



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.107 OF 2018

MIRIAM NJERI KAMAU.....CLAIMANT

VERSUS

COOL RIVERS HOTEL LIMITED.....RESPONDENT

JUDGEMENT

On 23rd April, 2019 the claimant filed the Memorandum of claim, the respondent was served and entered appearance on 3rd May, 2018 without filing any defence. On 17th July, 2019 both parties attended to take hearing directions and the matter was fixed for hearing on 26th November, 2019 and the respondent given 14 days to file a defence which was not done and on the scheduled hearing date there was no attendance.

The claimant was heard on the claim.

The claimant was employed by the respondent as a Stores Clerk on 2nd September, 2016 to 7th February, 2018 when employment was terminated without notice, hearing or payment of terminal dues. the claimant was earning ksh.9,000.00 per month.

The claims are there was underpayment of the due wage;

The wage due in January, 2018 was in underpayment and contrary to the wage orders; there was no payment for 7 days worked in February, 2018; no notice pay or compensation for unfair termination of employment.

The claimant is seeking the following dues;

- a) Salary for January, 2018 Kshs. 27,794.00;
- b) Notice pay Ksh.20,931.00
- c) Compensation ksh.251,172.00;
- d) Underpayment Ksh.202, 872.00;
- e) Overtime ksh.525,529.00;
- f) Public holidays ksh.92,160.00;
- g) Annual leave ksh.41,862.00;
- h) Certificate of service; and
- i) Costs.

The claimant testified in support of the claims made. That upon employment by the respondent she worked diligently until 7th February, 2018 when the respondent called her and stated that there was no more work. There was no notice, hearing or prior warning of such a matter. For days worked there was no payment and the wages paid over the years there was underpayment.

At the close of the hearing the claimant filed written submissions.

In the absence of the respondent, without a defence, the court is only left with the claimant's pleadings, evidence and submissions. There being no work records to challenge the averments made by the claimant, the court has no other material to rely upon at the close of the hearing and has to apply the same in assessing the claims made.

Section 43 of the Employment Act, 2007 requires the employer to terminate employment with reason(s) or where there is an operational requirement to issue the requisite notice(s) in accordance with the law and allow the employee the fair chance to a hearing. Without the mandatory compliance with section 43, 41 and 35 where there are no reasons, hearing and a notice, the termination of employment unfair and unlawful. Under section 45 of the Act, the employee is entitled to compensation under the provisions of section 49 of the Act.

As noted above, without any defence or the respondent filing any work records, the court has to believe the claimant.

On the claims made, the claimant at a Clerk/store keeper had her wage regulated under the Wage orders. On the payment of Ksh.9,000.00 this was an underpayment and the dues payable shall be assessed on this basis.

Notice pay is due at the rate of one month in accordance with section 35 of the Employment Act, 2007 all at ksh.20,931.00.

On the claim for unpaid wages for 7 days this is due together with the wage for January, 2018 all at ksh.27,794.00.

The claim for underpayment assessed together with the applicable wage orders is correct and awarded at ksh.202,872.00.

On the claims for overtime pay, the evidence is that the claimant worked for 16 hours instead of 8 hours each day making an overtime work of 8 hours. The claimant however failed to clarify how such 16 hours related to and the claim is premised on general averments. Such is declined.

On the claims for work during public holidays, there is a general claim that there were 20 public holidays for the period covered without setting out how such arose. Public holidays are gazetted days and cannot be general days. Such claims are declined.

On the claim for annual leave, section 28 of the Employment Act, 2007 allow the employee to take annual leave and where not taken a payment tin lieu at basic pay. For work from 2nd September, 2016 to 7th February, 2018 a period of one (1) and 3 months. The basic pay plus the 3 months at 1.75 days each is all at ksh.21,386.75 in annual lsave pay as there are no work records to confirm the respondent allocated annual leave.

On the finding there was unfair termination of employment, the claimant having worked for a period of less than 3 years and without any certificate of service having been issued, a compensation of 3 months gross wage is found appropriate all at Kshs.54,603.00

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

- a) Compensation awarded at ksh.54,603.00;**
- b) Notice pay Ksh.20,931.00;**
- c) Annual leave Ksh.21386.75;**
- d) Underpayments ksh.202,872.00.**
- e) Unpaid wages Kshs. 27,794.00.**
- f) Certificate of Service be issued under the provisions of section 51 of the Employment Act, 2007;**
- g) And the dues paid to the claimant shall be subject to section 49(2) of the Employment Act, 2007.**
- h) The claimant shall be paid costs.**

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

M. MBAR?

JUDGE

In the presence of: