



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**  
**ELRC CAUSE NO. 29 OF 2017**

**JESSICA MUTENYO LUBWA.....CLAIMANT**

**VERSUS**

**DAVID SIMIYU MUCHELE T/A**

**SATELITE HOTEL WEBUYE.....RESPONDENT**

**J U D G M E N T**

The Claimant filed this suit against the respondents seeking compensation for unlawful and unfair dismissal and payment of terminal benefits set out in the Memorandum of Claim.

The Claimant testified as CW1 and told the court that she was employed by the Respondent as procurement officer in July 2009 and worked continually until 21<sup>st</sup> November 2017.

That she had started as a waiter, then cashier and finally procurement officer.

That she earned Kshs 8,200 per month at the time she left. That she worked daily from 8.am. in the morning to 9 00 p.m in the evening for 7 years. That she was never paid overtime. That she was never given a letter of appointment.

That on 19<sup>th</sup> November, 2016, she left work for her off day which was on 20<sup>th</sup> November 2016. That on reporting back on 21<sup>st</sup> November, 2016 the manager asked her to go on leave.

The Claimant asked the manager to put it in writing. The manager was Deborah Chepkorir. The manager refused and evicted the Claimant from the premises using security guards.

The Claimant called the Director Mr. David Simiyu from her home. He told her to go on leave and return later.

After 21 days, the Claimant reported back but was barred by the security guard from accessing the hotel. The Claimant called the Director but he did not pick her calls. He wrote an sms telling the Claimant that he would contact her later but that did not happen.

The Claimant states that the action by the Respondent amounted to a summary dismissal that she had worked 7 days a week including public holidays but was not paid.

That she was not issued a certificate of service. That the dismissal was unlawful and unfair. That she claims payment of Kshs 8,200 in lieu of notice. Kshs 28,700 service pay; Kshs 57,400 in lieu of leave days not taken; Kshs 284,000 in respect of 6240 hours overtime worked at the rate of Kshs 152 per hour and compensation for the unlawful dismissal. That she be paid costs and interest. The Claimant produced a letter of demand dated 20<sup>th</sup> February 2017 written by Maloba Kayika Advocates.

**Response:**

The Respondent filed a statement of defence on 12.17.2017 in which the Respondent denies that it ever employed the Claimant nor summarily dismissed her.

In the same vein the Respondent pleaded that the Claimant deserted work after going on leave for 21 days and did not return as scheduled on 21.11.2014.

The Respondent states that the Claimant is not entitled to any of the reliefs sought.

RW1 David Simiyu Muchele testified that on 21.11.2016, the Claimant was given 21 days annual leave. That the Claimant never returned to work as scheduled on 21<sup>st</sup>.11.2016 upon expiry of the leave period. That he was surprised when he received a letter of demand dated 20.2.2017. that he replied to the demand Letter denying that he had dismissed the Claimant.

RW1 denied that the Claimant was owed equivalent of 4 months salary in lieu of leave days not taken.

RW1 stated he had no problem in issuing a certificate of service to the Claimant. RW1 added in the further witness statement that the Claimant enjoyed both annual leave and maternity leave. That the Claimant worked sometimes beyond 8 p.m and compensated for the days she left early. That she is not entitled to payment of overtime. That the Claim of overtime is not supported by any documents and has not been proved.

RW1 denied having dismissed the Claimant.

Under cross examination, RW1 Said the Claimant was employed in 2008 and she deserted in November 2016. RW1 said he had lost attendance registers in a fire except the few he produced in court. He said he did not dismiss the Claimant and that she was a good employee and was his neighbor in Webuye. That Claimant could go back to work if she wished. Respondent prays that the suit be dismissed.

### **Determination:**

The issues for determination are:

- (a) Whether the Claimant deserted work or was dismissed from employment
- (b) Whether the Claimant has proved the reliefs sought to warrant grant of the same.

