



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 145 OF 2018

TERESIA MUTHONI MWANGI.....CLAIMANT

VERSUS

ERNEST MUIBU KIARIE T/A AVENUE SUITS HOTEL.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Memorandum of Claim on 14<sup>th</sup>, May, 2018 contending that he had been unfairly terminated by the Respondent. The Claimant prays for the following remedies: -

- a. One month wages in lieu of notice.
- b. Underpayments
- c. Public holidays
- d. Leave
- e. Gratuity
- f. Salary for 7 days worked in march, 2018
- g. Compensation for the unfair termination under section 49(1)(c) of the employment Act
- h. Costs of suit to be borne by the Respondent.

2. The Respondent entered appearance and filed a response to claim on the 1<sup>st</sup> October, 2018 conceding to employing the claimant on 1<sup>st</sup> November, 2007 but denied ever dismissing her from employment rather that the Claimant absconded duty on the 7<sup>th</sup> March, 2018 never to be heard.

#### **Claimant's Case**

3. The claimant avers that he was employed by the Respondent on the 1<sup>st</sup> November, 2007 as a room steward at a salary of Kshs. 4,500, which money was increased to Kshs. 5,500 from May,2010, Kshs 6,000 from November, 2013 and Finally her salary increased to Kshs.7500 from February, 2018 and then she was moved to attend to the Respondent as a receptionist commencing 9<sup>th</sup> March, 2018 till her dismissal.

4. The claimant contends that she was underpaid contrary to the prescribed minimum wages orders in use in the various years.

5. She avers that she worked on all public holidays neither was she compensated. With regard to annual leave, the claimant avers that she took her leave for 2011,2012,2013 and 2017 however that her leave for 2008,2009,2010,2014,2015 and 2016 was not taken nor paid for.

6. The claimant avers that on 21<sup>st</sup> February, 2018 she was served with a letter titled; "serious misconduct on theft" which required her to give an explanation of an alleged fraud that the claimant attempted to pocket Kshs. 1600 that was obtained from payment of a hotel room by a

client.

7. In response to the letter the Claimant wrote a letter dated 23<sup>rd</sup> February, 2018 requesting to view the CCTV Footage and to be heard on the allegation of fraud thereof. Instead of subjecting the claimant to any hearing she was deployed to the Respondent's sister company, Carnation Hotel by a letter of 7<sup>th</sup> March, 2018.

8. The Claimant avers that upon reporting on her new station she was directed to first meet with the Respondent's manager one Doris waithera and obtain official communication for the transfer who in turn informed her verbally on the 9<sup>th</sup> March, 2018 that she had been dismissed and ordered her out of the premises.

9. It is her case that the Respondent failed to make contribution towards her NSSF, therefore she prayed to be awarded gratuity for the 10 years worked.

10. The Claimant testified that when she reported to carnation hotel she was turned back because the Respondent had not alerted them neither did she have evidence of the deployment.

#### **Respondents case.**

11. The Respondent avers that the claimant utilized all her leave days, never worked in any holidays as alleged and that she was never underpaid as alleged.

12. It is stated that the claimant handled herself in a way that was unbecoming of an employee leading to the issuance of the letter of 21<sup>st</sup> February, 2018 which never elicited any response. Nevertheless, that the Respondent instead of punishing the claimant transferred her to Carnation Hotel but the claimant failed to report to the said hotel.

13. The Respondent then alleged that the claimant left employment on 7<sup>th</sup> March, 2018 when she had been directed to report to Carnation but instead absconded duty and never was she seen from that date.

14. The Respondent maintains that it never terminated the services of the claimant and that the claimant left on her volition.

15. Doris Waithera, RW-1, who is the manager of the Respondent testified that the claimant failed to respond to the letter of misconduct dated 21<sup>st</sup> February, 2018 and the Respondent's director resolved to transfer the claimant to carnation Hotel however that she did not report in her new station.

16. RW-1 further testified that the claimant absconded duty and the matter was reported to the labour office and in February, 2020 the claimant was paid Kshs. 55,000/-as her final settlement of this suit which was paid to her former Advocates.

17. On-cross examination she conceded that the payment was made on 4<sup>th</sup> February, 2020 after the filing of this suit and that there is no consent recorded for the payment of the said sum.

18. She testified further that CCTV footage was shown to the claimant on the alleged fraud however there was no disciplinary hearing concerning the issue.

19. She finally affirmed that there was no communication to Carnation Hotel that the Claimant was being transferred to their establishment, however that the Hotels are one and the same.

#### **Claimants Submissions.**

20. It was submitted for the claimant that, the claimant was underpaid as the wages paid were not commensurate to the work done. He argued that the claim for underpayment was not challenged by the Respondent and the same ought to be allowed as prayed.

