



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1137 OF 2015

[Consolidated with Cause Nos. 1918 & 1919 of 2015]

BETWEEN

- 1. RUTH MWIKALI MUIA**
- 2. JONATHAN MUSYOKA KYUMA**
- 3. NICHOLAS ONDIEKI MOSE.....CLAIMANTS**

VERSUS

- 1. JAM HOTELS LIMITED**
- 2. JAM RESCUE RESTARANT LIMITED.....RESPONDENT**

Rika J

Court Assistant: Emmanuel Kiprono

Namada & Company Advocates for the Claimants.

Anthony Gikaria & Company Advocates for the 1st Respondent.

JUDGMENT

- 1. 3 Claims shown above, were consolidated by consent, through an order recorded by the Court on 26th June 2019.
- 2. They were referred for mediation, but there was no settlement, and Parties reverted to Court for hearing.
- 3. When the consolidated files came up for hearing on 8th July 2021, only the 1st Claimant gave evidence. Her evidence was specific to her. She said nothing about the Co-Claimants. This is so with regard to her evidence- in-chief and cross-examination. There was nothing about the Co-Claimants.
- 4. Submissions filed after the hearing by the Parties, are confined to the 1st Claimant’s case. Nothing is said about the other 2 Claimants.
- 5. Parties confirmed filing and exchange of Submissions on 23rd September 2021. The common Advocates for the Claimants, said nothing about the other 2 Claimants.
- 6. *The Court finds there was no evidence adduced by, or on behalf of 2nd and 3rd Claimants, and declines their respective Claims against the Respondents, with no order on the costs.*

7. The 1st Claimant filed her Statement of Claim on 3rd July 2015. She states that she was employed by the Respondents in various capacities, from November 2008 to September 2014. She lastly worked as a cashier, earning a monthly salary of Kshs. 15,000.

8. She states, she fell ill in June 2014. She was granted a 12-day sick-off by the Respondent. At the time the days ended, her health had deteriorated, necessitating her to seek further medical attention at Kenyatta Hospital.

9. She was discharged on 1st September 2014. She went to her workplace to seek extension of her sick-off. The Manager, Julius Muturi extended her sick-off. In mid-September 2014, the Respondent placed her on half-salary. At the end of September 2014, she reported for duty and was advised that her services were no longer needed.

10. She holds that termination was unfair and unlawful. There was no letter to show cause; no hearing ever took place; no valid reason was given in justifying termination; due process was disregarded; and the decision to terminate her contract was extremely harsh.

11. She prays for Judgment against the Respondents for: -

a. 1-month salary in lieu of notice at Kshs. 15,000.

b. Half-salary for the month of August 2014 at Kshs. 7,500.

c. Annual leave for the years 2009, 2010, 2011, 2013, and 2014 at Kshs. 75,000.

d. 11 Public Holidays worked for 5 years at Kshs. 55,000.

e. Gratuity for 4 years when there was no contribution made to N.S.S.F at Kshs. 30,000.

f. 12 months' salary in compensation for unfair termination at Kshs. 180,000.

Total...Kshs. 378,000.

g. Declarations that termination was unfair, and that the 1st Claimant is entitled to terminal benefits and compensation.

h. Costs and interest.

12. The 1st Claimant filed an Amended Statement of Claim on 30th January 2019, which introduced the 2nd Respondent to the proceedings. It is explained that the business premises underwent renovations and the business changed its name to Jam Hotel Limited [paragraph 6 of the Amended Claim].

13. The 1st Respondent avers in its response that the 1st Claimant was never its Employee. The Certificate of Service issued to her indicates that she was an Employee of the 2nd Respondent. This is a separate legal entity from the 1st Respondent. The 1st Respondent therefore denies to have dismissed the 1st Claimant. It does not owe her any of the reliefs sought.

14. There is nothing on record filed by the 2nd Respondent.

15. The 1st Claimant testified and rested her case, on 8th July 2021. The 1st Respondent opted not to call any evidence, while the 2nd Respondent as observed above, filed nothing and did not likewise give evidence. Judgment was reserved for 18th November 2021 but is ready for delivery on the date shown at the end of Judgment, and Parties notified accordingly.

16. The 1st Claimant told the Court that she was employed in November 2008. She performed various roles including housekeeper, receptionist, office-cashier and bartender. The business changed its name in 2014. There were 2 Parties owning the business initially. 1 left and the business became Jam Hotels.

17. The 1st Claimant restated in her evidence, the contents of her Pleadings on illness, treatment at Kenyatta Hospital, and eventual release from duty by the Respondents. She was not issued or paid notice. She was not paid salary for days worked. She went on annual leave for 2013 only.

