



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CASE NO. 190 OF 2017**

**MARGARET NJOKI GICHIRI.....CLAIMANT**

**VERSUS**

**QUINTET ENTERPRISES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent as a former employee based at the New Ruiru Shell Petrol Station in Ruiru. She averred that she was paid a consolidated salary of Kshs. 13,256/- per month instead of Kshs. 15,244/- per the legal wages Order Legal Notice No. 117 for Ruiru area. It was averred that on 28<sup>th</sup> June 2016 the Claimant's union the Kenya Petroleum Oil Workers Union wrote to the employer to try and resolve the issue at the Respondent's offices at Thika and that the meeting with the employer on 28<sup>th</sup> June 2016 did not resolve the matter. The union reported the matter to the Ministry of Labour on 27<sup>th</sup> July 2016 to appoint a conciliator for further arbitration and after presenting a memorandum there were conciliation meetings called but these did not bear fruit precipitating the issuance of a certificate of disagreement. The Claimant averred that she was wrongfully dismissed as the Respondent failed to discharge its mandate under Section 41, 43 and 45 of the Employment Act and the rules of natural justice. She thus sought Kshs. 15,244/- as salary in lieu of notice, annual leave not taken Kshs. 15,244/-, severance pay Kshs. 70,371/-, 4 days worked in April 2016 Kshs. 2,346/-, underpayment of salary Kshs. 226,947/-, overtime worked Kshs. 164,250/-, public holidays worked Kshs. 103,210/-, maximum compensation for wrongful termination Kshs. 182,964/-, costs and interest, refund of expenses incurred for travel, accommodation and fare from Ruiru to Nyeri, union service charge Kshs. 50,000/- under Section 49(4)(j) of the Employment Act.

2. The Respondent denied violating the provisions of any legal notice as regards the payment of the Claimant's salary. The Respondent averred that the conciliation attempts all failed because of the uncooperative nature of the Claimant. The Respondent averred that there was no basis for the allegation of unfair termination. It was averred that the Claimant's claim was mala fides, untenable in law and designed to mislead this honourable court and the same should be dismissed with costs.

3. The Claimant testified that she was employed in 1985 and in 2007, the Respondent took over the station. She was a pump attendant and sold petrol, diesel and oil. She stated that on the material day 2<sup>nd</sup> April 2016, she reported to work and she as assigned to petrol pump while her colleague Gachanja was allocated diesel pump. At 10.00am the next day, she stated that she served a customer who paid Kshs. 3,000/- by Mpesa and there was another customer who was to pay Kshs. 3,750/- through the till no. and the person was asked to move but he moved out of the station while Njau who had served the customer attended to a visitor. She testified that she attended to the next vehicle and when the visitor left Njau was upset that the person who was to pay Kshs. 3,750/- had left. She stated that Njau was abusive yet he was the one who had left his pump unattended. She testified that there were no cash shortages on her part and that Njau had a shortage of the 3,000/- and the 3,750/- but the customer who owed Kshs. 3,000/- was known to her and he paid. She gave part of the sum owed leaving a balance of Kshs. 1,650/- and was told not to come to work as she had a shortage. She was due to return on Thursday and she was very upset and stayed away for 2 weeks. She went to Thika and spoke to her employer and she was informed she would be called. She said that she later went to the Labour Office for a meeting called between her and the employer and that the meeting did not result in a resolution of the dispute and the matter was eventually referred to court. She stated that she worked for all holidays, during Christmas and New Years and that when one worked on some holidays they wouldn't work on the other holiday as there would be some exchange. She stated that she worked in April and left. She was shown the payment of March 2016 and stated that there was deduction of the shortage, and that she was not heard prior to dismissal or issued with a dismissal letter. She testified that she would report at 7.00am and leave at 9.00pm or 10.00pm and was not paid for the extra hours worked. She stated that she had no disciplinary issues which was confirmed by the employer at the Labour Office.

4. In cross-examination she stated that the money was not lost as the first customer paid the sum on Monday. She stated that the other customer was to pay and did not pay and she was the one who had served both clients. She testified that she was on pumps she was not assigned and that they would be allowed to serve from pumps not assigned. She was told not to come to work by a supervisor Samuel Githu and she did not sue him. Regarding the Labour Office she stated the employer attended twice and sent a representative twice. She was asked whether the meetings were to force payment and she declined answering despite several attempts to get an answer. She stated she did not know if she had been paid overtime as there were no payslips. She was referred to the muster roll and conceded that it showed that she had taken leave. She testified that she did not go for leave for one year. She admitted that no demand letter was made as all demands for payment were not in writing.

