



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO.2118 OF 2015**

**HELLEN NZILANI KAVITA .....CLAIMANT**

**VERSUS**

**PAUL MOIPEI.....1<sup>ST</sup> RESPONDENT**

**CALIFORNIA BAR & BUTCHERY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By statement of claim dated 6<sup>th</sup> November 2015 the Claimant sought the following reliefs:-

- a. Kshs 1,385,800/- comprising of particulars under paragraph 12 being 3 months' salary in lieu of notice, 1 month's salary each year worked, accumulated leave days, overtime, NSSF contributions, house allowance, damages for unlawful termination for 12 month's salary.**
- b. Damages for unlawful dismissal equivalent to twelve (12) months salary together with the contributions already made to the pension scheme.**
- c. Contributions deducted from her salary towards N.H.I.F.**
- d. A Certificate of service**
- e. Costs of the cause plus interest.**

2. The Claimant filed together with the claim dated 6<sup>th</sup> November 2015, Claimant's list of documents dated 6<sup>th</sup> November 2015 and produced Claimant's Staff ID card and demand letter dated 3<sup>rd</sup> August 2015 by Ngugi, Mwaniki & Company Advocates, Claimant's list of witnesses and witness statement both dated 6<sup>th</sup> November 2015 and list of issues dated 10<sup>th</sup> February 2020.

3. The Respondent entered appearance through the firm of Nyokabi Waiganjo, Omung'ala Advocates and filed defence to the claim dated 26<sup>th</sup> January 2016. The 1<sup>st</sup> Respondent filed witness statement of Paul Mopel dated 3<sup>rd</sup> December 2020 and list of issues dated 3<sup>rd</sup> December 2020.

4. The case was heard inter partes on the 9<sup>th</sup> August 2021 with the Claimant and 1<sup>st</sup> Respondent each testifying on oath.

5. The parties agreed to file written submissions and the court directed on the filing. Both parties did not file written submissions.

**THE CLAIMANT'S CASE**

6. The Claimant Hellen Nzilani Kavita duly sworn in as a witness told the court she had been employed as cashier at the Respondent's Bar and Restaurant in 2010 upto 1<sup>st</sup> July 2015. The Claimant told the court that she worked 8 am to 11 pm and was paid salary per month. That she used to be paid in cash monthly and would sign on payment and was not given any document on payment. She said that the book on payment was kept by a person called John who was the manager and that there was not signing on reporting and leaving work.

7. The Claimant told the court she was stopped from working for refusal to sign contract for 3 months and that she refused because on employment she had no contract. The Claimant told the court that she was deducted NSSF and NHIF. That she was not paid dues on

termination and that her termination was not legal. The Claimant produced the documents attached to her claim as evidence. The said documents being staff ID issued on the 14<sup>th</sup> March 2014 and demand letter dated 3<sup>rd</sup> August 2015. She prayed for dues for years worked.

8. During cross examination the Claimant told the court she did not sign a contract with the employer. That she received her last month's salary for June 2015. She did not get a letter to terminate her job but received a call from the manager. That they were stopped from employment the three of them and gave names of Judy Wamaitha, Mwanzi and Kasyoka. That she did not know if they came to court and further she did not mention the said persons in her statement. That she was issued with staff card in 2015 and has produced the card dated 14<sup>th</sup> March 2014 which has her signature and was issued with the card while in employment by manager called Jared Mwangi. The Claimant told the court that she signed the statement filed in court.

9. The Claimant told the court that she was paid salary in cash and signed the master roll kept by the manager called John. That there were 3 managers. John is not in court. The Claimant told the court that she had been asked to sign a contract of employment for 3 months so that she can continue with work. She said she had given the contract to the advocate but the same was not before the court.

10. The Claimant told the court that she was reporting at 8.00am and leaving at 11.00pm. That she was a cashier at the Bar. The Bar operated 24 hours as it was a restaurant. That she had never asked for leave. That she has not complained to the management. That she would ask for off to attend to personal matters. That she worked for 2 days per week and took a rest. That she used to work 15 days in a month including Sundays. That she did not decide to stop work.

11. The Claimant told the court that she did not stop work. That she was called while on off and told not to come to work for refusing to sign contract. That she did not know whether she was replaced.

12. In re-examination the Claimant told the court she used to work 2 days per week and rest on shift basis. That she did not have any former employees in court and did not know whether they are still at work with the Respondent.

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

14. The Respondent call one witness Paul Mopel who testified on oath. The witness told the court that he was the owner of the Respondent. He adopted as his evidence in examination in chief his statement dated 3<sup>rd</sup> December 2020.

14. The witness told the court that he knew the Claimant as his employee since 2010 and that she had left in 2016. That when the Claimant left work he tried to follow up on her absence through his manager and that he tried to call her but could not reach her. That the Claimant was a cashier at his Bar and he thought she got another job. He said that the Bar was opened at 5pm due to alcohol rules and closed at 11pm. That the Claimant reported to duty at 5 pm and worked from Monday to Saturday. That the Respondent closed on Sundays. The counter person worked for 2 days on shift basis. That he had many employees and only 2 at the counter.

