



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1688 OF 2015**

**PETRONILLA KATUNGE MUENDO .....CLAIMANT**

**-VERSUS-**

**DOMINIC KINYA NGABA T/A PINNACLE PUB.....RESPONDENT**

**JUDGMENT**

1. The claimant brought this suit on 23.9.2015 alleging that she was unfairly dismissed from employment by the respondent on 5.9.2014 and prayed for the following reliefs:

- a. Declaration that termination of her employment was unfair and unlawful.
- b. Kshs. 2,001,582
- c. Certificate of service
- d. Costs and interest at court rates

2. The respondent admitted that the claimant was his employee but denied that she was unfairly dismissed. He specifically denied knowledge of the alleged unfair dismissal of the claimant and put her to strict proof. He further denied the claim for Kshs. 2,001,582 and prayed for the suit to be dismissed with costs.

3. Both parties tendered evidence but thereafter only the claimant filed written submissions.

**Claimants case**

4. The claimants testified as CW1 and she stated that she joined the respondents on 1.2.2011 as a Bar Attendant and was given an appointment letter dated 9.4.2011. Her salary was Kshs. 6000 per month and no house allowance was paid on top. Her duties included stocktaking, banking and arranging workers. She used to report to work at 7.30 a.m. and leave at 11 p.m. but if there were customers she used to work upto 3 a.m. She was not deducted any NSSF or pension contributions from her salary.

5. She further testified that on 5.9.2014, the respondent's wife Sarah Wanjiku Kinya dismissed her from work without citing any reasons or according her any hearing or serving her with any prior notice. She was also not paid her terminal benefits after the dismissal except salary for the days worked.

6. As a result she instructed her lawyer to serve a demand letter but the respondent never responded to the same. She therefore prayed for the reliefs sought including a certificate of service.

7. In cross-examination, she admitted that she was employed by the respondent but maintained that she was dismissed by his wife Sarah Wanjiku Kinya. She contended that she could not refuse dismissal by her employer's wife. She contended that the salary of Kshs. 6000 was below the minimum wage under the law. She further contended that she always applied for annual leave but the employer declined citing pressure of work. She also contended that her verbal requests for over time pay was always rejected.

**Defence case**

8. The respondent testified as RW1. He stated that he employed the claimant from April 2011 as a Bar Waitress till September 2014 for a

monthly salary of Kshs. 6000 and provided her with a house for Kshs. 3000 monthly rent. He admitted that the said salary was below the minimum salary under the law by Kshs. 1269 as per the 2011 Wage Order.

9. He, however contended that the claimant was working for 6 hours from 5 p.m. to 11 p.m. daily in accordance with the law. He contended that under the law a bar can only be opened for those 6 hours and denied any possibility of the claimant working extra hours.

10. He further testified that the claimant used to go for her annual leave in alternate with her co-workers. He contended that the workers used to divide their annual leave into portions of 5 days and take them at a time.

11. RW1 further testified that early September 2014, the claimant absconded duty without any reason and failed to take his calls. Thereafter the business collapsed. He denied ever dismissing the claimant and contended that he enjoyed a cordial relationship with the claimant. He further contended that he was not made aware that she was dismissed by another person and stated that he was the owner of the business and the only manager thereof. He therefore denied the alleged unfair termination and contended that the claimants deserted her employment and failed to go for her certificate of service.

12. In cross-examination RW1 admitted that he never indicated in the appointment letter that he was to provide a rented house for the claimants worth Kshs. 3000. He however contended that she used to pay the rent and keep the receipts.

13. He admitted that there are times the claimant used to go out earlier than 5 p.m. when supplier went to deliver stock. He admitted that the claimant was in charge of the business and other workers, she was selling, collecting money and banking the same. He further admitted that he never paid the claimant any money after she absconded and he also never gave her a certificate of service.

14. He maintained that he never dismissed the claimant and refused to pay her dues. Finally he contended that he never received any demand letter from the claimant.

#### **Issues for determination**

15. There is no dispute that the claimant was employed by the respondent as a Bar Attendant vide the appointment letter dated 9.4.2011. There is also no dispute that the claimant worked as such until September 2014. The issues for determination are:

- a. Whether the claimant deserted work or she was unfairly dismissed.
- b. Whether she is entitled to the reliefs sought.