### **Issue (a)**

The Claimant's testimony to the effect she served the Respondent in various capacities from the year 2009 up to 2016 is confirmed by RW1, her employer. The point of divergence is whether the Claimant took an off day on 20<sup>th</sup> November 2016, and when she returned back to work on 21<sup>st</sup> November 2016, her manager Deborah Chepkorir asked her to go for leave but she asked that the leave be put in writing. At that point Deborah asked security guards to evict the Claimant from the work place.

The Claimant then called RW1 who told her to proceed on leave and would be called back. Claimant testified further that upon expiry of 21 days she reported back to work but was barred from entering the work place. The evidence by the Claimant was compelling and not dented under cross examination.

There is no reason advanced why the Claimant could have deserted work. No such reason has been put forth by RW1 who testified that the Claimant was a good employee and he was ready to take her back. Deborah was not called to contradict the testimony by the Claimant.

The testimony by RW1 that the Claimant took 21 days leave and did not come back was not credible given that the Claimant had no issues at work and was at the time procurement officer having been promoted from a waiter to supervisor and finally to procurement officer.

The Respondent refused the Claimant to return back to work upon taking a one day off for no reason given. The Claimant had no warning letters and no adverse record at all.

The verbal dismissal of the Claimant from work for no reason at all and without giving her a chance to explain why she ought not to be dismissed violated sections 41, 43 and 45 of the Employment Act, 2007.

The Claimant suffered loss and damage as a result of the unlawful and unfair dismissal and is entitled to compensation in terms of Sections 49 (1) (c) and (4) of the Act.

In this regard, the Claimant had served faithfully for a period of 7 years. The Claimant did not contribute to the dismissal. The Claimant was not paid any terminal benefits or compensation for the loss of her job without notice. The Claimant wished to continue working and had not found another job up to the time of the hearing of the suit.

RW1 had not made any effort to re-employ her despite testifying that she was his neighbor and was a good employee and that she could return to work. Considering the above circumstances the court finds this an appropriate case to award the Claimant the equivalent of seven (7) months salary in compensation for the unlawful and unfair dismissal in the sum of Kshs 57,400.

The Claimant is also awarded one month salary in lieu of notice in the sum of Kshs 8,200.

### **Service pay:**

The Claimant served for a period of seven (7) years. There is no evidence that she had any pension Scheme or NSSF paid for her. The Claimant is entitled to service pay at 15 days salary for each completed year of service in the sum of Kshs 28,700 and the court so awards.

### **Leave pay:**

The Claimant had taken 21 days leave just before her dismissal. She did not tell court how many days and in respect of which year she had not taken leave. The claim for payment in lieu of leave has not been proved and is dismissed.

**Unpaid overtime:**

The Claimant testified that she worked from 7 a.m to 7 p.m for 7 days inclusive of public holidays and was not paid overtime for extra hour worked. The Respondent did not rebut this claim sufficiently. The Claimant stated that she was entitled to Kshs 152 overtime per extra hour worked. She claims for 6240 hours. The court finds this claim to have been proved on a balance of probabilities but would cap the overtime due and owing to the last three years from the date of dismissal. The court awards the Claimant overtime done and not paid for three years at Kshs 152 for each extra hour worked. The Claimant to compute and file the revised claim within 30 days of judgment and serve the Respondent for confirmation.

In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-

(a) 7 months salary in compensation Kshs 57,400

(b) Service pay Kshs 28,700

(c) Overtime done for the last three years at the rate of Kshs 152 per hour for two hours a day seven days a week including public holidays. Computation to be done and filed by the Claimant and served on the Respondent within 30 days. Respondent to file counter computation within 15 days of service.

(d) Interest at court rates from date of judgment till payment in full.

(e) Costs of the suit.

**DATED, SIGNED and DELIVERED at BUNGOMA this 30<sup>th</sup> day of MAY, 2019.**

**HON. M. N. NDUMA, JUDGE**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**BUNGOMA**

**Appearances:**

Mr. Maloba for Claimant

Mr. Milimo for Respondent

Chrispo: Court Assistant.