15. The witness told the court that the business was in 2016 demolished resulting to a loss of approximately Kshs. 4 million. That it was true he deducted NSSF and NHIF which he remitted and paid for the employees. RW1 stated that he had never received a complaint from the Claimant.

16. During cross examination the witness told the court that there was a book for signing by employees on coming to work but he had not produced the book. That he had called the Claimant when she failed to turn up at work. That he did not terminate the claimant's employment. That he did not have letters stating he looked for the claimant. That he paid the Claimant end of the month on cash basis. There was NSSF and NHIF deductions and payments.

17. The witness told the court that he lost all documents during the demolition. The NSSF and NHIF records are government records and are available to who whether payment was done. He said that he had managers called John and Mwangi. That they have recorded evidence that the Claimant absconded duty. That he used to give leave but has no record. The case was filed in 2015 and business demolished in 2016 hence had opportunity to produce documents. That he did not state that his business burnt in the statement.

18. In re-examination the witness told the court that he did not write to the Claimant on absconding. The witness told the court that he called the Claimant after her absence to reach her. That his business house was demolished and he lost all the documents.

### **Legal analysis and findings**

19. The parties filed separate issues for determination. The Claimant list of issues dated 10<sup>th</sup> February 2020 and the Respondent list of issues dated 3<sup>rd</sup> December 2020.

20. The court having heard the parties and considered the evidence for both parties and the list of issues by the two parties came to the considered position that the issues before the court for determination were-

**a. Whether the Claimant was unlawfully dismissed from employment by the Respondent**

**b. Whether the Claimant entitled to the reliefs sought**

21. The Court addressed the issues as follows: -

## Whether the Claimant was unlawfully dismissed from employment by the Respondent

22. The Claimant told the court that on 1<sup>st</sup> July, 2015 she was stopped from working for refusal to sign contract for 3 months and that she refused because on employment she had no contract. The Claimant told the court that she did not stop work. That she was called while on off and told not to come to work for refusing to sign contract. That she did not know whether she was replaced. During cross examination the Claimant told the court that she did not get a letter to terminate her job but received a call from the manager. That they were stopped from employment the three of them and gave names of Judy Wamaitha, Mwanzi and Kasyoka. That she did not know if they came to court and further she did not mention the said persons in her statement. The 1<sup>st</sup> Respondent, owner of the business denied terminating the Claimant's employment. He told the court that he did not write to the Claimant on absconding. That he called the Claimant after her absence to reach her after failing to turn up for her shift as the bar counter cashier. In his statement adopted at the hearing as evidence for the Respondent, the witness told the court that the Respondent could not have issued a recommendation letter if they had terminated the Claimant's employment. In paragraph 7 of the Claim the Claimant stated she was issued with a recommendation letter.

A witness would have been helpful to support the Claimant's allegations that she was terminated for failing to sign the contract. The alleged contract which she told the court was with her lawyer was not produced. At trial she mentioned other employees who were affected but that information is not in her written statement. The court on weighing the evidence by both parties finds that the Claimant was not terminated from work but failed to turn up for work after her off day. The court finds that there no unlawful dismissal of the Claimant by the Respondent.

### 23. Is the Claimant entitled to the relief sought?

**24. The Claimant sought Kshs 1,385,800/- comprising of particulars under paragraph 12 being 3 months' salary in lieu of notice, 1 month's salary each year worked, accumulated leave days, overtime, NSSF contributions, house allowance, damages for unlawful termination for 12 month's salary.**

25. Section 8, 9 and 10 of the Employment Act, 2007 creates a legal duty upon the employer to issue the employee with a written contract of employment within two months of employment where such employment commences orally and the employee is retained continuously undertaking the same duties. Where the employer fails in this duty, by operation of section 37 of the Act, the employee employed on causal/oral terms becomes protected and enjoys the terms under the law. The **Court of Appeal in the case of Nanyuki Water & Sewage Company Limited versus Benson Mwititi Ntiritu & 4 others [2018] eKLR** as Cited by Justice M.Mbaru in **Caroline Nyakerario v SEO & Son Limited [2019] eKLR** held as follows; ... '*Section 37 of the Employment Act, 2007 applies to the employment of the Respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies. The Respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.*'

26. The Claimant had oral contract and served from 2010 to 1<sup>st</sup> July 2015 thus enjoyed rights of employee on contract of service despite not having been issued with a written contract of service. The court already found there was no unlawful dismissal nor was there termination of employment hence no issue of notice pay or compensatory damages arise. The court then looks at the question of terminal dues:-

