



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.493 OF 2017**

**FLORENCE WAMBUI GITAU..... CLAIMANT**

**VERSUS**

**ECLIPSE INTERNATIONAL ..... RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent as a Waitress from April, 2014 earning ksh.7,500.00 per month. From June, 2017 the wage was increased to ksh.8,000.00 per month.

The claimant was not issued with a written contract or a payment statement.

Work hours were from 6pm to 6am as the respondent is a night club and was running 24 hours. This included public holidays when business sat the pick. Such was not compensated.

For the 4 years the claimant worked for the respondent, annual leave was not taken or paid in lieu thereof. There was no compliance with section 28 of the Employment Act.

The claimant took her maternity leave for two months but was not paid during such leave contrary to section 29 of the Employment Act.

On 10<sup>th</sup> November, 2017 the claimant was served with letter of suspension with various allegations and she replied on 15<sup>th</sup> November, 2017. The salary owing was deposited on 23<sup>rd</sup> November, 2017.

For the period on suspension the claimant was not paid and was on 1<sup>st</sup> December, 2017 informed by the Accountant Mr Isaac Limo that her employment had been terminated. This was without notice, hearing or valid reasons and amounted to unfair termination of employment.

The claims made are for the payment of the following;

- a) Notice pay ksh.14,2444.25;
- b) Underpayments ksh.169,320.25;
- c) Normal overtime ksh.212,612.60;
- d) Public holidays ksh.24,638.70;
- e) Leave ksh.35,551.80;
- f) Maternity leave ksh.28,488.50;
- g) Salary for 10 days in November, 2017 ksh.5,029.00;
- h) Half salary for 3 weeks on suspension ksh.5,280.54;
- i) Compensation.

The claimant testified that she was employed by the respondent as a Waitress on verbal terms and paid ksh.7,500.00 which was an

underpayment as the due wage was ksh.9,372.15. upon complaining the wage was increased by Ksh.500.00 but this was still an underpayment. The respondent runs a night club where the claimant as required to work from 6pm to 6am without payment for the overtime hours. The respondent kept a record of work hours and each employee was required to clock in and out.

The claimant also testified that she took maternity leave but was not paid.

The claimant was suspended over alleged indiscipline and after demanding for a wage increase. From 15<sup>th</sup> November, 2017 she was on half pay and when she reported back on 1<sup>st</sup> December, 2017 the accountant said her employment had been terminated.

The claimant also testified that I the year 2015 she was issue with warning letter for work place misconduct. Another warning was issued in the year 2017 over alleged indiscipline.

The claimant went on annual leave but was not paid. She took two months maternity leave and was not paid.

During the course of employment the claimant was made to pay for all breakages and shortages in her work. The respondent also paid for NSSF and NHIF.

#### Defence

The defence is made of denials save on without prejudice basis is that the claimant absconded duty when she was sent on 2 weeks suspension so as to show cause why disciplinary action should not be taken against her having been found culpable. Terminal dues were paid.

The claimant was employed as a Waitress on probation and would be required to serve is other departments from time to time and was required to serve as cashier as a suitable person was sourced. On 9<sup>th</sup> November, 2017 the claimant failed to show up at work and efforts to reach her were in vain. She was suspended and required to show cause why her employment should not be terminated.

The claimant's employment was full of minor incidents and for lack of diligence, attitude and petty pilfering and had monies missing and unaccounted for from sales and without proper explanation. Verbal and written warnings were issued without change on the part of the employee. Termination of employment was found appropriate following unethical conduct with regard to loss of cash sales, and irregular management of work. There was fair hearing and the claims made are not justified and a 30 days' notice was issued from 2<sup>nd</sup> January, 218 to 2<sup>nd</sup> February, 2018.

Isaac Limo testified that the claimant was employed on 20<sup>th</sup> February, 2013 as a waiter and at times would be assigned cashier duties. The claimant was allowed to take annual leave but failed to return to work.

In December, 2017 the respondent decided to send all cashiers with negative returns into their accounts but the next day the claimant failed to attend work and efforts to reach her through the phone were in vain the claimant was suspended and instead of making a reply she opted to made demand for her final dues.

A waiter was paid ksh.7,500.00 per month and when she was allocated other duties was paid ksh8,000.00. all statutory dues were paid. The claimant deserted duty.

Due to the nature of business of a night club the respondent is open from 7pm to 3am and due to security going home at such an hour, employee are allowed to remain until a time when it is safe to go home.

During public holidays the claimant was paid double wage. She took her annual leave and was allowed maternity leave of 90 days but was allowed to come back earlier for personal reasons.

During the course of work the claimant was issued with various warning for absence from work, being rude and refusal to attend work as required and failing to open the work place when she had the office keys and following her suspension she opted to file suit. For the losses incurred at work, the claimant should pay back.

