



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.237 OF 2016

DORCAS NDANU DAVID.....CLAIMANT

VERSUS

JOSEPH NGIGE KANGETHE T/A NAKUBREEZE TRAVELLERS INN....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in May, 2014 as a Waitress and then promoted to Cashier from August, 2014 and in which position she served until February, 2016 when her employment as terminated while earning ksh.10,000.00 per month. The terms and conditions of employment were verbal save for the Certificate of Service dated 7th March, 2016.

The claim is that there was underpayment contrary to the law and the wage orders. The claimant worked overtime from 6.30pm for 6 days each week and was not compensated. During public holidays the claimant remained at work without the requisite pay and for the entire period of work there was no annual leave allocated or payment made in lieu thereof. The wage due in January, 2016 was not paid and despite demand the respondent has refused to pay.

The claim is that on 4th February, 2016 at 10.pm the claimant was told by the accountant and who was her senior to go home and her employment had been terminated and that such decision had been made for the respondent. there was no notice, hearing or reasons given such action contrary to section 35, 41 and 45 of the Employment Act.

The claimant is seeking for the payment of the following due;

- a) *A notice pay for cashier ksh.26,751.80;*
- b) *Underpayments Kshs.275,7335.70;*
- c) *Overtime pay ksh.301,507.60;*
- d) *Public holidays Ksh.38,674.10;*
- e) *Leave for 1 year 10 months ksh.35,880.20;*
- f) *Salary for January, 2016 Ksh.26,751.80;*
- g) *Salary for 4 days in February, 2016 Ksh.4,479.20;*
- h) *Gratuity ksh.13,375.90;*
- i) *Compensation ksh.321,021.60*

The claimant testified that she was first employed by the respondent as a Waitress and paid ksh.6,000.00 per month and then promoted to a Cashier and paid Ksh.10,000.00 per month and would be at work from 6am to 6pm for 6 days each week without taking annual leave or enjoying the public holidays.

On the night of 4th February, 2016 the claimant had no cash and another cashier gave her some giving her a float of Ksh.3,000.00 in excess and when they closed at 10pm the respondent said she had stolen the cash by giving customers food without a receipt. The respondent told her to take account and was dismissed at 10pm. The next day the claimant was called by the police and arrested and alter released without any charges. There were no reasons given. Such resulted in termination of employment and no terminal dues were paid. There was no

absconding duty as alleged in defence and after arrest the respondent did not make a follow up.

The defence is that the claimant was retained at the butchery till in her cashier duties and the claims that there was an underpayment are not correct as remuneration was as per the location of the respondent.

The conduct of the claimant was brought to the attention of the respondent arising from CCTV footage to the effect that she and the employee manning the butchery were receiving monies and failing to issue receipts for the same. Upon seeking for an explanation, there was admission of such actions and conduct. A report was then made to Mwariki Police Station which led to the arrest of the claimant and the other butchery employees. The claimant then failed to report on duty and absconded duty.

The claimant had no justifiable reasons to fail in her duties and should have been dismissed summarily under the provisions of section 44(4) of the Employment Act but she chose to abscond duty. The claims made have no basis and should be dismissed with costs.

In evidence the respondent called James Munene the manager and who testified that the claimant had applied for a job with the respondent as a waiter and in the year 2015 she was promoted to a cashier. As a waiter the claimant was paid Ksh.7,000.00 per month and as cashier she was paid ksh.10,000.00 per month.

Mr Munene also testified that in February, 2016 upon review of CCTV footage the claimant was observed pocketing cash which was investigated and noted that she was receiving cash and not issuing receipts. The matter was reported to the police and she was arrested and after this date she never returned to work.

The respondent was running shifts of 8am to 6pm.

The claimant was called to explain her conduct but she had no good explanation. She could not explain why she was pocketing cash without issuing receipts and that amounted to theft. A show cause notice was issued on 8th February, 2016 and she failed to attend and a letter of summary dismissal was issued and dated 16th February, 2016.

At the close of the hearing both parties filed written submissions and which together with the pleadings and the evidence have been put into account.

It is not in dispute that following an incident at the workplace and involving cash which the claimant asserts was borrowed from a colleague and what the respondent asserts was stolen and no receipt issued by the claimant, the matter was reported to Mwariki Police Station and the claimant arrested. According to the claimant, the respondent did nothing about her arrest and even upon release did not bother to follow up.

In this regard, from the evidence, upon the claimant's arrest and release on dates which were not clear or elaborated, she never resumed duty. The letters of show cause and summary dismissal done by the respondent allegedly issued to the claimant to attend disciplinary hearing and dated 8th and 16th February, 2016 respectively have no forwarding address and it is not clear the claimant received these letters and communication.

