



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 804 OF 2016**

**BETWEEN**

**ELIZABETH MWONGELI MULU.....CLAIMANT**

**VERSUS**

**HILARY MSONERA t/a CITY MILLENIUM**

**NITE CLUB AND RESTAURANT.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*B.W.Kenzi & Company Advocates for the Claimant*

*Muraya & Wachira Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed her Statement of Claim on 11<sup>th</sup> October 2016. She avers she was employed by the Respondent, at his Bar and Restaurant, as a Supervisor, in August 2006. The Respondent’s business was distressed for rent in August 2016. The Respondent did not advise the Claimant on her employment status, upon distress. She considered her position to have been rendered redundant. Her last salary was Kshs. 9,000 monthly. She wrote a demand letter to the Respondent, claiming redundancy dues. She received no response, prompting her to approach the Court. She seeks Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 9,000.
- b. Unpaid salary for the months of June, July and August 2016 at Kshs. 27,000.
- c. Accrued annual leave over a period of 10 years worked at Kshs. 90,000.
- d. Severance pay at 15 days’ salary for every complete year of service [10 years] at Kshs. 45,000.
- e. N.H.I.F contributions at Kshs. 48,000.
- f. Overtime of 6 hours daily at Kshs. 450 per day, amounting to Kshs. 135,000.

Total.....**Kshs. 354,000.**

g. Costs.

2. The Respondent filed his Statement of Response on 27<sup>th</sup> October 2016. He does not disagree that the Claimant worked for his business as

a Supervisor. Her employment history, the terms and conditions of service appear not in dispute. The Respondent explains that indeed his business was unlawfully distressed for rent. His furniture and tools of business were carried away, while others were destroyed. The business was closed down. These occurrences were known to the Claimant. The Respondent filed an application and an appeal against the Landlord in the Civil Courts. He denies that he declared Claimant's position redundant, holding that closure of his business upon distress for rent, were factors beyond his control. He urges the Court to dismiss the Claim with costs to him.

3. Hearing proceeded on 21<sup>st</sup> February 2018 in the absence of the Respondent and his Counsel. An Affidavit of Service sworn by Court Process Server Alex P. Nzuki on 21<sup>st</sup> February 2018, indicates Counsel for the Respondent received Hearing Notice on 27<sup>th</sup> September 2017.

4. The Claimant restated, in her evidence before the Court, the contents of her Statement of Claim, and her Witness Statement. She exhibited employment records, among them: her work identification card; minutes of Staff meetings; list of Employees; duty rota; her Certificates of Medical Examination issued under The Food, Drugs and Chemical Substances Act Cap 254 the Laws of Kenya; photographs of the Staff at Respondent's business; and her letter of demand before filing of the Claim.

**The Court Finds:-**

5. The Court is persuaded the Claimant was employed by the Respondent as a Supervisor at his Restaurant for 10 years. It is not disputed that the business was shut down, after Respondent's Landlord distrained for rent.

6. The Claimant was rendered jobless upon closure of business. It cannot be doubted that her position became redundant. The closure of business fitted the description of the term 'redundancy' under Section 2 of the Employment Act 2007. The Respondent ought to have treated Claimant's contract as terminated on account of the collapse of his business, and invoked Section 40 of the Employment Act 2007, in remedying the economic harm occasioned to the Claimant.

7. The Civil Cases taken out by the Respondent against his Landlord are of no relevance to termination of the Claimant's contract of employment. It is unhelpful for the Respondent to posit that his business closed due to circumstances beyond his control, and that the Claimant was aware of these circumstances. It was wrong for the Respondent to go mum and not engage the Claimant in any way, after closure of business, more so because the Claimant had worked for the Respondent for 10 creditable years, and earned certain employment benefits over the years, which could not simply be wished away.

8. The evidence availed to the Court by the Claimant persuades the Court that the Claimant was employed by the Respondent for 10 years; her position was rendered redundant upon closure of business; she was denied redundancy benefits; and deserves the assistance of this Court in recovering her benefits.

9. She has not established the prayers for N.H.I.F contributions and overtime. There are no records whatsoever from N.H.I.F. She has not shown why statutory contributions in any event, should revert to her if unpaid, rather than be forwarded to the statutory body in question. Her evidence does not establish that she worked for 6 excess hours daily. It is not clear what hourly rate she adopts, in her computation, leading to the sum of Kshs. 135,000 over a period of 10 years. The duty rota exhibited does not show hours of work. There is no schedule capturing the hours of work. There is no evidence that the Claimant worked excess hours, or that such work was authorized and necessary.

10. Annual leave pay is claimed on the basis that the Claimant was entitled to 30 days of annual leave for every year worked. There is no contract exhibited showing the Claimant was entitled to 30 days of annual leave for every year of service. ***She is granted the statutory minimum 21 days of annual leave for 10 years, amounting to 210 days, translating to annual leave pay of Kshs. 72,692.***

11. ***The prayer for severance pay is granted under Section 40 of the Employment Act 2007, at 15 days' salary for each of the 10 years completed in service, amounting to Kshs. 51,923.***

12. ***She is allowed the prayer for arrears of salary for the months of June, July and August 2016 at Kshs. 27,000.***

13. ***Costs to the Claimant.***

IN SUM, IT IS ORDERED:-

***a) The Respondent shall pay to the Claimant: annual leave pay at Kshs.72,692; severance pay at Kshs. 51,923; and arrears of salary at Kshs. 27,000- total Kshs. 151,615.***

***b) Costs to the Claimant.***

Dated and delivered at Mombasa this 8<sup>th</sup> day of June 2018.

James Rika

Judge