



**Kariuki v Ann Wanjiku Kahwae t/a Mother's Kitchen Café (Cause  
151 of 2015) [2022] KEELRC 13408 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13408 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 151 OF 2015  
HS WASILWA, J  
DECEMBER 6, 2022**

**BETWEEN**

**GLADYS NJOKI KARIUKI ..... CLAIMANT**

**AND**

**ANN WANJIKU KAHWAE T/A MOTHER'S KITCHEN CAFÉ ... RESPONDENT**

**JUDGMENT**

1. The Claimant has instituted this claim against the Respondent *vide* the memorandum of claim dated 18<sup>th</sup> May, 2015 alleging to have been terminated and seeking for compensation for the unfair termination. She sought for the following prayers;
  - a. One month salary in lieu of notice.
  - b. Underpayments.
  - c. Normal overtime.
  - d. Off duties.
  - e. Public holidays.
  - f. Leave for 4 years 4 months.
  - g. Compensation under section 49(1)(c) of the *Employment Act*.

**Claimant's case.**

2. The Claimant was employed by the Respondent in September, 2010 as a waitress earning a salary of Kshs 4,500 which was enhanced to Kshs 8,000 on 30<sup>th</sup> April, 2013, an amount which she earned till her termination in February, 2015.



3. It is alleged that the Claimant reported to work every day at 6am and left at 9pm at night without receiving any compensation for working overtime. She protested working for all those years without taking her annual leave or one off day per week. She also contested working on all public holidays without any compensation.
4. The Claimant stated that she fell ill sometimes in January, 2015 and was out of work for a period of one month, a fact which was within the knowledge of the Respondents as it send her workmates to check on her from time to time. That she healed after a month and reported back to work on the 6<sup>th</sup> February, 2015 and was shocked to learn that she had been terminated for being ill and away for more than 2 weeks.
5. The issue was reported to Naivasha labour office who summoned the parties for conciliation. After the meeting the labour officer advised the Respondent to pay the Claimant the claims sought such as underpayments, leave, off days' et al to be sorted out within the shortest time and in response the Respondents offered Kshs 25,000 all-inclusive without giving particulars of the said payments.
6. That the negotiations collapsed and the matter did not proceed any further informing the filling of this suit.
7. During hearing the Claimant adopted her witness statement of 26<sup>th</sup> March, 2022 which reiterated her claim.
8. Upon cross examination she testified that she was employed by the Respondent in September, 2010 and worked well save for complaints of overtime pay and off days' pay. She testified that she was terminated via text message by Anne Wanjiku. She testified that she was sick from September, 2014 and took painkillers however the illness became serious and she had to seek medical attention in December, 2014. That she requested for permission and the Respondent advised her to take sick leave in January, 2015 which she complied.
9. Upon further cross examination, she testified that she used to go for one off day every fortnight and that if she requested for off days the same was granted. She admitted that the Respondent gave her Kshs 50 everyday as transport allowance. She also admitted receiving her January salary together with three days' salary for February, 2015.

#### **Respondent's case.**

10. The Respondent entered appearance on the 26<sup>th</sup> June, 2015 and filed a response to claim on the 17<sup>th</sup> July, 2015. The Respondent denied either owning Mothers' Kitchen Café or employing the Claimant as alleged.
11. It stated that the Claimant was indeed employed as a waitress at Mother's Kitchen Café from August, 2011 or thereabout till January, 2015 when she deserted employment and left on her volition.
12. Contrary to the allegations by the Claimant, the Respondent avers that the Claimant was paid all her dues while at Mother's Kitchen café and indicated that she used to report to work at 8am and clock out at 6pm. Further that the Claimant was entitled to two rest days in a week.
13. The Respondent denied receiving any communication of alleged illness from the Claimant and maintained that it was not aware of the said illness neither did the Claimant seek for any sick leave during the alleged illness. It maintained that the Claimant left its employment on her volition.
14. Anne Wanjiku testified as RW-1and adopted her witness statement of 19<sup>th</sup> March, 2021 which in summary reiterated the defence and in addition stated that she is a partner in Mother's Kitchen and



café. That the Claimant was employed in August, 2011 and left employment in January, 2015. That she used to earn Kshs 4,700 together with transport allowance of Kshs 1300, which salary was increased to Kshs 8,000 but the transport allowance remained at Kshs 1300. In addition to transport allowance the Claimant was entitled to breakfast, lunch and supper as benefits attached to the said job. She maintained that each employee worked for 8 hours per day and the Claimant just like the other employee was entitled to two rest days in a week.

