtime pay.
4. It was stated that he never went for leave for the one year worked and also that he worked on all public holidays without any compensation.
5. The circumstances leading to his termination is that on November 10, 2015 at around 4pm, the operations manager one Benson Maina Wanjohi informed him that the director had issued orders for him not to report to work the next day. On inquiring the reason for termination he was informed that the director was cutting down on its work force and he was the one identified to be terminated first.
6. At the time of termination, the claimant was not paid for the 11 days worked in November, neither was he paid his terminal dues.
7. During hearing the claimant testified as CW- 1 and adopted his witness statement dated 30th November, 2016 which basically reiterated the claim herein and urged this Court to allow the claim as prayed.
8. The respondents entered appearance on the July 24, 2017 and filed a response to claim on the August 4, 2017. In its defence the Respondents admit to employing the claim on the September 1, 2014 but only as a butcher and not a supervisor as alleged, at a salary of Kshs 7,500 which was increased as particularized by the claimant.
9. According to the respondents the claimant's worked till 6pm everyday as the nightshift employee reported at 6pm and took over from the claimant. It is stated that the claimant and all other employees were compensated for any public holiday worked.
10. The allegation of unfair termination is denied by the respondent and instead state that the claimant absent himself from duty without notice or communication thereafter as such that the separation from the respondents' employ was voluntary and not caused by any action or inaction by the Respondent.
11. The respondent did not however attend hearing to defend their case which was closed and the claimant filed submissions.

Claimant's Submissions.

12. The claimant submitted on three issues; whether the claimant was an employee of he respondent, whether he was unfairly terminated and what reliefs are awardable to him.
13. On the first issue, the claimant submitted that he was not issued with any employment letter, pay slip or work card to affirm his employment but that the payment vouchers marked as Exhibits DOA-1 dated October 11, 2014 and the one dated October 20, 2014 demonstrates that he was in the respondents' employ. Additionally, that the respondents have admitted at paragraph 3 of its defence that he was employed as a butcher.
14. On the second issue, the claimant submitted that it was abruptly dismissed from employment without notice or hearing as such the termination was unfair. He argued that the explanation by the respondents that he deserted work was not backed up with any evidence and also that no evidence was



tendered before this court to demonstrate any steps taken by the Respondents to reach out to him. On that basis the claimant urged this court to rely on his claim and allow the reliefs sought in the claim as prayed.

15. I have considered the evidence of the claimant herein this matter having proceeded ex-parte when the respondent failed to attend court to defend the claim.
16. From the evidence of the claimant, there is no evidence attributed to his termination.
17. No notice of termination was issued nor was he subjected to any disciplinary process before the termination.
18. I therefore find that the claimant's termination was unfair and unjustified under section 45 (2) of the Employment Act 2007.
19. I therefore find the claimant's case is proved and uncontroverted as against the respondent.
20. I enter Judgment for the claimant and award him as follows;
 1. 1 months' salary in lieu of notice = 12,071.40
 2. Underpayment of salary as pleaded = 45,452
 3. Leave for 1 year = 7,347 as pleaded
 4. Unpaid salary for 1 month = 12,012.40
 5. Salary for 10 days in November 2015
= $10/30 \times 12,012.40$
= 4,004
 6. 12 months' salary as compensation for the unfair and unlawful termination
= $10 \times 12,071.40$
= 120,714
Total Awarded = 201,600.80
Less statutory deductions
 7. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Maragia for Claimant – present

Respondent – absent

Court Assistant – Fred

