



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 385 OF 2017

Consolidated with Nyeri ELRC No. 413 of 2017

1. JULIA WARUGURU KAHIHIA

2. WANJIKU JACINTA CLAIMANTS

VERSUS

THIKA THE BLEND LIMITED

T/A THE BLEND RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent their erstwhile employer for relief in regard to their dismissal from employment. The Claimants had filed two separate suits that were consolidated by order of the court. The two were bar attendants at the Respondent which was a bar and restaurant. The Claimants averred that they were dismissed on 21st August 2017 ostensibly because there was shortfall in the cash they were allegedly required to hand in for drinks sold. The Claimants averred that they were employed as bar attendants at a monthly salary of Kshs. 15,000/- but were never issued with letters of appointment. For the 1st Claimant averred that she was employed on the 5th January 2017 while the 2nd Claimant was employed on 18th April 2017. The Claimants averred that they were rarely paid and when payment was made it was a portion of the salary due. The Claimants averred that they were not paid house allowance in terms of Section 31 of the Employment Act and that the NSSF and NHIF contributions were not made. The Claimants averred that the Respondent made false accusations of theft against them in order to justify the non-payment of salaries owed as no investigations were carried out to verify the authenticity of the claims made against the Claimants. The Claimants averred that terminal dues were not paid and that the Respondent was therefore liable for the salary in lieu of notice, salary arrears, payment in lieu of leave earned and not taken, house allowance, compensation for unlawful loss of employment, service pay, certificate of service and costs of the suit as well as interest on the sums sought.

2. The Respondent filed a defence in each of the matters and stated that the Claimants' claims were denied *in toto* and averred that the Claimants during their employment on various occasions fraudulently failed to account for monies directly entrusted to them by virtue of their roles at the Respondent which sums were well in excess of their salary. The Respondent denied that statutory dues were not remitted and averred that all NSSF and NHIF statutory dues were deducted and remitted to the said entities in accordance with the law. The Respondent averred that the Claimants had admitted to occasioning losses to the Respondent. The Respondent averred that the Claimants had failed to account for Kshs. 40,600/- on 12th August 2017 which was found to be missing after reconciliation undertaken leading the Respondent to suspect fraudulent activities on the part of the Claimants. The Respondent averred that on 20th August 2017, the Claimants failed to account for a sum of Kshs. 28,485/- which went missing while directly under the care of the Claimants. The Respondent duly informed them of the missing cash and the Claimants were unable to offer a reasonable explanation and were therefore required to reimburse the Respondent the said sum. Failing to do so, and on suspicion of fraud the matter was reported to Thika Police Station where a report to this effect was made and that at no point was the Claimant held against her will. The Respondent averred that it was at all times ready to have the matter settled amicably through reimbursement of the said missing sums and it was only upon failure to reimburse was the matter reported to the Police and that the Claimants were released on bail. The Respondent denied dismissing the Claimants while they were in remand and that the Claimants had since their release on bail failed to report to work or communicate their whereabouts. The Respondent denied owing the Claimants any salary in lieu of notice having absconded from work or any salary arrears and averred that it was in fact the Claimants who owed the Respondent monies due to losses incurred during their fraudulent actions. The Respondent averred that the Claimants were not entitled to the payment in lieu of leave not taken as they took 2 off days each week throughout their employment with the Respondent. The Respondent reiterated its averments in support of the counterclaim and further stated that in the course of employment by the Respondent, the Claimants had occasioned significant losses totalling Kshs. 124,740/- which sum the Respondent sought from the Claimants together with interest from the date of loss as well as costs of the suit and interest on both the sums claimed.

3. The Claimants filed a reply to defence and a defence to counterclaim. In the pleadings filed, the Claimants denied the averments made by

the Respondent and further averred that the Respondent had failed to keep proper accounts and wrongfully and unlawfully compelled the Claimants to pay for deficits found. The Claimants averred that no charges were levied against them as the Claimants were innocent of all the charges. The Claimants averred that the defence and counterclaim should be struck out and judgment entered on their claims.

4. The Claimants testified on 25th April 2018 and reiterated their claims. The Respondent availed Eric Osero Ombongi the manager at the Respondent during the material time. The 1st Claimant stated that she was employed on 5th January 2017 as a bartender earning Kshs. 15,000/-. She stated that on 20th August, Saturday after completing the shift there was a shortfall of Kshs. 27,385/- which was alleged to be with the bartenders. They were searched, their Mpesa balances checked and the case was not found. She stated the cash used to be handled by the account, manager and cashier and that she was told to pay the cash due and know that she was no longer employed. She testified that she did not have the money and that they were locked up in the balcony and the cashiers informed not to speak to them. She stated that they stayed there till the next day and did not eat or change clothes and that it was the intervention of a customer that led them to being taken to the police station. She stated that no investigations were done and that the Respondent did not pay salaries on time. She stated no house allowance was paid, there was no remittance of NSSF and NHIF dues.