15. The witness maintained that the Claimant was entitled to annual leave, compassionate leave and sick leave which the Claimant enjoyed each year during her employment. She denied notice of the Claimant's illness and maintained that the Claimant deserted employment.
16. Upon cross examination, the Respondent testified that the Claimant stopped reporting to work and she send a co-worker to go to her house and find out her whereabouts. That soon after she received a letter from the labour office inviting her to conciliatory hearing. She admitted that the Claimant could not stand for long but that she did not disclose any ailments she was suffering from.

### **Claimant's Submissions.**

17. The Claimant submitted from the onset that she was terminated from employment for being absent for a month due to illness, contrary to *ILO Convention* of 1982 No. 158 of Article 6(1) which provides that temporary absence from work because of illness shall not constitute a valid reason for termination. It was argued that since the Claimant was not subjected to any hearing or given the reason for termination as provided for under section 41 and 43 of the *Employment Act*, such termination was unfair within the meaning of section 45 of the *Employment Act*. To support this claim she relied on the case of *Rashid Jeneby V Prime Bank Limited* [2015] eKLR and the case of *Mary Chmweno Kiptui V Kenya Pipeline Company Limited* [2014] eKLR.
18. In conclusion, the Claimant submitted that it had discharged the burden vested upon her under section 47(5) of the *Employment Act* and demonstrated that it was dismissed unfairly as such urged this Court to allow the claim as prayed.

### **Respondent's Submissions.**

19. The Respondent submitted that the Claimant left employment on her volition and was not terminated as alleged. It was argued that the Claimant never informed it that she was ill, neither did she seek sick off informing the decision by the Respondent to seek for her replacement as her whereabouts was not known to the Respondent.
20. It was submitted that as per section 45(5) of the *Employment Act*, the Claimant was empowered to seek redress from either the labour office or this Court and having selected to have the labour officer address her claim, she ought to have maintained her claim in the labour office and only appeal to this Court when dissatisfied.
21. The Respondent maintained that the Claimant has not discharged the burden under section 47 of the *Employment Act* to warrant the granting of the reliefs sought. In support of the defence it relied on the case of *Charles Mutua Mwanzi V Invesco Assurance Company Limited* [2016] eKLR and the case of *Hassanath Wanjiku V Vanela House of Coffees* [2018] eKLR and urged this Court to dismiss the claim with costs.
22. I have examined all the evidence and submissions of the parties herein.
23. The Claimant has contended that she was unfairly terminated vide text message for being sick.



24. The Claimant was able to prove that indeed she had been sick during the period in question as per the medical records exhibited in Court.
25. The Claimant however did not exhibit any text send to her terminating her services as alleged.
26. The Respondents on the other hand aver that the Claimant absconded duty on her own volition. The Respondents however failed to show that they subjected her to a disciplinary process for absenteeism before terminating her.
27. Section 41 of the [Employment Act](#) 2007 states as follows;

41. Notification and hearing before termination on grounds of misconduct

Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make”.

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28. There is no indication that the above process was followed. There is also no indication that there were valid reasons that led to Claimant’s termination as alleged.
29. Without proof of the validity of valid reasons and without any fair disciplinary process being accorded to the Claimant, I find the Claimant was terminated unfairly and unjustly and I declare so as per Section 45 (2) of the [Employment Act](#) 2007 which states as follows;

“ 45.

- (1) .....
- (2) A termination of employment is unfair if the employer fails to prove-
  - (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason-



- (i) related to the employee's conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure”.

1. As for remedies, the Claimant has sought to be paid underpaid wages. Wages were paid as submitted by the Claimant and admitted by the Respondent.
2. It is true that during the period under review, the Claimant was underpaid as per the substantive legal notices in force.
3. I find that the Claimant is entitled to the underpayment as pleaded and I enter Judgment for the same at kshs.11,014.20/=.
4. The Claimant also claimed she worked overtime. No duty roster has been exhibited by the Claimant and neither was demand made for its production.
5. The Court is therefore unable to ascertain this fact and will disregard this prayer. This also goes with holiday pay and rest days.
6. I however find that the Claimant is entitled to payment of leave for 1 year = 9,490/=.
7. I also award Claimant compensation equivalent to a maximum 12 months' salary for unfair treatment and termination during illness = 12 x 9,490 = 113,880/=

TOTAL AWARDED = 134,384.20/=

Less statutory deduction

30. 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 6<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Oumo for Claimant – present

Korongongo for Respondent – Absent

Court Assistant – Fred

