



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.104 OF 2018**

**CATHERINE MUGURE.....CLAIMANT**

**VERSUS**

**HILLCOURT HOTEL & SPA LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent in the year 2012 as a public attendant/cleaner in the respondent company on casual terms until her confirmation in October, 2012 and earning a gross wage of Ksh.10,000.00 per month. The claimant worked until December, 2015 when employment was unlawfully terminated.

The claim is that there was no notice issued or any reasons given before employment terminated save to indicate that her services were no longer required following a work place injury that required the claimant to be away from work to attend physiotherapy treatment.

The claimant was not paid in lieu of notice, she did not take her annual leave for 3 years and claim the payment thereof and was working for a total of 72 hours for 6 days per week and for the overtime hours, and payment is due. The wage paid was contrary to the due minimum wage.

The claimant is seeking the following dues;

- a) Notice pay Ksh.16,490.00;
- b) Annual leave pay ksh.133,188.46;
- c) Overtime pay Ksh.194,835.69;
- d) Gratuity Ksh.95,135.62;
- e) Compensation;
- f) Costs.

The claimant testified that she was employed by the respondent as a cleaner and while on duty she fell while cleaning the steamer and got injured. She was required to wear a belt to support her back. She did not abscond duty as she was unwell and could not attend work.

The claimant also testified that the respondent called her and told her she had been dismissed from her employment. She made a report to the Director of Occupational Health and issued with DOSH form on 26<sup>th</sup> August, 2015 and which the respondent filled through the manager and therefore had knowledge of injury. The respondent had kept her contacts and was aware where to get the claimant.

The claimant also testified that the manager called her back to work but could not walk as she still had a belt and unable to walk with it. She was dismissed over the phone.

Work was for 7 days and then a day off. The respondent paid for NSSF and NHIF.

Overtime was not paid and work during public holidays was not compensated. Work hours were 7am to 5pm and depending of the workload each day. Each week the claimant got a day off. She took leave but would be recalled back when there was more work. For the 3 years of

work she took leave on 26<sup>th</sup> August, 2015. In December, 2015 she was called back but was unable to report back due to injury. In the DOSH form it is noted that the claimant was in hospital from 28<sup>th</sup> August to 2<sup>nd</sup> September, 2015 and on sick leave for 5 days.

## Defence

The defence is that in October, 2012 the claimant was employed as a cleaner until the year 2015 when she absconded duty. The claimant had previously shown no interest in her work and issued with verbal and written warnings. All wages were paid in full and as the claimant remained absent from work for no good cause, employment terminated at her own instance.

Mr Kevin Kagwe for the respondent as Director testified that the claimant was a general cleaner with work hours from 8am to 4pm for all day staff as the respondent was running work in shifts each of 8 hours. The claimant had small children who required her attention and was thus placed in the day shift to allow for breastfeeding.

While away, the claimant had 3 other colleagues to attend to similar duties.

On 26<sup>th</sup> August, 2015 the claimant slipped and fell while at work, she was hospitalised and since, never resumed work. No medical sick sheet or medical certificate was/were submitted for any incapacity. There was a master roll for all employees and kept by the manager and which show the claimant was last at work on 26<sup>th</sup> August, 2015.

The claimant was called on phone to resume duty but failed to attend. All annual leave was applied for and upon approval, the claimant was able to take her leave days. Overtime and work during public holidays was possible and this was compensated with a day off of several days off.

The claimant had written and verbal warnings for laxity and failure to improve on her work. When she absconded duty without reason, the respondent stopped paying the wages.

Both parties filed written submissions.

The court has taken into account the pleadings, evidence and submissions by the parties. The issues which emerge for the court determination can be summarised as follows;

Whether employment terminated fairly or unfairly;

Whether the remedies sought are due; and

Who should pay costs.

It is not in dispute that on 26<sup>th</sup> August, 2015 the claimant got injured while at work with the respondent as a cleaner. She reported the matter to the Director of Occupational Health and was issued with the DOSH form and which she submitted with the respondent as the employer.

The claimant submitted the Medical Certificate dated 10<sup>th</sup> September, 2015 from Nakuru Provincial hospital and which indicates that she was attended to as an out-patient on 28<sup>th</sup> August, 2015 with soft tissue injuries to the head and back. This followed an accident on 26<sup>th</sup> August, 2015 while at work.

There is no sick sheet or medical certificate produced by the claimant.

Work non-attendance is a matter subject to summary dismissal under the provisions of section 44(3) and (4)(a) of the Employment Act, 2007. An employee who fails to attend work without any good cause, permission and or approval by the employer frustrates their work employment and the employer is justified to issue summary dismissal. The only condition for the employer to meet is to issue notice or hear the employee.

In this case the claimant testified that upon being injured at work on 26<sup>th</sup> August, 2015 she got admitted in hospital and was made to wear a belt to support her back. She could not walk and hence unable to report to work. While at home, the respondent called her over the phone with directions to resume work but she could not as she was not able to walk.

Section 30 and 34 of the Employment Act, 2007 requires an employee who is sick or requires medical attention to enjoy such right subject to notice to the employer and submissions of a medical certificate to confirm sickness and need for time off work. The DOSH form submitted by the claimant is not similar to the Medical certificate envisaged under section 34 of the Act. The DOSH form is a medical report under the provisions of the Work Injury Benefits Act, 2007 and not as under section 43 of the Employment Act, 2007.

Even where the claimant had the DOSH form issued to her, reason demanded that where she was sick and unable to report to work, to seek permission and approval by the respondent. It was not sufficient to assume that the respondent knew where she was following a work injury. The record and daily work attendance could only be regularised from the approved time off, sick off or granted permission to be away as correctly cited by the respondent in the cases of **BIFU versus Barclays Bank of Kenya [2014] eKLR** and in **Simon Ngugi Kamau versus Silpark Industries Limited [2014] eKLR**. an employee who is absent from work due to sickness has a good cause/reasons for such absence, however the employer has to be informed of such cause and or reasons for approval and permission.

Without the claimant submitting any evidence that there was notice of illness and absence from work was with the approval and consent of the employer, upon being recalled back to work and failure to do so, the claimant frustrated her own employment and cannot claim unfair termination of employment. By recalling the claimant back to work, there being no attendance, the respondent was justified to stop payment of wages for work non-attendance.

No notice pay is due or compensation. Such claims are not justified upon the claimant failing to attend work and being absent for no good cause.

On the claim for payment for annual leave, the claimant by her own evidence admitted to taking annual leave but she would be recalled back without pay. Such periods of recall back to work were not particularised. The respondent has submitted a master roll noting the periods the claimant was on leave or on an off day/rest day. This evidence is sufficient to support the claimant taking off/rest days and annual leave. The attendant leave application forms approved by the respondent were also filed and not challenged in any material way.

The claimant admitted there was payment of NSSF and NHIF dues. The claim for gratuity on this basis is not justified.

On the claims made, there is no merit.

**Accordingly, the claim is hereby dismissed. Costs to the respondent.**

**Delivered at Nakuru this 10<sup>th</sup> day of July, 2019.**

**M. MBARU JUDGE**

**In the presence of:**

**Court assistants:**

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