5. In cross examination she testified that this was not the first time that there had been any shortages. She stated that the sums would be deducted from their salaries. She testified that there was no record of the sales and that they would know of the difference after the sale. She stated that stock was taken in the morning and after sales they would check and they would know the difference after the check on remaining stock. She testified that Boniface would check on the stocks and that she was forced to write the note to repay the sum of 20,300/- which was deducted from her salary. She stated that she was arrested on 20th August at 8.00am and was taken to the Police station on 21st August 8.00pm and released on 22nd August at 8.00pm. She stated that she was not charged and that she never went back to work. She testified that she was on off for 2 days in a week.

6. In re-exam, she testified that she was compelled to write the letter on the short and that there was no investigation undertaken. She was paid by instalment and that she could manage despite the haphazard pay as her husband provided for her. That marked the end of testimony for the 1st Claimant.

7. The 2nd Claimant testified that she was employed on 18th April 2017 as a bartender and was not issued with a letter of employment. She stated that she received Kshs. 15,000/- a month and was unfairly dismissed from employment by the Respondent. She stated that on 20th August 2017 there was a cash shortage of Kshs. 27,300/- after the shift and that was not the first time that there had been a shortfall. She testified that the shortfall was the fault of the bar attendant. She stated that the cashier, manager and accountant handled cash. She said she was told to pay the shortfall alongside her colleague Julie (the 1st Claimant). She testified that she told them that she did not have money and they were searched and there was no money found. She stated that they were told that if they did not pay the money they would not leave. She stated they did not go home or shower from 20th August 2017 till 21st at 8.00pm. She testified that the waitresses were told not to talk to them and that it was a customer who came and asked them what was wrong. They explained to him what had happened and he told the manager to take the bartenders to the Police if they had stolen. She testified that they were taken to Thika Police station and no statements were taken or report made and they were in Police remand till 22nd August 2017 at 8.00pm when they were released on bond. She stated that she was paid inconsistently and there was no house allowance or leave allowance paid. She stated that she was still unemployed since the incident.

8. In cross-examination she testified that she wrote the letter and was to pay the Respondent 20,300/- for 2 months from her salary. She stated that there was a rule that cash shortages would be recovered from their pay. She stated that the payment was on account and not just cash and she did not know how the others would pay. She testified that she was taken to the Police on 21st August and she left on 22nd August and she had been dismissed. She stated that she was verbally dismissed by Eric the manager of the Respondent. She testified that she had 2 off days in a week. She said she was not employed and stated that she had worked at Club 37 on Friday and Saturday on weekends. She stated the 1st Claimant was also employed there. She testified that she was employed there for only 3 days a week and that she had left that job and was not dismissed.

9. In re-examination she testified that she had said she would pay Kshs. 20,300/- as she was pushed to do that. She testified that they were searched and were told to agree to either agree to have the money deducted or they would be dismissed. That marked the end of the 2nd Claimant's testimony.

10. The Respondent called the manager Eric Osero Ombongi who testified that the 1st Claimant was employed on 5th January 2017 and her salary was initially Kshs. 10,000/- and that it was all inclusive. He stated that the salary was raised to around 12,000/- in April. He stated that the bartenders would report at around 4.30pm and collect stock from the counter which was sold and after the end of the shift the bartender would cash out by giving in the cash and then the stock take would be done, Mpesa checked, PDQ, cash and the amount should tally. He stated that if there is a difference the employee would have to meet the shortfall. He stated that the waitresses receive cash from patrons and they can release drinks to patrons before payment is made. He testified that they are to make sure that the payment is made and there should be no shortfall if they follow up on the payments. He stated that the Claimants had cash shortages and they wrote letters on the shortage on 12th when a sum of Kshs. 40,600/- was found to be missing. The sum was divided between the two and the letter undertaking to pay was countersigned by him. He testified that they reported around 4.30pm on a Saturday. He could not recall the date but on Sunday morning they had a shortfall of Kshs. 28,000/- and that he was called by the cashier. He stated that the cashier told him that there was a shortage and that he asked the cashier to talk to them and they said they did not have money. He called his boss and told her what had transpired and they refused to talk to anyone. That was on Sunday evening. He denied that anyone was detained and that they were free to move around and that no one was stationed to cover them. No door was locked and there was food brought by a friend. They refused to pay and the matter was reported to the Police. No one told them they were dismissed. He testified that he did not go to the Police station and that the one who went was the cashier. He was not certain of the date of their release and they never came back to work. He stated there was no bar to them returning to work. He testified that they normally go for 1 day off and 1 leave day and there are 2 days in a week. He stated that the Respondent had sought in the counterclaim to get payment of the shortfall.