5. She testified during her re-examination that the money that was lost was repaid and only Kshs. 1,650/- had remained unpaid. She stated that there was no prohibition to serve customers at other pumps. She said that Samuel Githu was a supervisor and he was directly answerable to the employer. She stated that she did not see any payment for overtime and only saw there was NHIF and NSSF deductions.

6. The Respondent called Michael Mwangi Chege who testified that he was the manager at the Respondent's Shell petrol station at Ruiru. He stated that he knew the Claimant and that she was a pump attendant. Regarding the issue of sales, he testified that fuel sales are at the forecourt and meter readings are taken in the morning and after close of the shift they calculate the sales on cash and invoice sales. He stated that after the shifts, she had a shortfall of Kshs. 1,650/- and that she stated that she did not know how the shortfall had arisen. The sum was to be deducted from her salary and he stated that she must have sold fuel and not collected payment. He testified that she was not terminated from employment and after going on off she did not report back to work or call. He stated that the supervisor did not have authority to dismiss and that only the owner could dismiss. He testified that as manager he could not even dismiss Samuel Githu the supervisor. He stated that the Respondent did not fail to attend any of the conciliation meetings and that the Claimant wanted to be reinstated or paid her dues. He stated that she worked well and that no letter of dismissal was given as she was not dismissed. He said that the Claimant had shortages in November and December 2015 for Kshs. 1,010/- and Kshs. 4,997/-. He stated that he did not know if the Claimant was paid for overtime as the muster roll did not show if she was paid overtime. She never complained about the underpayment.

7. In cross-examination he testified that the Claimant worked from 2008 till 2016 which is around 8 years. He stated that there was a shortage and it was from her pump and that she would not be asked for payment for a pump that was not assigned to her. He said she either took the money and failed to hand it in or failed to collect from a customer and that the shortage was deducted from the March salary. He stated he supervisor did not tell the Claimant not to report to work. She left work and never came back and after 2 weeks she went to see his boss. He stated that if she had been told not to report to work she would have called the boss to inform him. He testified that the leave forms were available though not produced in court and that the Claimant worked on public holidays and the work was in shifts. He testified that the Claimant did not report of an incident where a customer who did not pay. He said that the remittance of funds was through the bank and no payslips were issued. He stated that the muster roll showed the days worked. He was stood down for further cross-examination and he failed to attend the next hearing.

8. The Claimant filed submissions and stated that the Respondent's witness failed to attend the further hearing and that the court should disregard his previous testimony for that failure. The Claimant submitted that there was no reason given for the dismissal and that Section 41 of the Employment Act was not followed. The Claimant was not invited for a disciplinary meeting. The Claimant submitted that her rights under the Constitution were abridged and that she was not paid for her work during public holidays. It was submitted that the Claimant was underpaid as demonstrated in the Wages Order. It was submitted that the witness for the Respondent was not aware if the records of employment were available at the labour office. She relied on the cases of **Jared Odhiambo Ojao v Polypipes Limited [2015] eKLR** and **Andrew M. Mwangela v Mbukoni Logistics Limited [2015] eKLR**. The Claimant thus sought the grant of the prayers in her claim.

9. The Claimant was not dismissed from employment as she was the one who went missing after the shortfall in April 2016. She was not paid overtime as per the records available. She however failed to properly tabulate her demands. The Claimant was not entitled to notice therefore and the procedural safeguards under Section 41 were not available as she was not dismissed. In the submissions she filed she relied on cases which have been considered in this award. She was paid Kshs. 13,256/- a month while the regulated monthly salary for vehicle service worker at a Petrol Station was Kshs. 13,259.30 for the town of Ruiru and all former municipalities. She was entitled to earn Kshs. 13,259.30 a month and therefore it shows that she was underpaid slightly. In her claim she sought payment of Kshs. 50,000/- as part of the costs in the suit for accommodation, travel and other fees. These sums are not recoverable as the Claimant chose to file the suit at Nyeri. If she incurred additional expenses that is her fault not that of the Respondent. Joining a union is her right but it has its consequences as she has to pay fees which cannot be recovered from the employer.

10. In the final analysis I find that the Respondent is liable only for the underpayment of some Kshs. 3.30 per month in the years 2013, 2014 and 2015 as well as the 4 days worked in April 2016, severance pay and a certificate of service. I enter judgment for the Claimant as follows:-

- i. Kshs. 118.80 as underpayment for the 3 years (3.30x12x3);
- ii. Kshs. 1,767.90 as pay for the 4 days worked in April 2016;
- iii. Kshs. 53,037.20 as severance pay for 8 years;
- iv. Costs of the suit;
- v. Certificate of service.

It is so ordered.

**Dated and delivered at Nyeri this 8<sup>th</sup> day of October 2018**

**Nzioki wa Makau**

**JUDGE**