



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 64 OF 2017**

**MERCY NDUTA KIMANI.....CLAIMANT**

**VERSUS**

**JAMES WAHOME KURIA**

**T/A CHAKA GARDENS RESORT.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent and averred that in 2015 she was employed as a manager in the Respondent's business initially earning Kshs. 8,000/- later reviewed to Kshs. 10,000/- and lastly raised to Kshs. 12,000/-. She averred that he was dismissed on 1<sup>st</sup> August 2016 without any lawful or just cause after she requested for a salary increase on 31<sup>st</sup> July 2016. He averred that on 1<sup>st</sup> August 2016, the Respondent sent his agents including his wife to the workplace where they took away the keys to the premises denying her any access to the workplace. She averred that on 4<sup>th</sup> August 2016 she was accused of stealing money and other valuables whereas the keys had been with the Respondents agents. The Claimant averred that she was entitled to notice of termination – Kshs. 12,000/-; unremitted NSSF dues – Kshs. 8,640/-; underpayment of salary – Kshs. 86,805/-; unpaid leave (26 days) – Kshs. 26,737/-; overtime on Sundays – Kshs. 146,217/-, holidays – Kshs. 30,309/-, weekdays and Saturdays – Kshs. 328,804/-; house allowance – Kshs. 37,020/-, general damages for unfair termination – 12 months compensation; costs of the suit and interest.

2. The Respondent in its defence to the claim denied that the Claimant was employed as a manager of the Respondent's business. It was averred that the Claimant was employed as a bar maid and agreed on the salary which would be increased as the business picked up. The Respondent averred that the business was not doing well and that he gave all the employees notice in the month of April that if the business did not pick up within 3 months the business was to be closed on 31<sup>st</sup> July 2016. He averred that at the end of July 2016 he closed the business and terminated the services of the employees. He averred that the Claimant was earning Kshs. 12,000/- at the date of termination. The Respondent denied the allegations of underpayment and averred that the Claimant was working at the salary negotiated and agreed upon. He denied the allegations that his wife stormed the premises and took it over and averred that upon termination of the services of his employees he took the keys and handed them over to the caretaker. The Respondent denied that the Claimant used to work overtime and averred that the Claimant used to work on shift basis and would work normal hours. He averred that each employee had an of day to cater for extra hours worked or any public holidays in the week. The Respondnt urged the claim be dismissed with costs.

3. The Claimant as well as the Respondent, his witnesses Francis Njuguna Wanyeki and Cornelius Wainaina testified. The Claimant stated that she was a former employee of the Respondent. She reiterated her claim as set out above in her pleadings and statement. She produced her exhibits and relied on them in support of her case. In cross-examination she stated that the letter from Labour was sent through G4S and the delivery was to Margaret Wangeci Mathenge the wife to the Respondent. She stated that she was employed in March 2015 and that she was the manager of the premises. She testified that she was not employed at the Respondent' home and that when the hotel opened she was working with the wife of the Respondent. She stated that she did not sell at the bar and that there was a barman employed by the Respondent. She testified that she was not provided with accommodation and rented at Chaka. She stated only the shamba boy and guard were housed. She testified that they would open the bar at 9.00am and close at 12 midnight after the last customer left. She stated that there were off days for the staff. She stated that she supervised the employees and that if she wanted to attend to any personal issue she would get permission but never went on leave. She testified that there was theft in July 2015 and that in March there was attempted robbery. She stated that the alarm deterred the robbers. She testified that it was in July that the TV ws stolen plus some stock. She stated that it was not the Respondent who closed the business but the wife who came with the son to close the premises on 1<sup>st</sup> August. She was re-examined and testified that previously she was employed before the hotel started. She stated the Respondent was her employer at the hotel and that the theft did not cause the closure of the hotel as business continued. She testified that the wife too the keys when she was reporting to work and that she was not given any reason. She stated that she was told to direct queries to her employer.