**a. On housing allowance**, the Respondent in statement of Paul Mopel states there was no house allowance payable. Section 31 of the Employment Act provides that payment of housing allowance is a right. The Claimant worked for 5 years and 6 months. She said she was terminated on 1<sup>st</sup> July 2015. The Claimant told the court she earned Kshs. 7000 paid monthly. The Respondent did not provide the record of employment hence the Claimant position on period of employment is upheld. The Claimant was entitled to house allowance as follows  $15/100 \times 7000 =$  Kshs. 1050 per month. In total the Claimant was in service for 5 years, 6 months totaling 66 months. Thus  $66 \times 1050 =$  (69,300). The total award for housing allowance Kshs. 69,300/-

**b. Claimant asked for NSSF and NHIF contributions refund.** Section 35 6(d) recognizes NSSF as a social security. Service pay is not payable where there is NSSF deductions under section 35(6)(d). The Claimant stated that she was deducted NSSF and NHIF and sought refund of the NSSF contribution of Kshs.400 per month for the period worked. The Respondent admitted the Claimant was deducted NSSF and NHIF and that those are government records. NSSF is a statutory body. Even if no remittances had been made by the Respondent, the Claimant would still not be entitled to a refund of the same as both NSSF and NHIF have statutory and administrative structures to collect the same from defaulting employers, backed up by powers to prosecute and charge penalties for late payment. The Court cannot order refund by the Respondent of deducted statutory dues. The Claimant has a remedy against the Respondent from the administrator of NSSF and NHIF. Service pay is not payable as she was on NSSF. The claim fails for that reason.

**c. On overtime** - The Claimant told the court that she was reporting at 8.00am and leaving at 11.00pm. That she was a cashier at the Bar. The Bar operated 24 hours as it was a restaurant. That she had never asked for leave. That she has not complained to the management. That she would ask for off to attend to personal matters. That she worked for 2 days per week and took a rest. That she used to work 15 days in a month including Sundays. That she did not decide to stop work. The 1<sup>st</sup> Respondent told the court the alcohol law was for bars to open at 5pm and close at 11pm and they did not open on Sundays. The Claimant admitted she worked for 2 days in a week on shift basis. She was a bar cashier and must have operated in compliance with alcoholic regulations. The 1<sup>st</sup> Respondent said they opened 5.00 pm to 11.00 pm. It is considered finding of the court, weighing the evidence of both parties that the overtime claim is not justified.

**d. Claim for accrued leave**— On accrued leave, under Section 28 of the Employment Act the Claimant was entitled to 21 days of leave for every year worked. The Claimant told the court that she did not go on leave. The Respondent told the court his managers used to give leave but he had no record produced. On balance of probabilities the court finds without employment record the Respondent failed to rebut the claim of accrued leave. The statutorily leave days under section 28 of the Employment Act is 21 days

per year. **Unpaid accrued leave for period of 21 days of every year worked being period of 5 years, 6 months. Thus 5 (years) x 21/30 x 7000 ( Kshs. 24,500/) + 6/12 (months) x 21/30 x 7000(Kshs 2450) = 26,950.**

The Claimant is entitled to annual leave pay of kshs.**26,950/-**.

e. Issuance of certificate of service under section 51 of the Employment Act.

**CONCLUSION AND DISPOSITION**

27. I have found that the employment of the Claimant was not terminated by the Respondent hence no wrongful dismissal or termination of employment by the Respondent. I found the Claimant just left work while on off day and never reported back. I also found that the Claimant was entitled to terminal dues of unpaid housing allowance, accrued leave and certificate of service. I have dismissed all other claims. Consequently I enter judgment for the Claimant against the Respondent in the following terms:-

**a. Unpaid accrued leave for period of 21 days of every year worked being period of 5 years, 6 months. Thus 5(years) x 21/30 x 7000= (24500) + 6/12(months) x 21/30 x 7000(2450) totals = Kshs.26,950/-. The Respondent to pay the Claimant Kshs. 26,950/- as accrued annual leave.**

**b. Unpaid Housing allowance- the housing allowance is 15% of gross monthly salary of 7000 being Kshs. 1050/- housing allowance per month. In total the Claimant was in service for 5years, 6 months totaling 66 months. Thus 66x1050(69,300) total award for housing allowance Kshs. 69,300/-. The Respondent to pay the Claimant Kshs. 69,300/- as unpaid housing allowance.**

**(Award amount in (a) and (b) above subject to statutory deductions.)**

**c. I award the Claimant interest on the award sum above at court rates from the date hereof until payment in full.**

**d. Issuance of certificate of service under section 51 of the Employment Act.**

**e. Costs of this suit shall be borne by the Respondents jointly and severally.**

**Written and Dated the 18<sup>th</sup> November 2021 at BUNGOMA**

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**J.W. KELI**

**JUDGE**

**DELIVERED AND DATED THIS 18<sup>TH</sup> NOVEMBER 2021 AT NAIROBI**

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**JUDGE**

In the presence of: No appearance for parties.