11. In cross-examination, the Claimants normally reported each day at 4.30pm in the evening. He stated the Respondent was normally closed

during the day. Only the cashier takes the stock and the Respondent opens around 4.20pm. He testified that no alcohol is sold during the day and that the restaurant is not open for alcohol. He stated that the cashier does the stock-take and the Respondent is open from 9.00am and the sales start at 4.00pm. The cleaner and cashier are on the premises and the counter is restricted. He reported at 4.30pm and the cashier oversees the place. He was certain the counter is protected. He stated that the Claimants should do stock take and compare and that it was their job to do stock take. He testified that there is an accountant and normally they do not have an accountant and it is the cashier who does the stock take and that the Claimants are there when he does the stock take. He stated that he oversaw the stock take. He testified that there was a stock sheet for 19th August attached to the response. The Claimants incurred a shortfall of Kshs. 23,000/- on the item of beer. He stated that there is a system as the cashier does a stock take and they could not account for the product sold. He testified that the tabulation he had given was prepared by the general manager and that was an official report. He was not in a position to confirm to court the source of the figures. He stated that the Claimants' salaries were Kshs. 10,000/- a month and that was all inclusive. He said it was supposed to be written but he did not have a record. He stated that there are cashiers, bar attendants and waiters. He testified that when the cashier does the cash out, the waitresses should give all the money they have. He stated that it was not an assumption. He stated that the Claimants were required to pay the difference. He testified that the shortfalls were investigated and that he had been following up the case since August 2017. The policeman who was handling their case was transferred. He was aware the Claimants are deemed innocent until they are convicted by a court. He stated that they were not detained as per him. He stated that he was not around and according to what the cashier told him the Claimants were not detained. They got food. He testified that he reported at 4.30pm on 21st August and was not there in the morning. According to him he never told them not to come to work. He stated that they never came back after release on 22nd. He stated that the Claimants did not come back and the Respondent was operating and because they did not return they were replaced. He asked the cashier to call them. He did not understand how one can dismiss someone who does not come to work.

12. He was re-examined and stated that the stock take is done by the cashier and the bartender takes custody of the goods after stock take. The waitresses and bartenders receive cash and the cashier ultimately received the cash from the waitresses and bartenders. They are responsible for stock handed to them. After they were released from the police station they never reported to work. That marked the end of the testimony of the Respondent's witness. Parties were to file written submissions.

13. The Claimants filed submissions on 28th May 2018 and at the time of penning the judgment, none had been filed for the Respondent. In their submissions the Claimants submitted that they were employed by the Respondent and that they were not paid house allowance. The Claimant submitted that the Respondent in its evidence produced an employee payment schedule and the payment schedule did not include house allowance. The Claimants submitted that the Respondent did not make regular salary payments as shown by their bank statements and that they were paid a portion of their salary. They submitted that after the incident following their service on 20th August 2017 they were accused of causing a shortfall and they were detained in the Respondent's premises. The Claimants submitted that it was after members of the public intervened that they were taken to Thika Police Station where they were remanded but no charges were preferred to date. The Claimants submitted that their contracts of service with the Respondent were terminated orally. They submitted that the Respondent denied their detention but admitted that they received food from their friends who were allowed to stop by. The submissions were that Respondent denied that the Claimants were dismissed and that they instead deserted duty. The Claimants submitted that the Respondent could not explain why no disciplinary action had been taken against the Claimants. The Claimants submitted that the Respondent did not keep or avail records of its employees which is a mandatory requirement under Section 74 of the Employment Act. Reliance was placed on the case of **Maurice Wandera Egesa v Inter-Security Services Ltd [2016] eKLR**. The Claimants submitted that no investigations were carried out and the Respondent did not take into account that there were other staff members who had access to the proceeds of its business including the cashier, accountant and waitresses. The Claimants submitted that their dismissal was contrary to the provisions of the law and that their dismissal was not fair and there was no valid reason for dismissal. The Claimants relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**. The Claimants thus urged the court to award them the sums claimed in their respective claims.