4. The Respondent testified that he was a retired military officer and that the Claimant had misled the court. He stated that she was a househelp employed by his wife for about a year and that he was developing the hotel and opened it in 2015. He stated that the Claimant approached his daughter seeking employment and was employed as a supervisor. He testified that the starting salary was Kshs. 8,000/- and

was to be increased over time. He stated that there were 2 violent robberies in 2015 and another in 2016. He stated that the second robbery was in March 2016 and that he called the staff after the robbery and told them the business was not doing well. He testified that he informed them that if the business did not improve then it would be closed. He stated that the pay was from his pocket and that on 31<sup>st</sup> July he went there after paying them, closed the business. He denied that the Claimant worked continuously. He stated that she had accommodation on the premises and that after the robbery in 2015 the place was closed for a while. He testified that there was no issue with staff and the only disagreement arose when the handover was sought. He stated that he went to work and expected her to hand over the keys and close down. In cross-examination he testified that the Claimant worked from March 2015 and supervised the staff on his behalf. He stated that it would operate from 11.00am till 11.00pm. He stated that there were robberies which affected business and that he closed because of the robberies. He stated that he gave the staff 3 months notice and that the notice was verbal for the closure on 1<sup>st</sup> August 2016. He stated that he leased the premises as a going business as he still owned the business. He testified that he sold the business not the premises. He stated that he was not a witness to the altercation with his wife but came to learn of it. He testified that his wife took the keys and closed the business as he had instructed and he had only one employee left who was the caretaker and therefore they could not access the premises as it was locked. The 2<sup>nd</sup> defence witness Francis Wanyeki testified and adopted his statement. His statement was to the effect that he resided in Chaka and that after the robbery in March 2016 all the staff were called and notified that if the business did not pick up the business would be closed at the end of July 2016. He stated that their salaries were paid on 31<sup>st</sup> July 2016 and the business closed. He was not cross-examined. The last witness for the defence was Cornelius Wainaina who testified that he worked as the caretaker and that the Claimant was the supervisor. He stated that there were off days scheduled for the employees each week. He testified that on public holidays they did not get any off days as it was busy and that the Claimant was the overall supervisor. He was cross-examined and stated that he was housed on the premises and that he was the caretaker and therefore did not have any specific time to report. He stated the notice was verbal and that he was paid the salary dues though he had nothing to show for it. That marked the end of the oral testimony.

5. The Claimant's submissions were that a transfer of undertaking could not operate as to terminate the employment. She submitted that her termination was therefore unlawful and unfair. She cited the case of **Secretary of State for Employment v Spence & Others [1986] 3 All ER 316** and submitted that whether the termination was as pleaded by her or as admitted by the Respondent it was automatically unfair and unlawful. She submitted that she was entitled to the maximum compensation for the unfair dismissal and payment of her claim in terms of the Employment Act and the respective minimum wages orders and the Labour Institutions Act.

6. The Respondent on his part submitted that the Claimant had been employed by his wife and later after the bar business was opened she was employed there among other employees. The Respondent submitted that the employees were notified of the intent to close the business and that the premises subsequently were leased to another person in April 2017. He submitted that the Claimant had not proved any underpayment as she did not prove the premises were within the former Nyeri Municipality. He submitted that the business was somewhere in the bush at a place called Chaka. The Respondent thus urged the dismissal of the suit with costs.

7. The Claimant's claim from the evidence adduced was a redundancy which arose as a result of the frequent robberies curtailing the business enterprise. The business was sold as a going concern but from the sale agreement this was done in 2017 after the closure in July 2016. As such the ratio in **Secretary of State for Employment v Spence & Others (supra)** would not apply. In case of a redundancy under such circumstances as here, the process is as set out under Section 40 of the Employment Act. Section 40 provides as follows:-

40. (1) *An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—*

*(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than month prior to the date of the intended date of termination on account of redundancy;*

*(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*

*(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

*(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

*(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*

*(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*

*(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

8. It is clear the Claimant and her colleagues were only notified verbally and the Labour Officer was not notified. The law is clear that where the employee is a member of a trade union, the employer must notify the union and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than one month prior to the date of the intended date of termination on account of redundancy. The employer must inform the employee personally in writing and the labour officer if that employee is not a member of a trade union. The employer has, in selecting the employees to be declared redundant taken into account seniority, the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. As this was not done the employment was terminated contrary to the law and I hold that the Claimant is entitled to:

- a. One month's salary in lieu of notice – Kshs. 12,000/-
- b. 2 months compensation for the unlawful termination of contract – Kshs. 24,000/-.
- c. Costs of the suit capped at Kshs. 40,000/-
- d. Interest on the sums in a) and b) above at court rates from the date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 13<sup>th</sup> day of November 2019**

**Nzioki wa Makau**

**JUDGE**