#### **Desertion or unfair dismissal**

16. RW1 alleged that the claimant absconded duty from early September 2014 without any reason and failed to pick his calls. He contended that he enjoyed cordial relationship with the claimant. However the claimant contended that she was dismissed by the respondent's wife Sarah Wanjiku Kinya on 5.9.2014. In her view, the employer's wife approached her in a manner she could not resist.

17. I have carefully considered the evidence and the submissions by the parties. The respondent did not deny that he has a wife by the name Sarah Wanjiku Kinya. He also did not deny that she went to the bar on the 5.9.2014. He also did not prove that he contacted the claimant by phone or at all after she was fired by his wife on 5.9.2014. He in fact never called his said wife or any other eye witness to rebut the allegations by the claimant. Consequently, I return that on a preponderance of evidence, the respondent has not proved that the claimant deserted her job.

18. On the other hand I must hold that the claimant has proved on a balance of probability that she was dismissed by the respondent's wife. Although RW1 alleged that he was the sole proprietor and manager of the business, He did not produce any documentary evidence to that effect.

19. It follows that, the business in issue was a family business and any reasonable employee in such undertaking cannot take the orders of any spouse for granted. She enjoyed the same status of employer in the family business as the husband.

20. The question that begs for answer is whether the dismissal was unfair. Under section 45(2) of the Employment Act, termination of employee's services is unfair if the employer fails to prove that it was ground on valid and fair reason, and that fair procedure was followed.

21. In this case the claimant contended that no reason was cited for her dismissal and no hearing or prior notice was accorded to her. RW1 never made any effort to prove a valid reason for dismissing the claimant or to show that a fair procedure followed. Consequently I return that the dismissal of the claimant on 5.9.2014 was unfair and unlawful within the meaning of section 45 of the Act.

#### **Reliefs**

22. In view of the foregoing I make declaration that the termination of the claimants' employment was unlawful and unfair as prayed.

23. In addition, under section 49 of the Employment Act, I grant one month salary in lieu of notice plus 3 months salary as compensation for unfair termination. In awarding the said compensation, I have considered that the claimant worked for 4 years without any warning and that she did not contribute to her dismissal through misconduct. The award is based on admitted salary of Kshs. 7269 plus house allowance of Ksh. 3000 totaling to Kshs. 10269.

24. The claim for leave for 14 years is dismissed for want of particulars and evidence. The claim for house allowance also lacks particulars on how it was arrived at and it is dismissed. The claims for overtime is also dismissed for lack of evidence especially in the face of un rebutted evidence by RW1 that the bar only operated for 6 hours daily starting at 5 p.m till 11 p.m.

25. The claim for under payment is granted to the extent that Rw1 admitted the sum of Kshs. 1269 per month under the 2011 Wage Order. The claimant never gave any other particulars of the underpayments in her pleadings or even submissions. I will therefore not aid her case by granting more than what she has pleaded and what has been admitted by the respondent being Kshs. 1269 per month. The claimant worked for 45 months which translates to Kshs. 1269 x 45 months equaling to Kshs. 57,105.

26. The claim for certificate of service is granted by dint of section 51 of the Employment Act. Finally, the claimant is granted service pay at the rate of 15 days pay per year for 4 years. Hence Kshs.  $10269 \times 15/26 \times 4 = 20538$

**Conclusion and disposition.**

27. I have found that the claimant was unfairly dismissed from service on 5.9.2014 and awarded compensatory damages and terminal dues. consequently I enter judgment for her as follows:-

**Notice .....Kshs. 10269**

**Compensation .....Kshs. 30807**

**Service pay.....Kshs. 20538**

**Salary underpayment .....Kshs. 57105**

**TOTAL .....Kshs. 118719**

The award is less statutory deductions but in addition to costs and interest at court rates from the date hereon.

**Dated,signed and delivered in open court at Nairobi this 24<sup>th</sup> day of January, 2020**

**ONESMUS MAKAU**

**JUDGE**