14. The Claimants assert that they were dismissed on 21st August 2017 after an incident the day before when there was shortage in sales and they were blamed for it. They assert that they were detained and later taken to the Police station after complaints by patrons. The Respondent on its part seeks to recover the alleged shortfall by way of counterclaim. It asserts that the Claimants were not dismissed and that they instead absconded duty. The Claimants assert they were earning Kshs. 17,200/- a month. There was no record of the payment due as even the bank statements given as evidence revealed a lower sum. The sum paid per the Respondent's employee payment schedule was Kshs. 10,000/-. The Respondent asserts that this figure is consolidated. There is no employment contract shown to this effect and the schedule does not indicate consolidated salary. Under the Employment Act section 31, the employees are entitled to house allowance at 15% of the basic pay. The sum of 10,000/- due would of necessity have to be taken as the basic and the basis of calculation of house allowance in terms of Section 31. The Claimants were from all accounts not properly handled after the incident giving rise to this claim. It is clear that they were handled in the most inhumane way. In the words of the Respondent's witness *they reported around 4.30pm on a Saturday. He could not recall the date but on Sunday morning they had a shortfall of Kshs. 28,000/- and that he was called by the cashier. He stated that the cashier told him that there was a shortage and that he asked the cashier to talk to them and they said they did not have money. He called his boss and told her what had transpired and they refused to talk to anyone. That was on Sunday evening. He denied that anyone was detained and that they were free to move around and that no one was stationed to cover them. No door was locked and there was food brought by a friend. They refused to pay and the matter was reported to the Police.*

This is proof that the Claimants were detained by the Respondent so that they could pay back the shortfall in sales for the material day. The Claimants did not report back to work after their release from custody. No charges were preferred against them. I do not blame them for not reporting back to work. The dismissal was constructive. The manner they were handled showed them that they were of no value to the Respondent and it was in those prevailing circumstances ridiculous to expect them to troop back to work. They were accused of causing a shortfall on the night of 20th August 2017, they were held against their will on Sunday 20th August and the OB report numbers the Respondent gave indicate that they were taken to the Police Station on 21st August 2017 (OB 28/21/8/2017 and 27/21/8/2017 respectively) It is not rocket science to discern that the report to police was not in the normal course of investigation as no statements were produced to show that the Claimants were part of an active investigation. It is deplorable that the Police are used to conduct such shady business as extortion that was attempted herein. The Respondent focused on the 2 Claimants without taking into account there were other handlers of cash. There are waitresses and the most probable cause of the problem – the cashier. The cashier undertook stock taking alone and then handed over stock to the bartenders and waitresses. We are not told whether there were other bartenders. Assuming these were the only two, there were cashiers who did the runs between tables and they too could have caused the shortfall. The Respondent asserts that it has a system in place but it seems the system employed has chronic failure as there are shortfalls ever other time. The Claimants were dismissed without adherence to the dictates of the law. Even if they had committed the alleged offences the Respondent should have handled the matter in the manner

prescribed in law. The dismissal of the Claimants was therefore unfair and unlawful. There was no procedural fairness or substantive fairness as held in the **Walter Anuro v TSC** case cited above.

15. The Respondent did not produce any documentation that would have proved the counterclaim. The Respondent had a duty to provide particulars of the loss the Claimants are supposed to have caused. Having failed to prove the loss and the connection of the Claimants to the loss, the one paragraph counterclaim cannot succeed. I will dismiss it accordingly as the Respondent did not prove it on a balance of probabilities.

16. In the final analysis I enter judgment for the Claimants against the Respondent as follows:-

Julia Waruguru Kahihia

- i. Kshs. 11,500/- one month salary
- ii. Kshs. 12,000/- being house allowance arrears
- iii. Kshs. 138,000/- as compensation for 12 months for the unlawful dismissal
- iv. Interest on the sums in (i) and (ii) above at court rates from the date of filing suit till payment in full
- v. Interest on the sums in (iii) above at court rates from the date of judgment till payment in full
- vi. Certificate of service in terms of Section 51 of the Employment Act
- vii. Costs of the suit

Wanjiku Jacinta

- i. Kshs. 11,500/- one month salary
- ii. Kshs. 6,000/- being house allowance arrears
- iii. Kshs. 138,000/- as compensation for 12 months for the unlawful dismissal
- iv. Interest on the sums in (i) and (ii) above at court rates from the date of filing suit till payment in full
- v. Interest on the sums in (iii) above at court rates from the date of judgment till payment in full
- vi. Certificate of service in terms of Section 51 of the Employment Act

It is so ordered.

Dated and delivered at Nyeri this 9th day of July 2018

Nzioki wa Makau

JUDGE