



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 934 OF 2010**

**MILLICENT VINAYWA.....CLAIMANT**

**v**

**MINI LOAF BAKERY LTD.....1<sup>st</sup> RESPONDENT**

**FRANCIS MBUGUA.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Millicent Vinaywa (Claimant) commenced legal proceedings against Mini Loaf Bakery (1<sup>st</sup> Respondent) and Francis Mbugua (2<sup>nd</sup> Respondent) on 17 August 2010 alleging wrongful and unfair termination of employment and failure to pay terminal benefits.
2. In his Response, the 2<sup>nd</sup> Respondent denied being the employer of the Claimant while the 1<sup>st</sup> Respondent contended that the Claimant was a casual employee who failed to resume work after the referendum in 2010 (absconded).
3. On 8 March 2011, the Claimant filed an application seeking leave to amend the Memorandum of Claim but the application was never prosecuted. The Court will therefore rely on the initial Memorandum of Claim.
4. The Cause was heard on 16 July 2018 when the Claimant testified and closed her case.
5. Although served with a hearing notice (affidavit of service was filed in Court on 16 July 2018), the Respondents and their advocate on record did not attend.
6. The Court has considered the pleadings and the evidence on record and identified the Issues for determination as

- a. the nature of the Claimant's contract*
- b. whether there was unfair termination of employment*
- c. whether there was breach of contract and*
- d. Appropriate remedies/orders.*

**Nature of contract**

7. The Claimant's case was that she was employed by the Respondents in July 2007 as a Kneader at a monthly wage of Kshs 6,000/- and that she was not issued with a formal contract.
8. The Respondents pleaded case was that the Claimant was engaged as a casual worker in June 2010 on a daily wage of Kshs 200/-.
9. The Claimant's testimony was not rebutted and in consideration of the provisions of sections 9, 10(7) and 37 of the Employment Act, 2007, the Court finds that the Claimant was employed in July 2007 on *term contract* at a salary of Kshs 6,000/- per month.

**Unfair termination of employment**

10. The Claimant testified that around 4 August 2010 she and other employees alerted the Respondents that they would not report to work due to the referendum that was to be held on that day but the 2<sup>nd</sup> Respondent informed them that any employee who failed to report to work would be dismissed.

11. According to the Claimant, when she reported to work on 5 August 2010, the 2<sup>nd</sup> Respondent informed her (and others) that their services were no longer required.

12. Section 35 of the Employment Act, 2007 envisages written notice of termination while section 41 of the Act contemplates a hearing.

13. Considering the Claimant's un rebutted testimony that there was no notice and/or hearing, the Court finds that the Claimant's contract was unfairly terminated.

14. If the Claimant absconded as suggested by the Respondents, the Court rejects such defence as it was not proved as required by sections 43 and 45 of the Employment Act, 2007.

15. With the finding, the Court finds that the Claimant is entitled to pay in lieu of notice, and the equivalent of 3 months gross wages as compensation considering the length of service.

### **Breach of contract**

#### **Salary for July 2010**

16. The Claimant's testimony that she was not paid wages for July 2010 was not challenged and the Court finds that that was in breach of contract. She is entitled to the Kshs 6,000/- as claimed.

#### **Accrued leave**

17. An employee is entitled to at least 21 days annual leave and section 28(4) of the Employment Act, 2007 circumscribes the carrying forward of annual leave to 18 months.

18. The Claimant's testimony that she did not go on leave during the 3 years of employment was not challenged or rebutted by production of employment/leave records and the Court will allow the head of claim as sought but in the sum of Kshs 9,000/- because of section 28(4) of the Employment Act, 2007.

#### **Overtime**

19. Apart from stating that she worked night and also did overtime, the Claimant did not lay an evidential foundation as the contractually agreed working hours or prescribed minimum working hours in the sector the Respondents operated in, and the Court is therefore unable to accede to this head of claim.

#### **Severance pay**

20. The Claimant did not disclose whether her contract provided for severance pay. If she meant severance pay as contemplated by section 40 of the Employment Act, 2007, she would not be entitled as this was not a case of redundancy.

### **Conclusion and Orders**

21. The Court finds and holds that the termination of the Claimant's employment was unfair and awards her

|                           |                      |
|---------------------------|----------------------|
| (a) Pay in lieu of notice | Kshs 6,000/-         |
| (b) July 2010 wages       | Kshs 6,000/-         |
| (c) Accrued leave         | Kshs 9,000/-         |
| (d) Compensation          | Kshs 18,000/-        |
| <b>TOTAL</b>              | <b>Kshs 39,000/-</b> |

22. Claimant to have costs of Kshs 10,000/-.

**Delivered, dated and signed in Nairobi on this 9<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant      Mr. Mwariri instructed by Kituo cha Sheria

For Respondent    Akoto & Akoto Advocates

Court Assistant    Lindsey