



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 284 OF 2015

MERCY WAIYEGO MWANGI.....CLAIMANT

v

JAMES MWANGI KINUTHIA t/a JOYLAND.....RESPONDENT

JUDGMENT

1. Mercy Waiyego Mwangi (Claimant) instituted legal proceedings against James Mwangi Kinuthia (Respondent) on 3 March 2015 alleging *wrongful and unfair termination* of employment.
2. According to an affidavit of service filed in Court on 2 April 2015, the Respondent's agent one Nicholas Mutiso was served with Summons on 10 March 2015, accepted but declined to acknowledge the service.
3. The Court was not satisfied with the service and on 2 June 2015, it directed that copies of the Summons and Memorandum of Claim be affixed on the door of the Respondents café.
4. An affidavit of service filed in Court on 15 June 2015 attested to service upon the Respondent who accepted but declined to acknowledge the service.
5. The Court was again not satisfied and on 23 July 2015 directed the Claimant to effect substituted service.
6. The Claimant filed an *Amended Memorandum of Claim* on 15 February 2016 and a year later, on 15 February 2017, Abuodha J directed that the Cause proceed to formal proof.
7. The hearing was conducted on 20 December 2018 when the Claimant testified and closed her case. She filed submissions on 15 January 2019.
8. The Claimant sought Kshs 1,180,367/- comprising salary in lieu of notice, house allowance, service pay, annual leave, underpayments and compensation for unfair termination of employment.
9. The Court will examine each head of claim presented by the Claimant while noting that the Respondent failed to issue a *contract of service* setting out the particulars as contemplated by sections 9, 10, 11 and 12 of the Employment Act, 2007.

Unfair termination of employment

10. The Claimant's testimony that she was dismissed after presenting a medical report advising that she be put on light duties due to her pregnancy was not rebutted.
11. The Claimant also testified that a Manager with the Respondent instructed her to leave work until further communication and that no such communication was forthcoming. The testimony remains unchallenged.
12. Section 35(1) of the Employment Act, 2007 envisages written notice of termination of employment whilst section 41 of the Act require a hearing.
13. There being no evidence that *written notice* was issued or that a hearing was held, the Court finds that the Claimant satisfied the burden imposed on her by section 47(5) of the Employment Act, 2007.

14. With that finding, it is inevitable that termination of the Claimant's employment by the Respondent was unfair.

15. Since the Claimant served the Respondent for about 5 years, the Court is of the view that the equivalent of 6 months wages as compensation would be fair (Court will use prescribed minimum wage at time of separation with 15% as house allowance – Kshs 12,147/-).

16. The Court further finds that the Claimant is entitled to 1 month pay in lieu of notice (Court will use prescribed minimum wage at time of dismissal of Kshs 10,563/-).

Underpayments

17. The Claimant testified that she was employed by the Respondent on 1 March 2009 as a waiter at a salary of Kshs 7,000/- per month which had increased to Kshs 8,000/- in 2010.

18. The Claimant pleaded that from May 2009 to April 2010 the prescribed minimum wage was Kshs 13,833/-; Kshs 15,216/- from May 2010 to April 2011; Kshs 17,118/- from May 2011 to April 2012; Kshs 19,360/- from May 2012 to April 2013 and Kshs 22,070/- from May 2013 onwards.

19. The Court has looked at the *Regulation of Wages (General)(Amendment) Orders*.

20. The prescribed minimum wage for a waiter in 2009 was Kshs 6,621/-; in 2010 it was Kshs 7283/-; in 2011 it was Kshs 8,193/- and in 2012 it was set at Kshs 10,563/-.

21. It is clear to the Court that the Claimant presented figures not backed up by the relevant *Regulation of Wages Orders*.

22. Further, considering that this head of claim is in the nature of special damages, the Court declines to find in favour of the Claimant.

Annual leave

23. The Claimant sought back leave backdated to over 5 years.

24. In the view of the Court, and in consideration of the circumscription of leave which can be carried forward to 18 months by section 28(4) of the Employment Act, 2007 (unless expressly agreed by the parties), the Court declines to make a finding for the Claimant.

25. The Court has considered this as another factor apart from length of service in assessing compensation.

House allowance

26. The Claimant sought Kshs 215,324/- on account of house allowance for the duration of the employment and the factor used was 15% of Kshs 22,070/- as the monthly salary.

27. The Claimant did not disclose the source of the Kshs 22,070/- factor.

28. The amount is in any case beyond the prescribed minimum wage for waiters at the relevant periods.

29. The relief is declined.

Conclusion and Orders

30. The Court finds and holds that the termination of the Claimant's employment was unfair and awards her

(a) Compensation	Kshs 72,884/-
(b) Salary in lieu of notice	Kshs 10,563/-
TOTAL	Kshs 83,447/-

31. Claimant was represented by Kituo Cha Sheria, a legal NGO. She is awarded costs of Kshs 25,000/-.

Delivered, dated and signed in Nairobi on this 15th day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Rhoda Maina instructed by Kituo Cha Sheria

Respondent did not participate

Court Assistant Lindsey