What is apparent, the claimant too after her arrest and release, she did not return to work. In these circumstances to claim unfair termination of employment and compensation is without any good cause.

The claimant has also made claims for underpayment, overtime and public holidays work, pay for not taking annual leave and due wages for January, and 4 days worked in February, 2016.

Section 8, 9 and read together with section 10 of the Employment Act, 2007 requires every employer to issue an employee with a written contract spelling out the terms and conditions of employment. The failure to issue such employment letter or contract to an employee only serves to the disadvantage of the employer as under oral terms contract, the word of the employee must be believed as the employer has filed its legal duty to issue written terms of employment.

In this regard, save for the certificate of service which outline the claimant as having been a cashier with the respondent, there is nothing else other than the word of the claimant. The alleged certificate of service is not signed by the respondent. The court reading of this document is given credence by the respondent under paragraph 3 of the defence where there are averments that the claimant was employed first as a waitress and then as cashier.

The respondent entity is situated within Nakuru and within the boundaries which are covered by wage orders applicable therefrom and not its environs. A waitress employed in May, 2014 was supposed to earn Ksh.9,372.15 and the claimant earned ksh.6,000.00 from May to August, 2014 and which was an underpayment by ksh.3,372.15 all being Ksh.13,488.60.

For the period of September, 2014 to April, 2015 when the claimant was promoted and working as a cashier and on the failure of the respondent to keep work records, the claimant was entitled to Ksh.20,770.00 but was paid ksh.10,000.00 less by Ksh.10,770.00 and for the 8 months she is entitled to ksh.86,160.00 in underpayments.

For the period of May, 2015 to February, 2016 the minimum wage for a cashier was ksh.23,262.40 and the claimant was paid ksh.10,000.00 an underpayment by Ksh.13,262.40 and for the 9 full months she is entitled to Kshs.119,361.60 in underpayments.

Total underpayments is ksh.219,009.60.

The respondent's witness Mr Munene admitted that employees worked in shift from 8am to 6pm with a lunch break. The claimant had testified that she would report at 6pm to 6pm and her pleadings carry the same error. The respondent's evidence shall suffice.

The fact of having an employee at work for over 8 hours and even where there is a lunch breach, the overtime hours should be compensated. From 8am to 6pm these are 10 hours and hence overtime work for 2 hours for the 6 days the claimant was at work each week. Section 49(1) (c) of the Employment Act, 2007 the basis of the tabulation of the owing dues is the last gross wage paid to the claimant being Ksh.23,262.40 for a cashier.

May to August, 2014 for the 4 months at 2 hours overtime is Ksh.4,430.50;

From September, 2014 to April 2015 on the application of the same formula the overtime worked is ksh.69,020.00;

May, 2015 to January, 2016 Ksh.77,302.50.

Total overtime pay is Ksh.150,752.50.

The claim for work during public holidays Is not specifically pleaded, the claimant did not go into these claims in her evidence and no effort is made to delve into thee claims in the written submissions. These claims generalised and some falling on days the claimant may have taken her off days as testified are declined.

Section 28 of the Employment Act, 2007 requires an employer to allow for taking of annual leave by each employee. In the absence of taking such leave the payment in lieu is due all at Ksh.23,262.40 and for the 10 month worked the prorated leave earned is $1\frac{3}{4}$ per month all being 17 days at ksh.13,181.80. total annual leave pay due is Ksh.36,443.80.

The claimant is seeking pay for January, 2016 and there is no record submitted by the respondent as to whether such wage as due and worked for was paid. Such failure serves to the disadvantage of the respondent as the employer. Such wage is awarded at ksh.23,262.40 as per the wage orders.

The claimant testified that she worked for 4 days in February, 2016. The respondent witness testified that the claimant was issued with a notice to show cause dated 8th February, 2016 and a letter terminating employment on 16th February, 2016 and which day should be the last date of engagement. However the claimant only offered her labour for 4 days and only claims for that much and is awarded at Ksh.3,101.60.

The claim for gratuity is not supported under any law, private contract, agreement or treaty. Such is declined.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a) Underpayments Kshs. 219,009.60;**
- b) Overtime pay ksh.150,752.50;**
- c) Total leave pay ksh.36,443.80;**
- d) Pay for January, 2016 ksh.23,262.40;**
- e) pay for 4 days in February, 2016 Ksh.3,101.60;**

Delivered at Nakuru this 17th day of October, 2019.

M. MBARU

JUDGE

In the presence of: