



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CASE NO. 105 OF 2018

KENYA UNION OF COMMERCIAL FOOD

& ALLIED WORKERS UNION.....CLAIMANT

VERSUS

SHANYAKI HARDWARE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievants Catherine Wawira and Niceta Murugi. The 1st Grievant was employed in November 2015 as a shop assistant earning Kshs. 6,000/- a month. It was averred that she would report at 7.15am and leave at 7.00pm in the evening. It was asserted that she worked Monday to Saturday and all public holidays without being compensated. The Claimant averred that the 1st Grievant was not granted annual leave during her employment period. Her termination was alleged to be verbal on 28th December 2016 for her failure to report to work on 27th December 2016 as instructed. The 2nd Grievant was employed on 28th July 2015 as a shop assistant earning Kshs. 6,000/- a month. She was not earning house allowance and would also report at 7.15am and leave at 7.00pm in the evening. It was asserted that she worked Monday to Saturday and all public holidays without being compensated. The Claimant averred that the 2nd Grievant was also not granted annual leave during her employment period and that her termination was verbal on 28th December 2016 for her failure to report to work on 27th December 2016 as instructed. The Claimant averred that the shop was closed on 24th December 2016 as usual in the evening and the 2 Grievants granted off days for 25th and 26th December 2016 which were Christmas holiday. They had been instructed to report back on 27th December 2016 at 7.30am and the Claimant averred that Catherine Wawira was held up in her county due to lack of transport and was unable to report back on 27th December 2016 as instructed. It was averred the 1st Grievant could not call the Respondent to advise of the development as there was a network problem. As for the 2nd Grievant, the Claimant averred that she had travelled to Nakuru for the Christmas holiday and due to lack of transport she was held up and was unable to report back on 27th December 2016. The Claimant reported the matter to the Cabinet Secretary for Labour and after parties failed to agree the matter was referred to court. The Claimant sought the reinstatement of the Grievants to their positions and payment of all salaries they would have earned had they not been dismissed till the date of judgment, overtime worked for and payment for all public holidays. In the alternative the Claimant sought the following for the 1st Grievant 1 month notice – Kshs. 15,693.60, December 2016 salary – Kshs. 15,693.60, accrued leave for 22 days – Kshs. 10,007.40, public holidays – Kshs. 5,231.20, overtime for 13 months – Kshs. 86,484/-, service gratuity – Kshs. 6,823.20, underpayment of wages – Kshs. 126,016.80, compensation for unlawful dismissal – Kshs. 188,323.20 as well as costs. In respect of the 2nd Grievant, the Claimant sought the payment of 1 month notice – Kshs. 15,693.60, December 2016 salary – Kshs. 15,693.60, accrued leave for 17 months Kshs. 13,191.20, public holidays – Kshs. 7,323.70, overtime for 17 months – Kshs. 113,094.50, service gratuity – Kshs. 6,823.20, underpayment of wages – Kshs. 164,791.20, compensation for unlawful dismissal – Kshs. 188,323.20 as well as costs. The 1st Grievant however, withdrew her suit against the Respondent on 16th April 2018 leaving only the 2nd Grievant Niceta Murugi as the sole Grievant.

2. The Respondent denied the Grievant was employed as a shop assistant and averred that it employed the Grievant as a casual who earned Kshs. 400/- per day. It was averred that her contract could be terminated verbally as she was a daily casual and she worked on some days as and when she wished. It was averred that she was verbally informed that her services would not be required in the month of January 2017 as some items had been stolen and the Respondent was investigating the theft.

3. The Grievant Niceta Murugi Mbogo and the director of the Respondent, Nyaga Kiura testified. She stated that she reported at 7.15am and that Shadrack told her to go away. She was not paid for the month of December. She stated that she used to work on public holidays from 8.00am to 6.00pm and was not paid extra. She testified that the salary was not up to the standard required as it was meant to be Kshs. 15,000/- and that she had been underpaid. She was cross-examined and she stated that when she went on holiday that was the first time she had gone for holiday. She was questioned further and stated that in 2015 and 2016 she went for holiday. She stated that she was not paid house allowance or leave pay. She testified that she was not a casual and was sent to the bank daily and that it was only on Sunday that she did not work. She denied that she was under investigation. She stated that she was not paid her December salary. In re-examination she stated that she was not informed that she was not required to return after Christmas.

4. The Respondent's witness stated that he had 12 staff of whom 5 were permanent and 7 were casual employees. He stated that the Grievant was a casual from July 2015 till December 2016 and that she would come to work for 3-4 days in a week. He stated that for permanent staff

there is NSSF payment and they have letters of appointment. In cross-examination he testified that the Grievant was paid Kshs. 400/- per day when she worked and that she could be asked to sweep, arrange the items in the shop and was even sent to the shop. He stated she was not entitled to leave as she did not work everyday. In re-exam he stated that Niceta did not return in January and that he did not report the theft to the Police.

5. The Claimant filed submissions as did the Respondent. The Claimant submitted that the Respondent as employer was required to maintain records. It was submitted that the Respondent discriminated against the Grievant by failing to pay her dues as was done for the other Grievant who withdrew her claim. The Respondent submitted that the employment of the Grievant was on casual basis and that the employment never converted at any time under Section 37 of the Employment Act into a regular term contract. The Respondent relied on the case of **Rashid Odhiambo Allogoh & 245 Others v Haco Industries Limited [2015] eKLR** and the case of **Rashid Mazuri Ramadhani & 10 Others v Doshi & Company (Hardware) Limited & Another [2018] eKLR** on the issue of casual employment.

6. The Claimant herein did not assert that the Grievant was a casual. It was the Respondent as employer who stated she was such. She asserts that she worked every month earning Kshs. 6,000/- as a shop assistant. She stated in testimony that she was often sent to the Bank. If that was the case she surely was not a shop assistant. Be that as it may, her pay per month was stated to be Kshs. 6,000/-. The Claimant did not avail any evidence to show what her pay should have been and her claim for underpayment would therefore fail. She was dismissed in December 2016 after the Christmas holidays and she stated in her testimony that she had gone for holiday the previous year putting into doubt whether she was denied leave on public holidays. Her claim on a balance of probabilities in that regard fails. As regards the house allowance, she failed to avail the Wages Order which would have shown whether she was underpaid for her work at Embu. In any event, as a union member, was it not the duty of the Union to agitate for her dues? Where is the evidence of the demand for proper pay from the union? This aspect of the claim is also unproved. She did not get notice as indicated nor was she given any modicum of due process as there was no hearing or the like prior to her dismissal. If indeed she was suspected of theft as alleged by the Respondent's director there was all the more reason to afford her a hearing. In the final analysis she is entitled to the following-

- a. One month salary as notice – Kshs. 6,000/-
- b. Salary for December 2016 – Kshs. 6,000/-
- c. 5 month's salary as compensation for the unlawful dismissal – Kshs. 30,000/-
- d. Certificate of Service.

It is so ordered.

Dated and delivered at Nyeri this 11th day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar