



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.473 OF 2017**

**CATHERINE NJOKI MWANGI.....1<sup>ST</sup> CLAIMANT**

**JUDITH ANYANGO OLOO.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**WAGIKA HOLDINGS LTD.....RESPONDENT**

**JUDGEMENT**

1. The claimants filed the Memorandum of Claim on 1<sup>st</sup> December, 2017. The respondent was served and entered appearance on 31<sup>st</sup> January, 2018. No defence was filed.

2. The claimants applied to proceed with their case as no defence was filed within the required time. The respondents were served with hearing notice on 11<sup>th</sup> September, 2018 and receipt is acknowledged. Under the provisions of Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 the court heard the claimants' case by way of formal proof.

**Claim**

3. The claimants were employed by the respondent company as Waitresses at its Nyandarua Bar and Restaurant. The contract was oral and terms and conditions of work were also verbal.

4. The 1<sup>st</sup> claimant was employed in July, 2010 and paid a wage which was increased each year as follows;

April, 2012 a wage of Kshs.2, 500.00 per month;

May, 2012 wage increased to Kshs.4, 700.00 per month;

In May, 2013 the wage was increased to Kshs.5, 000.00 per month;

In May, 2016 the wage was increased to Kshs.5, 500.00 per month;

In March, 2017 the wage increased to Kshs.6, 000.00 per month.

5. The 2<sup>nd</sup> claimant was employed in April, 2014 and wages were increased during the period of employment as follows;

April, 2016 the wage was kshs.5, 000.00 per month

In May, 2016 the wage increased to Kshs.5, 500.00 per month;

In March, 2017 the wage increased to Kshs.6, 000.00 per month.

6. The claim is that the claimants remained at work during public holidays, no leave was allocated or payment in lieu of leave.

7. On 15<sup>th</sup> November, 2017 Mr Murethi a manager with the respondent called the claimants and terminated their employment verbally. No reasons were given or notice issued. It was summary action. Terminal dues were not paid. Efforts to reach the management to seek a hearing were fruitless.

8. The claimants are seeking dues for underpayment, work during public holidays, leave pay, salary for days worked, notice pay, gratuity and compensation for unfair termination from employment.
9. Each claimant testified in support of the claims.
10. There was no defence to challenge the claims.
11. The claimants' case shall be assessed based on the pleadings, the evidence and the applicable law.
12. The essence of a specialised court for employment and labour relations in Kenya is to ensure that parties in an employment and labour relations dispute are given a hearing and such is considered with minimal application of procedures. However to ensure that each party is given a fair chance to articulate its case, the Employment and Labour Relations Court (Procedure) Rules, 2016 requires a respondent served with a Memorandum of Claim to file a defence and respond to the claims made within the provisions of Rule 13.
13. The response by an employer is crucial as with it the court is able to access the work record with regard to the employee whether such an employee is the claimant or the respondent. The duty vested in law upon an employer is to ensure production of all work records in court proceedings. See **Stephen Mbugua Chege versus Nairobi City Water & Sewerage Company [2017] eKLR**
14. Without the respondent filing defence and only filing appearance, I take it they were not keen to defend this suit and opted to be present and not offer any material. The evidence of the claimant therefore becomes crucial as this is the only material available to the court.
15. Without any challenge to the claims made and the employment having been on oral terms as well as the termination process, the court is also denied the reasons leading to the dismissal of the claimants from their employment. Such lapses lead to one finding. The claimants were not taken through the due process of the law before their employment with the respondent was terminated. Such is contrary to the mandatory provisions of the law at sections 35, 41, 43 and 45 of the Employment Act, 2007. Compensation is due.
16. On the claims for underpayments, the Wage Orders published by the government are to ensure that every employee is paid within the legal minimum wage at any given time. The employer can only pay above such legal minimum but cannot go below even in a private treaty. Any wages not paid within the legal minimum, the difference is due to the employee upon demand or when a claim is filed with the court.
17. The claimants were employed as Waitresses. Their services were required in the hospitality industry at the respondent's Nyandarua Bar & Restaurant.
18. The wage Orders applicable in 2015 required the claimants as Waitresses be paid a monthly wage of Kshs.10, 496.90.
19. Over the years from 2010 to 2017 when the claimants were dismissed, the applicable Wage Orders were not adhered to by the respondent.
20. The claimants in the pleadings have correctly applied the Wage Orders and outlined the owing dues. The 1<sup>st</sup> claimant is entitled to Kshs.491, 334.95 in underpayments and the 2<sup>nd</sup> claimant is entitled to kshs.262, 406.00 in underpayments for the duration of employment.
21. Work during Public Holidays is also regulated in the Wage Orders. The claimants have each set out the number of public holidays worked in each given year. The 1<sup>st</sup> claimant is awarded kshs.67, 499.00 for working during public holidays and the 2<sup>nd</sup> claimant awarded Kshs.31, 259.90.
22. Taking of annual leave or payment in lieu is regulated under section 28 of the Employment Act, 2007. Such leave must be taken or paid for within each 18 months. In this regard the claimants are awarded leave pay for the 18 months due each at kshs.20, 992.00 in lieu of taking leave for the duration of employment.
23. Whatever reason leading to termination of employment, the employee should be paid for days worked unless the respondent has a reasonable cause to withhold such payment. Without defence, I find no good reasons as to why the claimants were not paid for the 15 days worked at the time of termination of employment. Such payment is due. Each claimant is awarded kshs.5, 248.00
24. Notice pay is due in a case where procedure is not followed in termination of employment. The claimants are awarded notice pay in terms of section 35 of the Employment Act, 2007 each at kshs.10, 486.00.
25. On record are payments to NSSF. Where the respondent was remitting statutory due therein, service or gratuity payment is not due unless the claimants had a written contract or private treaty which have not been produced. Claim in gratuity pay is declined.
26. Compensation is due and each claimant is awarded one month's gross wage at kshs.10, 496.00.

**Accordingly, judgement is hereby entered for the claimants against the respondent with a finding that termination of employment was unfair and dues awarded in the following terms;**

**1<sup>st</sup> claimant;**

- a) Compensation Kshs.10,496.00;
- b) Notice pay Kshs.10,496.00;
- c) Underpayment Kshs.491,334.95;
- d) Public holidays Kshs.67,499.70;
- e) Salary for 15 days Kshs. 5,248.00;
- f) Leave pay Kshs. 20,992.00

**The 2<sup>nd</sup> claimant;**

- a) Compensation Kshs.10,496.00;
- b) Notice pay Kshs.10,496.00;
- c) Underpayment Kshs.31,259.90;
- d) Public holidays Kshs.31,529.00;
- e) Salary for 15 days Kshs. 5,248.00;
- f) Leave pay Kshs.20,992.00

**The claimants are awarded costs.**

Dated and delivered in open court at Nakuru this 18<sup>th</sup> day of October, 2018.

**M. MBARU JUDGE**

In the presence of:.....