



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 3 OF 2016

JESKA DEMESI MINYANDE.....1ST CLAIMANT/RESPONDENT

VERSUS

JANE WAITHIKA

T/A SIX WINGS BAR & RESTAURANT.....1ST RESPONDENT/APPLICANT

JUDGMENT

1. On 16/11/2020, the Court gave directions for this matter to proceed by way of Affidavit evidence with parties at liberty to cross-examine the deponents of the Affidavit evidence duly filed by both parties. The matter was subsequently mentioned on 10/2/2021 when M/s Athena appeared for the claimant and the Respondent did not attend Court.

2. The Court having considered affidavit of service dated 20/1/2021 filed by one Josiah Nyamu, the process server and Court clerk of the Advocate representing the claimant was satisfied that the respondent had been duly served with the notice to attend Court on 10/2/2021 but did not appear nor had the respondent complied with the Court directions given on 16/11/2020.

3. The Court directed the matter to proceed to judgment in default of the respondent.

4. The suit was filed on 5/1/2016 in which the claimant prays for the following reliefs:-

(a) A declaration that the termination of employment of the claimant was unfair and unjust.

and

(b) The respondent be ordered to pay terminal benefits as set out in paragraph 6 of the Statement of Claim and compensation for the unfair termination.

(c) Any other relief the Court may deem fit and just to grant.

5. The claimant in her affidavit evidence deposed that she was employed on 20/1/2014 as a cleaner by the respondent at Ngong Road Branch, Nairobi. That she was not given any written contract.

6. That the claimant started working on 3/7/2014, when the respondent opened the branch for business.

7. That the claimant worked daily for 7 days a week including Sundays and public holidays.

8. That the claimant worked for one year and four months and that in early 2015, the management of the Respondent changed from one Jane Waithaka to Lucy Waithaka and thereafter the Respondent stopped paying the claimant his monthly salary for the month of August, up to November, 2015.

9. That the claimant asked the management to pay her salary but instead her employment was terminated.

10. That the claimant reported the dispute to the Labour officer who wrote a letter to the Respondent on 23/11/2015 giving the Respondent 7

days to respond to the issue of termination. The letter was produced and marked "JD1".

11. The respondent was asked to attend a conciliation meeting by a letter dated 1/12/2015 produced and marked "JD2". The Respondent did not respond to the letter.

12. The claimant through her advocate wrote a letter of demand dated 8/12/2015 produced and marked "JdM3."

13. The claimant denies that she was a casual employee as alleged by the respondent in its statement of defence.

14. The respondent further claims that the premises was shut down, but the claimant states that, the respondent ought to have followed fair termination procedure despite the closure of the Branch and in particular Section 40 of Employment Act, on retrenchment for operational reasons.

15. The claimant prays for payment of-

(a) Salary arrears for the month of August, September, October and November, 2015 in the sum of Kshs. 30,400.

(b) One-month salary in lieu of notice in the sum of Kshs.5,71,600.

(c) Unpaid leave days in the sum of Kshs. 6,138.51

(d) Service pay in the sum of Kshs. 4,384.65.

(e) House allowance in the sum of Kshs. 34,155.

(f) Public holidays worked in the sum of Kshs. 10,542.

(g) Overtime worked in the sum of Kshs. 190,905.00

16. The claims set out above in the Affidavit evidence and in the statement of claim have not been contradicted by the respondent who failed to file evidence in rebuttal and/or attend Court to cross-examine the claimant.

17. The claimant has discharged the burden of prove placed on him in terms of Section 107 and 108 of the Evidence Act Cap 80, Laws of Kenya by proving on a balance of probabilities that she worked for the respondent for a period of one year and four months and was not paid salary for the months of August, September, October and November, 2015 in the sum of Kshs. 30,400. That she earned Kshs. 7,600 per month as a cleaner and was not paid house allowance for the entire period At15% of the basic salary. That she did not go on leave and was not paid in lieu thereof. That she worked 7 days a week, including public holidays and was not paid double pay and overtime.

18. The Court finds that the claimant has proved all the aforesaid claims on a balance of probabilities and directs the respondent to pay the claimant all the items set out in her testimony and statement of claim.

Unfair termination

19. The claimant did not dispute the fact that the respondent closed its Ngong Road Branch due to financial difficulties but noted that the respondent ought to have followed the legal provisions for retrenchment in terminating her employment.

20. Considering the circumstances of this case and that the claim is undefended, the Court finds that the terminal benefits payable herein are sufficient to mitigate the unfair procedure followed by the respondent in terminating the employment of the claimant.

21. The Court does not therefore order any compensation for the unprocedural termination of the employment of the claimant who had worked for a period of one year and four months.

22. In the final analysis judgment is entered in favour of the claimant against the Respondent as follows:-

(a) Salary arrears – Kshs.30,000

(b) One month notice – Kshs.7,600

(c) Unpaid leave days – Kshs. 6,138.51

(d) Unpaid Service pay – Kshs.4,3846,

(e) Unpaid house allowance – Kshs. 34,155.

(f) Unpaid public holiday – Kshs.10,542.00

(g) Unpaid overtime – Kshs. 190,905.

Total terminal benefits – Kshs. 253,725.16.

(h) The award is payable with interest from date of judgment till payment in full.

(i) Costs to follow the event.

Dated and delivered at Nairobi this 20th day of May, 2021.

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

M/s Athena for claimants

Ondieka Orangi & Co. Advocates for the Respondent.

Ekale – Court Assistant