



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 139 OF 2014**

*(Before Hon. Justice Mathews N. Nduma)*

**KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT**

**VERSUS**

**HABESHA ETHIOPIAN RESTAURANT.....RESPONDENT**

**JUDGMENT**

1. The claimant union filed suit on behalf of two grievants one Mr. Shadrack Apong'o (now deceased) and M/S Phoebe A. Odhiambo. The claimant opted to proceed in respect of the claim for Mr. Oluoch Odhiambo and abandoned the claim for Shadrack due to lack of instructions from the next of kin.

2. The suit was filed on 17<sup>th</sup> June 2016 and the claimant seeks the following reliefs on behalf of Phoebe A. Odhiambo:

(i) One month salary in lieu of notice Kshs. 9,266.

(ii) Prorata leave for seven (7) months Kshs. 3,706.

(iii) Unpaid five (5) public holidays worked Kshs. 1,544.

(iv) Unpaid salary for the period September 2012 to March 2013 Kshs. 36,862.

Total claim Kshs. 51,378.

(v) Provision of certificate of service.

3. The facts of the case are that Phoebe Aluoch Odhiambo was employed by the respondent on 1<sup>st</sup> September 2012. She worked continuously for the respondent until the 3<sup>rd</sup> April 2013, when her employment was verbally terminated on grounds that she was pregnant. The grievant alleges that the conduct by the respondent constituted unfair labour practice and invokes Section 41, 45, 46 and 49 of the Employment Act 2007 to claim unpaid terminal dues including, notice pay, payment in lieu of leave days not taken, payment for holidays worked and arrear salary for the period September 2012 to March 2013.

4. The claimant seeks compensation for the unfair termination of the grievant by the respondent.

5. The grievant testified under oath and said that she worked as a waiter for the respondent. That her initial salary was Kshs. 4,000. That she had a good working relationship with the respondent until she became pregnant and on 1<sup>st</sup> April 2013, the Manager George Obina told her that she could not continue to work while pregnant. She was then verbally sent home without payment of her terminal benefits claimed herein. The grievant also seeks certificate of service.

6. The claimant filed an amended memorandum of claim on 26<sup>th</sup> March 2018 in which a claim for compensation for unlawful dismissal was added.

7. The amended memorandum of claim was served on the respondent on 2<sup>nd</sup> July 2018 by Mr. Amos Eliud Osango, a licensed process server. An affidavit of service was filed on 5<sup>th</sup> July 2018. The respondent had not responded to the original memorandum of claim despite service on 19<sup>th</sup> June 2014 and did not also respond to the amended claim.

8. The suit is therefore undefended and the court finds that the claims for terminal benefits have been proved on a balance of probabilities and enters judgment in favour of the grievant in the sum of Kshs. 51,378 as set out under paragraph 4.0 of the amended memorandum of claim. The court also finds that the claimant is entitled to a certificate of service and the respondent is directed to grant the same to the grievant within 30 days of this judgment.

### **Compensation**

9. With regard to the claim for compensation for the unlawful and unfair summary dismissal of the grievant by the respondent, the court finds that the respondent unlawfully dismissed the grievant from employment on account of her pregnancy. The court finds that this is unfair labour practice in violation of *Section 5 of the Employment Act 2007 as read with Article 41 of the constitution of Kenya 2010*. The evidence by the claimant is credible and uncontroverted and the court finds the conduct by the respondent was despicable and an affront on the human dignity of the grievant. The respondent had no valid reason to dismiss the grievant from employment and violated *Sections 41, 43, 45 and 46 of the Employment Act 2007*. The grievant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Employment Act, 2007*.

10. In this respect, the grievant had served the respondent for a short period of about one year. She was a good employee and did not contribute to the dismissal. She was victimized on account of pregnancy which act constituted a violation of her human dignity and right to work while pregnant. She was entitled to maternity leave of up to three (3) months but she was instead dismissed from employment. These are aggravating circumstances which the court has taken into account in awarding compensation to the grievant. The grievant was not given certificate of service to help her get new work. The grievant was underpaid for the period she worked for the respondent hence the claim for arrear salary for the period September 2012 to March 2013. The grievant was entitled to a minimum salary as a waiter of Kshs. 9,266 inclusive of house allowance in terms of the General Wage order for the period. The court considers the case of *Camu vs Bank of Africa Kenya Limited (2013) eKLR* in which the court awarded general damages in the sum of Kshs. 3 Million for unfair dismissal on account of pregnancy.

11. The court considers this an appropriate case to award the grievant the equivalent of six (6) months salary in compensation for unlawful summary dismissal in the sum of Kshs. 55,596.

12. In the final analysis judgment is entered in favour of the grievant Phoebe Aluoch Odhiambo through the claimant union as follows:

(i) Equivalent of six months salary in compensation Kshs. 55,596.

(ii) Kshs. 51,378 terminal benefits.

Total award Kshs 106,974

(iii) Interest at court rates from date of judgment in respect of (i) above and from date of filing suit in respect of (c) till payment in full.

(iv) Certificate of service to be provided within 30 days.

(v) Costs of the suit.

**Judgment Dated, Signed and delivered this 15<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Simiyu for claimant

Chrispo – Court Clerk