



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 23 OF 2018
[Formerly Cause Number 547 of 2016 at the E&LRC MOMBASA]

BETWEEN

EVERLINE KERUBO..... CLAIMANT

VERSUS

PATIENCE REHEMA JOHN AND VENCESLAS CHILUMO

t/a POWER BASE BAR & RESTAURANT.....RESPONDENT

Rika

Court Assistant: Benjamin Kombe

Mogaka Bwongaki & Company Advocates for the Claimant

Respondent in Person

JUDGMENT

1. The Claimant filed her Statement of Claim on 15th July 2016. She states the Respondent is a business owned by a Couple, Patience and Venceslas. The Claimant states she was employed by the Respondent as a General Worker. She states she was employed in the year 2011. She was paid Kshs. 5,000 monthly. She states that her contract was terminated by the Respondent without notice, on 28th May 2016. She prays the Court to find termination was unfair and grant her Judgment against the Respondent in the following terms:-

- a) Salary for the month of May 2016 at Kshs. 12,071.
- b) 1 month salary in lieu of notice at Kshs. 12,071.
- c) Annual leave over a period of 2 years at Kshs. 16,956.
- d) 12 months' salary in compensation for unfair termination at Kshs. 144,856.
- e) Underpayment of salary at Kshs. 7,071 a month for 29 months at Kshs. 205,070.

Total...Kshs. 391,024.

- f) Certificate of Service to issue.

2. The Respondent filed its Statement of Response on 15th November 2016, through Venceslas, on authority given by Patience, filed on the same date. The Respondent's position is that the Claimant was contracted by the Respondent in November 2014, to clean the Restaurant. She cleaned 3 times in a week, at a daily rate of Kshs. 450, payable weekly at Kshs. 1,350. She usually signed stock list and voucher. On 28th May 2016, she was asked by Venceslas where she had kept the stock list and voucher. She turned violent and assaulted her Colleagues who had earlier seen her carrying a black paper bag on her way out. Venceslas noted there were some wines and spirits missing from the stock.

Attempts to reach the Claimant subsequently were fruitless. The Respondent counterclaims the cost of missing stocks at Kshs. 18,695. It is also the Respondent's prayer that the Claimant is compelled to produce original stock list for up to May 2016 and petty cash voucher for January to May 2016.

3. The Claimant testified, and closed her case, on 5th December 2017. Venceslas testified on the same date, and called 2 other Witnesses, Employees of the Respondent, Chifwete Kalua Kanyoe and Faiza Akinyi Said, who testified on 28th February 2019, bringing the hearing to a close.

4. The Claimant told the Court she did counter work. She was paid Kshs. 5,000 monthly. She also served as a Waitress, Cleaner and Room-Attendant. She worked between 2011 and August 2016. She was denied her last salary. The Respondent employed someone else in the place of the Claimant.

5. Cross-examined by Venceslas, the Claimant told the Court she was initially employed by a Tenant of Venceslas in 2011. The Couple took over the business and continued to employ the Claimant. Venceslas sacked most Employees who worked under the Tenant, and apportioned the Claimant their respective roles. The Claimant was told by Patience to stop working. Redirected, the Claimant told the Court that the Tenant gave up the business after Venceslas and his Wife hiked the rent for the premises. The Claimant was left to do all the work after Venceslas sacked most of the Employees.

6. Venceslas told the Court he employed the Claimant in 2014. She worked 3 days a week, from 5.00 p.m. to 10.00 p.m. earning Kshs. 450 daily. On 27th May 2016, she left work early, alleging she was unwell. On the following day, there were stock sheets and vouchers missing. Venceslas enquired from the Claimant. She became violent and started beating her Colleague who manned the counter. When Venceslas enquired himself, the Claimant stormed out. She went away with the Respondent's business licences. She could not be traced. Venceslas discovered there were wines and spirits missing after the Claimant left. She damaged goods worth Kshs. 18,695.

7. On cross-examination, Venceslas told the Court he had a cordial working relationship with the Claimant. The Tenant left about 5 other Employees. Venceslas did not have a document showing that the Claimant worked 3 days in a week. He lost wines and spirits when the Claimant went wild. He made report to the Police, but did not pursue the report on humanitarian grounds. He could absorb the loss. He did not recall if the Claimant was paid her salary for the month of May 2016. He did not have the Colleague who was fought by the Claimant as a Witness for the Respondent, in Court.

8. Kanyoe told the Court that the Claimant and Akinyi almost fought on the material day. Kanyoe thought he heard the 2 Ladies discuss worksheets before their altercation. Akinyi told the Court she did not write the Witness Statement filed by the Respondent, claimed to be her Witness Statement. She did not fight the Claimant.

