



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 216 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

**KENYA UNION OF DOMESTIC, HOTELS,
EDUCATION INSTITUTIONS, HOSPITAL AND
ALLIED WORKERS (KUDHEIHA).....CLAIMANT**

VERSUS

THE MANAGEMENT OF UNIQUE CAFE.....RESPONDENT

JUDGMENT

The Claimant filed a Claim on behalf of its member Kennedy Muhuthu the grievant, on 18th February 2013 alleging the refusal by the Respondent to pay the grievant's terminal dues. It seeks the following reliefs:

1. Underpayment (cashier) General Order

a. With effect from 1st May 2009 – April 2010

13,833 – 8,000 = 5,833 x 12 months Kshs.69,996

b. With effect from 1st May 2010 –January 2011

15,216 – 8,000 = 7,216 x 8 months Kshs.57,728

Total underpayment Kshs.127,724

2. House allowance

a. With effect from 1st May 2009 – April 2010

2,074.95 x 12 months Kshs.24,899

b. With effect from 1st May 2010 – January 2011

2,282.40 x 8 months Kshs.18,259.20

Total Kshs.43,158.60

3. Public holidays

a. With effect from 1st May 2009 – 30th April 2010

13,833 x 11 days/30 Kshs.5,472.10

b. With effect from 1st May 2010 – 31st May 2011

15,216 x 7 days/30 Kshs.3,550.40

4. Leave for one year (2010)

With effect from 1st May 2010

15,216 x 21 days /30 Kshs.10,651.20

Total to be paid Kshs.190,156.30

The Respondent denied failing to pay the grievant's dues. It avers that it settled the grievant's dues of Kshs.23,200 by depositing the sum with the Ministry of Labour on 31st July 2012.

Claimant's Case

KENNEDY MUNANDU MUHUUHU, testified that he was employed by the Respondent as a cashier on 1st January 2000. He testified that he started work at the Respondent's stations at Jamas, then went to Rivera on 1st April 2003.

It was his testimony that on 1st January 2011 he issued to the respondent notice to leave work and that he was called to the office and asked why he wanted to leave. He testified that he worked until 31st January 2011 but was not paid. He contended he was accused of being negligent and absent for two weeks but he denied the allegations.

He testified that he was not present on 31st July 2012 when his dues were calculated and that he did not collect the Kshs.23,200 deposited at the labour office. It was his case that he ought to have been paid a salary of Kshs.13,833 as opposed to Kshs.8,000. He further testified that he was not paid house allowance and that he worked during public holidays. He also claimed 21 days leave.

In cross-examination, he testified that Mr. George Wachira owned both restaurants he had worked at. He maintained that he worked at the different restaurants as a cashier but he never received an appointment letter. He denied being a waiter and being overpaid or being paid house allowance. It was his case that he started working at Unique Café on 1st May 2005. He testified that on 1st January 2011 he wrote to the employer informing it of his problems. He testified that he was given a Certificate of Service, which was a recommendation letter.

Respondent's Case

PAUL MUSYOKI MUNYAO, RW1, testified that he has worked at Unique Café as a Supervisor from 2006 to 2012. He testified that the grievant was a cleaner at the café from the year 2006 to January 2011 and was thereafter engaged as a waiter from the year 2009. He testified that when the grievant left work he stated that he had secured another job. He denied that the grievant was terminated.

In cross-examination, he testified that he did not have evidence relating to the grievant's employment and promotion. He denied issuing the grievant with the recommendation letter as it is signed by Paul Musyoka while he is Paul Musyoki.

FRANCIS NJENGA KAMAU, RW2, testified that he worked at Unique Café as an accountant between 2006 and 2011. He testified that it was a business name registered on 15th August 2006 whose owner is Mercy Muthoni Irungu. It was his testimony that Unique Café was closed in December 2011 and all authorities were informed of the closure.

He testified that the grievant worked at Unique Café when it commenced operations in August 2006. That the grievant was initially employed as a cleaner and in 2009 he was promoted as a waiter. He testified that the grievant left employment in 2011 and that he was informed by the grievant's supervisor that the grievant no longer worked for the Respondent.

He contended that the grievant was informed of his terminal dues in the letter dated 2nd February 2011. He testified that the grievant had pending leave and salary in the sum of Kshs.10,800. That since the grievant had not served notice, Kshs.8,000 was deducted from this amount. He testified that the termination notice was never received by the management. He testified that the respondent offered to pay the grievant his terminal dues but the grievant disputed the amount.

