



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 451 OF 2017

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VS

RONGAI EATING HOUSE.....1ST RESPONDENT

MOSES GICHURU WAWERU.....2ND RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Kenya Hotels and Allied Workers Union on behalf of Selina Matere (the Grievant). The claim is documented by a Memorandum of Claim dated 9th June 2017 and filed in court on even date. The 1st and 2nd Respondents filed a joint Memorandum of Response on 17th July 2017.

2. When the matter came up for hearing, the Claimant called the Grievant and the Respondents called Amani Thomas. The parties further filed written submissions.

The Claimant's Case

3. The Claimant states that the Grievant was employed by the Respondents as a Storekeeper at a monthly salary of Kshs. 7,000 effective 1st November 2012. She worked as such until 28th January 2015 when her employment was verbally terminated.

4. The Claimant states that the Grievant never went on leave and she was not paid her salary for January 2015.

5. Pursuant to failure by the parties to agree on a settlement, the Claimant reported a trade dispute to the Ministry of Labour on 30th July 2015. The Conciliator appointed by the Ministry of Labour, Mr. J. Nyaga released his findings on 5th October 2015.

6. The Claimant seeks reinstatement of the Grievant without loss of accrued rights and benefits or in the alternative:

- a) One month's pay in lieu of notice.....Kshs. 11,743
- b) Salary for January 2015.....11,743
- c) 104 pending off days.....40,708
- d) Leave for 2 years and 2 months.....20,354
- e) Underpayment.....114,916
- f) Costs

The Respondents' Case

7. In their Memorandum of Response dated 17th July 2017 and filed in court on even date, the Respondents state that the Grievant's employment was based on an employment contract dated 1st July 2014. The Respondents further state that the Grievant only worked for 6

months from 1st July 2014 until 28th January 2015.

8. The Respondents aver that the Grievant engaged in malpractices to wit; theft of items when working as a Storekeeper and eventually on 28th January 2015, she deserted her duties and left employment.

9. The Respondents deny that the Grievant's employment was terminated and add that in February 2015 after taking inventory of stock and conducting investigations, they discovered that some items were missing and there was a shortage of goods and beverages worth Kshs. 19,368. A report was made at Diani Police Station under OB No. 35/25/08/2015 upon which the Grievant was arrested and later released unconditionally.

Findings and Determination

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

- a) Whether the Grievant deserted duty or was unlawfully terminated;
- b) Whether the Grievant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

11. In response to the Grievant's claim for unlawful termination, the Respondents state that the Grievant deserted duty from 28th January 2015 after discovery of loss in stock for which she was held accountable.

12. Desertion of duty is a serious offence which renders an employee liable to summary dismissal. It must however be proved. The law as developed is that an employer advancing desertion of duty must demonstrate that efforts have been made to reach out to the deserting employee (see *James Ashiemi Namayi v Menengai Oil Refineries Ltd [2016] eKLR*).

13. It is therefore not enough to simply state that an employee has deserted duty. In this case, there was no evidence of any efforts made by the Respondents to establish the whereabouts of the Grievant. At any rate, from the evidence on record, the Grievant was arrested and released unconditionally so the issue of loss in stock appears to have been resolved.

14. Overall, the Court finds and holds that the Respondents have failed to establish a case of desertion of duty against the Grievant. In the circumstances, the Court adopts the Grievant's plea that her employment was terminated without justifiable cause and in violation of due procedure. The Grievant is therefore entitled to compensation.

Remedies

15. Before making a determination on the level of compensation payable to the Grievant, I need to dispense with the preliminary issue of her employment period. On her part, the Grievant reckons the commencement of her employment with the Respondents from 1st November 2012. Conversely, the Respondents state that the Grievant was employed on 1st July 2014.

16. In support of their case, the Respondents produced a letter of temporary/seasonal employment dated 1st July 2014. The Grievant denied having received this letter and even if she had received it, it does not cover the entire duration of her employment. I say so, because the Grievant evidently continued working for the Respondents after the expiry date of this particular seasonal contract being 30th September 2014. Under Sections 10 and 74 of the Employment Act, the employer is responsible to keeping and availing employment records. The Respondents failed to produce the full employment records of the Grievant. I therefore invoke Section 10(7) of the Employment Act and adopt the employment period as pleaded by the Grievant.

17. That settled, I now award the Grievant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Grievant's length of service and the Respondents conduct in handling her case. I further award the Grievant one (1) month's salary in lieu of notice as well as salary for January 2015.

18. The Grievant made a claim for underpayment in the global sum of Kshs. 114,666 but did not bother to provide a tabulation formula. This claim was therefore not proved. However, the Court takes judicial notice that the Grievant was paid a basic salary without house allowance. I will therefore load the figure of Kshs. 1,050 as house allowance on to the figure of Kshs. 7,000 thus arriving at the sum of Kshs. 8,050 as the Grievant's monthly salary for purposes of this claim.

19. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

20. The claim for off days was not proved and is dismissed.

21. Finally, I enter judgment in favour of the Grievant as follows:

- a) 6 months' salary in compensation.....Kshs. 48,300
- b) 1 month's salary in lieu of notice.....8,050

c) Salary for January 2015.....	8,050
d) Leave pay for 2 years (8,050/30x21x2).....	<u>11,270</u>
Total.....	75,670

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

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

24. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF APRIL 2019

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JUDGE

Appearance:

Mr. Simiyu (Union Representative) for the Claimant

Mr. Muigai for the Respondents