18. Cross-examined, she told the Court that she was employed by Jam Rescue. The business later changed to Jam Hotels. She exhibited a detailed Certificate of Service. She was in and out of hospital in 2014. Certificate of Service was backdated to 2nd May 2014. She left employment in August 2014. The business was one, regardless of change of name. It operated from the same premises. Jam Rescue became Jam Hotels.

19. The issues are: whether the Claimant was employed by the Respondents, or either of the Respondents; whether her contract was terminated unfairly; and whether she is entitled to the prayers sought.

The Court Finds: -

20. The Certificate of Service issued to the Claimant is in the name of Jam Rescue Restaurant Limited [not Restarant as repeatedly pleaded by the Claimant]. It is dated 2nd May 2014.

21. It indicates that the Claimant was employed by *this Organization from 2008*. Reference is to an Organization. The year of employment on the Certificate, is 2008 as stated by the Claimant.

22. It goes on to state that she was promoted to the position of bartender in 2012 and promoted as cashier/ controller, a position she held to *April 2014 when the Organization wound up*.

23. There is merit in 1st Claimant's explanation that the Respondents were essentially the same restaurant business, which employed her, between 2008 and 2014. They operated from the same premises. They were part of the same Business Organization, and are to be treated as such, rather than separate legal entities, as advanced by the 1st Respondent. There is no evidence that any of the legal entities was wound up.

24. It could also true that the business was halted for renovations, which is not the same thing as being wound-up.

25. During the period of renovations, the 1st Claimant fell ill. Between May and September 2014, she was not actively involved in the business. She testified that she was on and off duty. She says she took sick-off of 12 days. There is no evidence on record, that she obtained extension. She was away without the leave of the Respondents. The Respondents would have had valid reason to terminate the 1st Claimant's contract for unilateral extension of sick-off. But they indicate that they wound up their business, in the Certificate of Service, dated 2nd May 2014. The service period was November 2008 to 2nd May 2014 when the Respondents communicated closure of business. They may, as suggested by the 1st Claimant, have remained active, doing renovations, but did not in any event, issue the 1st Claimant a letter of termination. They ought, if they were winding up, terminated the Claimant's contract on redundancy.

26. *The Court would in the end accede to her prayer on gratuity of 4 years at Kshs. 30,000.*

27. There was no clear reason given to her in a letter of termination, indicating the reasons for termination. It is open to interpretation whether termination was on account of redundancy; whether there was otherwise no more work for the 1st Claimant; or whether she was considered too ill to go on working post-renovations. The reasons are subject to speculation. It was for the Respondents to formally communicate termination and supply the Claimant with valid reason.

28. The Respondents do not seem to have honoured their procedural and substantive obligations under the Employment Act, in terminating their relationship with the 1st Claimant.

29. She worked for 6 years. She had a clean record. She expected to be retained, and continue working after the Respondents renovated their business. She was paid nothing on termination. ***The Court grants her 6 months' salary in compensation for unfair termination at Kshs. 90,000.***

30. Considering that she extended her sick-off without the leave of the Respondents and was away for most days between May and September 2014, there is no justification in an award of notice pay.

31. The Respondents have not offered annual leave records, to discount the claim that the 1st Claimant did not go on leave for the years 2009, 2010, 2011 and 2013. The Court would allow her prayer for annual leave, based on a minimum of 21 days annually, at 21 days x 4 years = 84 days x [Kshs. 15,000/ 26 days] = Kshs. 48,461. Between November 2013 and May 2014, the Claimant would deserve pro- rata annual leave of 10.5 days, computed at Kshs. 6,057. ***In total, the prayer for leave pay is allowed at Kshs. 54,518.***

32. She did not work in August and September to earn salaries. Her formal period of service is shown in the Certificate of Service.

33. *Costs to the 1st Claimant.*

34. *Interest allowed at court rates from the date of Judgment till decree is satisfied in full.*

IN SUM, IT IS ORDERED: -

a. It is declared that termination of the 1st Claimant's contract was unfair and unlawful.

b. The Respondents shall pay to the Claimant jointly and severally, gratuity at Kshs. 30,000; compensation equivalent of 4 months' salary for unfair termination at Kshs. 90,000; and leave pay at Kshs. 54,518 – total Kshs. 174,518.

c. Costs to the 1st Claimant.

d. Interest granted at court rates, from the date of Judgment, till decree is satisfied in full.

e. The Claims by 2nd and 3rd Claimants are declined with no order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF

HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 15TH DAY OF OCTOBER 2021.

James Rika

Judge