It was his case that he did not know of Jamas Hotel Shauri Moyo and Rivera Hotel and that they were not related to Unique Café. He denied that the respondent's café's operated during public holidays and Sundays. He testified that the grievant's salary was consolidated and was inclusive of house allowance. He denied the grievant was underpaid.

In cross-examination, he maintained that the grievant was employed as a cleaner on casual basis. He testified that the grievant's dues were paid to the Ministry of Labour and that he was expected to collect his dues from the Ministry.

Claimant's Submissions

The Claimant submitted that the grievant was terminated on 1st January 2011 in accordance with section 35 (5) of the Employment Act. It submitted that the Respondent in an effort to defeat the claim for salary earned for the month of January 2011 issued the letter dated 2nd January 2011 purporting that the grievant had absconded duty. It relied on sections 43 and 45 of the Employment Act and submitted that the Respondent's position that the grievant was dismissed for absconding duty was not proved and that the burden of proof shifts to the Respondent.

It submitted that it is undisputed that the grievant was the Respondent's employee and that the only dispute revolves around the period of service and the nature of termination. It submitted that it is a stranger to the amount purported to have been paid at the Labour office and denied the authenticity of the settlement agreement.

Respondent's Submissions

The Respondent submitted that the entity sued as "*the Management of Unique Café*" or "*Unique Cafe*" does not exist therefore the suit is null and void. It submitted that he who alleges must prove and that the grievant did not tender any document or evidence that Jamas Café in Shauri Moyo and Rivera Hotel existed and that he was employed in the alleged business.

It submitted that the grievant's claim for underpayment and house allowance must fail for reason that he was earning a consolidated salary that exceeded the consolidated minimum basic salary as a cashier under the General Wages Order 2009.

It submitted that the grievant's claim for leave allowance for one year is covered by the settlement arrived at on 31st July 2012 as Kshs.5,600 was paid to the grievant as annual leave and Kshs.20,000 as service pay for 5 years and Kshs.8,000 as January salary.

It was its submission that the Claimant had not proved the case against it thus the claim should be dismissed with costs.

Determination

It is not disputed that the grievant was employed by the respondent and that his last pay was Kshs.8,000/= per month. The grievant testified that he was employed by the Respondent on 1st January 2000 as a cashier while the Respondent avers that the grievant was employed as a cleaner in August 2006 after Unique Café opened.

The issues for determination is whether the Claimant is entitled to the reliefs sought following his resignation.

The Claimant avers that the grievant was employed by the Respondent as a Cashier and that he worked for the Respondent at two other cafes. The Respondent on its part averred that the Claimant was employed as a cleaner and thereafter as a waiter at Unique Café.

The parties do not dispute that the issues herein were the subject of a trade dispute at the labour office where the conciliator in the letter dated 25th July 2015 awarded the grievant Kshs.27,192, which was less the sum of Kshs.6,408 that had been deposited at the labour office. The Claimant in its letter dated even date confirmed that the grievant was entitled to the sum of Kshs.33,600 which was to be paid at the labour office. However the grievant rejected the offer which had been discussed and signed for in his absence by the claimant's Branch Secretary.

Section 3(6) of the Employment Act provides as follows –

(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

Section 26 of the Act further provides as follows –

Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

Section 48(1) and (2) of the Labour Institutions Act also provides for minimum terms of employment as follows –

48. Wages Order to constitute minimum terms of conditions of employment.

(1) Notwithstanding anything contained in this Act or any other written law?

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

(2) An employer who fails to?

(a) pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

(b) provide an employee with the conditions of employment prescribed in the order,

commits an offence.

The respondent did not deny paying the grievant Kshs.8,000 per month. The claimant on his part did not prove that he was employed as a cashier. According to the respondent, the grievant was a waiter. The minimum wage for a waiter in 2011 was Kshs.7,283 basic. Inclusive of 15% house allowance of Kshs.1,092.50/=, a waiter was entitled to 8,375.50. The claimant was thus under paid by Kshs.375.50 per month.

The grievant is thus entitled to the following –

Underpayments $375.5 \times 12 =$ Kshs.4,506

At the labour office, the grievant had been offered the following –

January pay 17 days

Pending leave unpaid 21 days

Service 5 years

Going by the salary of Kshs.8,375.50/-, the grievant would be entitled to the following –

1. Underpayments Kshs.4,506.00
2. Salary for 17 days Kshs.5,476.30
3. Annual leave 21 days Kshs.6,765.00
4. Service pay 5 years Kshs.24,160.00

Total Kshs.40,907.30

I therefore award the grievant the sum of **Kshs.40,907.30**

The respondent shall pay claimant's costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE