



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

**AT MOMBASA**

**CAUSE NO 695 OF 2015**

**CAROLINE KIREMA KANANU.....CLAIMANT**

**VERSUS**

**KARIBUNI RAFIKI BEACH RESORT.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Caroline Kirema Kananu, the Claimant in this case, worked for the Respondent in the position of Chef. She brought this claim following the termination of her employment on 20<sup>th</sup> March 2015.
2. The claim is contained in a Memorandum of Claim dated 1<sup>st</sup> September 2015 and filed in court on 8<sup>th</sup> September 2015. The Respondent filed a Response on 5<sup>th</sup> October 2015 to which the Claimant responded on 3<sup>rd</sup> August 2016. At the trial, the Claimant testified on her own behalf and the Respondent called its Director, Andrea Lange. The parties further filed written submissions.

**The Claimant’s Case**

3. The Claimant states that she was employed by the Respondent on 18<sup>th</sup> July 2011 at an initial monthly salary of Kshs. 18,000 which was later increased to Kshs. 20,000. She claims to have worked from 6.00 am until 8.00 pm, seven days a week including public holidays. She adds that she was not allowed to go on leave.
4. The Claimant pleads that on 20<sup>th</sup> March 2015, she lost her father and on 21<sup>st</sup> March 2015, she wrote to the Respondent asking for 10 days off to enable her join her family in Meru for burial arrangements. The Claimant’s request was not granted and she was required to continue working or to resign.
5. The Claimant left and returned after 10 days. She reported to work on 1<sup>st</sup> April 2015 but was verbally dismissed.
6. It is the Claimant’s case that her dismissal was unlawful and unfair. She now claims the following:
  - a) One month’s salary in lieu of notice.....Kshs. 20,000.00
  - b) Salary for March 2015.....20,000.00

c) Overtime.....	974,769.20
d) Off days.....	505,439.90
e) Public holidays.....	109,128.20
f) Leave pay for 3 years.....	42,000.00
g) Prorata leave for 8 months.....	93,33.80
h) 12 months' salary in compensation.....	240,000.00

## **The Respondent's Case**

7. In its Response dated 30<sup>th</sup> September 2015 and filed in court on 5<sup>th</sup> October 2015, the Respondent admits having employed the Claimant but denies terminating her employment. The Respondent states that it is the Claimant herself who terminated the employment verbally on 21<sup>st</sup> March 2015 and thereafter withdrew from the Respondent's premises.

8. The Respondent admits that on 20<sup>th</sup> March 2015, the Claimant reported that her father had passed away and on 21<sup>st</sup> March 2015, she asked for 10 days off. The Respondent was however willing to allow the Claimant only 6 days to attend the funeral of her late father.

9. Prior to the funeral, the Respondent required the Claimant to work for a few hours in the evening. According to the Respondent, this arrangement would give the Claimant time during the day to make arrangements for her father's funeral. The Respondent states that the Claimant became temperamental and decided to quit her job. She withdrew from the Respondent's premises and never reported to work again.

10. The Respondent avers that the Claimant is only entitled to salary for 20 days worked in the month of March 2015 net of Kshs. 5,000 being money advanced to her on 26<sup>th</sup> May 2014. The Respondent claims a right to set off against any award in favour of the Claimant, the sum of Kshs. 20,000 being one month's salary in lieu of notice.

11. The Respondent further states that portions of the claim are statute barred under the provisions of the Employment Act.

## **Findings and Determination**

12. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

## **Unlawful Termination?**

13. Following the death of her father, the Claimant asked for 10 days off from 21<sup>st</sup> March 2015, to travel to her home in Meru. She states that she was denied permission by the Respondent's Director, Andrea Lange who told her to resign. Lange told the Court that she told the Claimant that she would be allowed 6 days' off to attend the burial, whose date had not been set.

14. In the meantime, the Claimant was required to remain in Diani and continue working in the evenings even as she sought to fundraise for the funeral during the day. The Claimant testified that she was unable to continue working and therefore left on 21<sup>st</sup> March 2015 but upon coming back on 1<sup>st</sup> April 2015,

Lange dismissed her verbally. According to the Respondent, the Claimant left her employment without notice and was therefore replaced.

15. It is not in dispute that the Claimant's father passed away sometime in March 2015. It is also not in dispute that the Claimant's request to immediately travel to Meru was not granted; in fact, she was required to continue working.

16. The question is whether the Respondent acted reasonably in the circumstances of the case. I think not. It is not in doubt that the Claimant was adversely affected by the death of her father and to require her to continue working in that state was not only unreasonable but most uncaring.

17. Even assuming that the Claimant left her place of work and did not return, the Respondent was under a duty to reach out to her with a view to putting her on notice that her job was on the line, on account of desertion. It is not enough for an employer to simply state that an employee has deserted duty. This position has been consistently taken by this Court variously constituted (see James *Ashiemi Namayi v Menengai Oil Refineries [2016] eKLR* and *Dickson Matingi v Db Schenker Limited [2016] eKLR*)

18. The Court did not see any effort on the part of the Respondent towards reaching out to the Claimant and the defence of desertion of duty is therefore not available.

19. That said, the Court adopts the Claimant's account on the circumstances leading to her exit from the Respondent's employment. The resultant finding is that the Respondent terminated the Claimant's employment without justifiable cause and in violation of due procedure. The Claimant is therefore entitled to compensation.

## **Remedies**

20. Flowing from the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service accentuated by the Respondent's callous conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

21. The Claimant admitted receiving half of her salary for March 2015. She is therefore only entitled to the remaining half being Kshs. 10,000. The Claimant further admitted having taken leave in 2013 and 2014. The only claim she can legitimately lay on this account would be prorata leave for 2015. I say so because any pre 2013 claims would be statute barred by dint of Section 90 of the Employment Act.

22. The claims for overtime, off days and public holidays were not proved and are dismissed.

23. In similar fashion, the Respondent's claim for set off was not proved and is dismissed.

24. Finally, I enter judgment in favour of the Claimant as follows:

a) 10 months' salary in compensation.....	Kshs. 200,000
b) 1 month's salary in lieu of notice.....	20,000
c) Half salary for the month of March 2015.....	10,000
d) Prorata leave for 2015 (20,000/30x1.75x3).....	<u>3,500</u>
<b>Total.....</b>	<b>233,500</b>

25. This amount will attract interest at court rates from the date of judgment until payment in full.

26. The Claimant will have the costs of the case.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 21<sup>ST</sup> DAY OF MARCH 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Maragia for the Claimant

Ms. Oketch for the Respondent