21. With regard to public holidays worked and not paid for, the claimant submitted that no evidence was adduced by the Respondent to contravene the claimant's pleadings.

22. The Claimant argued that as much as she took her leave, the Respondent could deduct the 21 days taken for leave from her salary, Therefore, the Respondent ought to be compelled to pay the claimant for leave days for the 10 years.

23. The claimant also argued that the Respondent failed to remit her NSSF contribution therefore she ought to be paid Gratuity.

24. It was further submitted that the claimant was not issued with any termination notice as provided for under section 35(1)(c) and 36 of the Employment Act, neither was she subjected to any disciplinary process as envisaged under section 41 of the Employment Act therefore the termination was unfair according to section 45 of the Employment Act and she thus prayed to be compensated for the unfair termination as prayed in the claim.

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

25. The Respondent on the hand submitted that they never terminated the service of the claimant rather that the Claimant deserted and or absconded duty. It was argued that when an employee deserted work the Employer is tasked with demonstrating steps taken to trace the employee. In this case it was argued that the Respondent management called the claimant severally however that her phone went unanswered. They then argued that they have discharged their duty and therefore should not be blamed for the claimant's failure to report to duty. In this they cited the case of **Simon Mbithi Mbane V Inter Security Services Limited [2018] eKLR** and the case of **Joseph Nzioka V Smart Coatings Limited [2017] eKLR**.

26. It is argued that the Respondent was lenient on the Claimant who had committed acts of misconduct and instead of subjecting her to disciplinary process with an end result that might be dismissal the Respondent opted to transfer her to another of their establishments.

27. The Respondent then submitted that the claimant was never terminated and its clear from record that she absconded duty and therefore prayed that the claim be dismissed with costs.

28. I have examined all the evidence and submissions of the parties herein. The claimant contends that she was dismissed by the respondents verbally.

29. The respondents on the other hand aver that the claimant absconded duty never to be heard of again.

30. The claimants contends that she was served with a show cause letter dated 21/2/2018 alleging fraud. The claimant was expected to respond within 24 hours.

31. On 23<sup>rd</sup> February 2018, the claimant responded to the show cause letter denying the allegation and requesting for an opportunity to defend herself. There was no further response on this.

32. On 7/3/2018, the claimant was transferred to Carnation Hotel, the respondents Suites hotel after terminating her services as a receptionist at Avenue Suites Hotel with effect from 8/3/2018. She was now to be Head of Housekeeping at Carnation Hotel and was expected there on Friday 9/3/2018.

33. As concerns the relationship between the claimant and respondent – T/A Avenue suites, it is evident from the letter of 7/3/2018, that the services were terminated and despite the reason given, the claimant was never subjected to any disciplinary hearing. The validity of the reason for the dismissal was never established.

34. It is therefore my finding that the claimant's termination was unfair and unjustified 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”.**

35. In terms of remedies, the claimant sought for damages for the unfair termination which I find established and I award him 10 month's salary as compensation.

36. I also award the claimant 1 month salary in lieu of notice.

37. The claimant was employed at the respondent's hotel as a receptionist. As per the wages order legal notice of 16/5/2017 salary for a receptionist was 18,201.95/= in all municipalities and former town councils where Nakuru falls.

38. In legal notice of 20/5/2015, salary for a receptionist was 15,425.40 in Nakuru.

39. As per the legal notice of 2013 a general labourer's monthly pay in Nakuru was 9,024.15/= per month.

40. In 2012, the minimum wage for a general labourer was 7,915.90. It is therefore evident that the claimant was underpaid.

41. The rightful salary for the claimant in 2018 was to be as per the 2017 legal notice which put salary of a receptionist 18,201.95 and therefore the above award translates as follows;

1. Damages for unfair termination

= 10 x 18,201.95

= 182,002/=

2. 1 month salary in lieu of notice = 18,202/=

3. Underpayment of wages for 3 years preceding her termination, the rest of the years being time barred as pleaded

= 1<sup>st</sup> May 2015 to 30<sup>th</sup> April 2017 = 281,740/=

1<sup>st</sup> May 2017 to 31<sup>st</sup> January, 2018

= 134,390.25/=

February 2018 = 13,432.25

**TOTAL underpayments = 429,562/=**

4. Leave pay for 2018 = 18,202/= There being no indication that she applied for leave for the other years which was denied

5. Service pay for 10 years

= 15 days salary for each year worked

=  $\frac{1}{2}$  x 18,202 x 10 = 91,010/=

**GRAND TOTAL = 575,178/=**

Less statutory deductions

6. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

**DATED AND DELIVERED IN OPEN COURT THIS 7<sup>TH</sup> DAY OF DECEMBER, 2021**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ms. Towet holding brief for Mwangi for Claimant – present

Awuor for Respondent – present

Court Assistant - Fred