The Court Finds: -

9. There is evidence by both the Claimant and Venceslas, to establish that the Claimant was employed by Venceslas and his Wife Patience, at their Bar and Restaurant in Malindi. The decision of the Court in ***Kahindi Kazungu Baya & Anor v. Boniface Silas Mukanga t/a New Galana Bar & Restaurant [Cause Number 167 of 2016]*** which the Respondent relies on, to submit that there was no employment relationship between the Parties herein, is totally inapplicable. The Respondent expressly concedes to have engaged the Claimant in November 2014. It is also alleged that she, alongside other Employees signed stock sheets and vouchers. How does the Respondent then attempt to disown being in an employment relationship with the Claimant?

10. There is common evidence that the business was run by a former Tenant of Venceslas. Venceslas inherited the business and the Employees, with his Wife, after the Tenant was unable to continue with the business owing to hiking of the rent by Venceslas. The Claimant worked for Venceslas at least from the year 2014, when the business changeover took place.

11. The Court agrees with the Claimant that she was used in discharging a multiplicity of roles, as the Respondent sacked most of the Employees of the previous Management. The Claimant worked as Room Attendant, Cleaner and Waitress. The Respondent pleads to have employed the Claimant as a Cleaner. In its evidence however, it is clear that the Claimant was involved in stock sheets and vouchers. She was required to sign stock lists and vouchers. It is not usual to involve Cleaners with stock sheets and vouchers. The involvement of the Claimant only confirms her assertion that she was used in multiple roles.

12. It is also not believable that the Claimant was only a Cleaner, assigned duty for 3 days in a week. She may have cleaned 3 days in a week, and most probably discharged other roles over the balance of the week. Why would the Respondent be counterclaiming production of stock sheets and petty cash vouchers by a Cleaner?

13. She did not leave employment in the manner suggested by the Respondent. There was no fight as alleged by Venceslas. Akinyi, who was meant to give substance to this allegation, completely disowned the Witness Statement attributed to her. She did not fight the Claimant, and did not record the Witness Statement on record. There was no altercation, and storming out of the premises by the Claimant, as alleged by Venceslas. Akinyi's purported Witness Statement was supposed to be an important plank, in Respondent's justification of termination. Without it, there is no proof that the Claimant became violent and assaulted a Colleague, before deserting. The Employer did not show valid reason or reasons, justifying termination.

14. The Claimant was paid a Monthly rate of Kshs. 5,000. She claims she ought to have been paid Kshs. 12,071 monthly. She has not assisted the Court in understanding whether this is the rate which applied to her as a Waitress, a Cleaner, Room Attendant or Counter Attendant. She describes herself as a General Worker, at paragraph 3 of the Claim. To be safe the Court would apply the minimum wage applicable to Cleaners, Gardeners, General Workers, House Servants, Children's Ayah, Sweepers, Day Watchmen and Messengers in 2015, in Municipalities and Town Councils, which was Kshs. 10,107 monthly. This is a workable average for the period 2014- May 2016.

15. She worked for Venceslas incontestably, between 2014 and 28th May 2016- a period of 17 months. ***For purposes of redressing underpayment, she is allowed a sum of [Kshs 10,107 – Kshs. 5000] = Kshs. 5,107 monthly for 17 months = Kshs. 86,816.***

16. ***She is granted 1 month salary in lieu of notice at Kshs. 10,107.***

17. ***She is allowed the prayer for compensation for unfair termination, equivalent of 6 months' salary at Kshs. 60,642.***

18. ***She is allowed her prayer for salary for the month of May 2016, at Kshs. 10,107.***

19. ***She is allowed annual leave over a period of 17 months at 21 days per annum, at Kshs. 11, 564.***

20. The counterclaim was discredited through the evidence of Akinyi and is rejected in its totality. Venceslas was not clear in his own evidence on the nature of the loss, justifying the counterclaim of Kshs. 18,695. The counterclaim is rejected.

21. ***Certificate of Service shall be availed to the Claimant forthwith.***

22. ***No order on the costs and interest.***

IN SUM IT IS ORDERED: -

[a] Termination was unfair.

[b] The Respondent shall pay to the Claimant underpayment of salary at Kshs. 86,816; notice at Kshs. 10,107; equivalent of 6 months' salary in compensation for unfair termination at Kshs. 60,642; salary for May 2016 at ksh. 10,107; and annual leave at Kshs. 11,564 - total Kshs. 179,236.

[c] Certificate of Service to issue.

[d] No order on the costs and interest.

Dated and delivered at Malindi, this 28th day of June 2019.

James Rika

Judge