The respondent also filed the work rules and regulations, leave application forms and including maternity leave application, warning letters and payroll records.

The claimant's case is that on 10<sup>th</sup> November, 2017 she was suspended from work on alleged indiscipline and following which she replied vide letter dated 15<sup>th</sup> November, 2017 and also demanded for her unpaid salaries for October, 2017. At paragraph 5 of the claimant she asserts as follows;

*The claimant's salary which she requested for through the response letter was only reflected in her account on 23<sup>rd</sup>/11/2017.*

Other allegations in the suspension letter are not addressed save that the claim is that on 1<sup>st</sup> December, 2017 when the claimant reported on duty she was verbally dismissed by Mr Limo. Suit was then filed on 18<sup>th</sup> December, 2017.

In her evidence, the claimant did not give a proper account of herself following the suspension and the reply demanding her due salary. The evidence that she returned to work on 1<sup>st</sup> December, 2017 after the suspension only to demand her salary is found credible. The defence that

the claimant later absconded duty is therefore justified noting that she also failed to give account as to why she was absent from work on 9<sup>th</sup> November, 2017 as stated and required in the suspension letter. There is no reply to this fact.

Absence from work is a matter which justifies summary dismissal in accordance with section 44(4)(a) of the Employment Act, 2007. The claimant was issued with a show cause notice and required to explain why she was not at work on 9<sup>th</sup> November, 2017 and in response asserted that such was a mere fabrication and unfounded. Such conduct is not justified and the summary dismissal which followed was justified.

The claim for notice pay and compensation are not due.

On the claim for underpayments, the respondent confirmed employment commenced on 20<sup>th</sup> February, 2013 as a waiter [Waitress] and occasionally was allocated cashier duties. No payment statements are filed but payment sheets for all employees.

In April, 2015 the claimant was earning a basic wage of Ksh.6,000.00 and a gross pay of Ksh.9,924.00 per month.

Under the Wage Orders applicable in the years 2013 and 2014, for the position held by the claimant the due wage was Ksh.8,221.20 and 9,372.15 respectively. On the paid gross wage, the respondent paid above the minimum wage.

In the year 2015 from May, the wage payable was 9,372.15 per month. From the payment sheets the claimant earned a gross wage of ksh.9,924.00 which is above the minimum wage.

From May, 2016 the claimant was paid Ksh.9,924.00 instead of Ksh.10,496.90 less by 572.00 all due is Ksh.6,874.80 in underpayment.

In May, 2017 the wage due is Ksh.12,386.35 and the claimant was underpaid for the period May, to November, 2017 all at Ksh.17,236.45.

Total underpayments is Ksh.24,110.45.

On the claims for *normal overtime* for work for 12 hours daily, the defence that the business hours for the respondent were regulated from 8pm to 3am was not challenged in any material way. However, the requirement for employees to remain at work from 9am until it was safe enough to go home and for security reasons would have been addressed differently than to let them remain at the work place. The claims made for the payment for hours over the required time at work is given an appropriate defence.

Work during public holidays was admitted by the respondent and stated that for such days the claimant was paid double rate for the day. However there are no work

records submitted in this regard. The payment sheets submitted are for monthly wage without a segregation as to how the pay for the due public holidays pay was allocated. Such is due and awarded as claimed at ksh.24,638.70.

The claim for annual leave is on the basis that for 4 years and 7 months the claimant did not take annual leave. There are work records filed with annual leave approval for 42 days taken is not in the year 2016 and 90 days maternity leave allowed in the year 2017. Without the work records to confirm that the claimant was paid while taking such annual and maternity leave as required under section 28 and 34 of the Employment Act, 2007 the due salary for such period owe. For 4 years and 7 months the claimant was entitled to 85 leave days and based on the last due wage payable is entitled to ksh.35,093.00 not paid during annual leave.

The claimant testified that she took two months of the maternity leave and returned to work. Taking maternity leave without pay is contrary to section 43 of the Employment Act, 2007 however where an employee is allowed maternity leave, the returns for such leave is the medical certificate of the birth certificate where appropriate. Such records are not submitted to support the taking of such leave for the court to award.

Salary for 10 days worked in November, 2017 is due all at ksh.4,128.60.

Half salary not paid for 3 weeks while on suspension is due at ksh.5,280.54 as claimed.

**Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of the following terminal dues;**

- a) Underpayments Ksh.24,110.45;**
- b) Public holidays ksh.24,638.70;**
- c) Annual leave to ksh.35,093.00;**
- d) 10 days for November, 2017 Ksh.4,128.00;**
- e) Half salary unpaid during suspension ksh.5,280.54;**
- f) Dues above shall be subject to section 49(2) of the Employment Act, 2007; and**

**g) Each party shall bear own costs.**

**Delivered at Nakuru this 14<sup>th</sup> day of March, 2019**

**M. MBARU**

**JUDGE**

In the presence of: .....