



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.270 OF 2017

FANCY JERUTO CHEROP.....1ST CLAIMANT

NANCY JEPKEMOI KIYAL..... 2ND CLAIMANT

VERSUS

HOTEL CATHAY LIMITED.....RESPONDENT

JUDGEMENT

The 1st claimant was employed by the respondent on 22nd August, 2012 as an Accountant and paid Ksh.13, 000.00 per month but without a house allowance. The salary was increased to Ksh.22, 000.00 and which was paid to the date when employment was terminated on 22nd December, 2016. The claim is that there was no leave allocated or payment in lieu of taking leave, the claimant worked on public holidays, without compensation, no off day was allocated or paid for. the claimant reported to work on 23rd December, 2016 but was not allowed access by the guards who told her that the respondent had given instructions not to allow her within the premises. The claimant was directed to hand over her keys and go to meet the director but the secretary told her employment had been terminated.

The 2nd claimant was employed on 17th October, 2013 as a Cashier and then promoted to an Accountant after two months. The salary was paid at Ksh.18, 000.00 per month but without a house allowance. From January, 2015 the salary was increased to Ksh.30, 000.00 until July, 2015 when a house allowance was paid at ksh.2, 500.00 per month. The claimant did not take annual leave, off days and there was no compensation. On 23rd December, 2016 the claimant reported to work but was denied access and directed to see the manager and who informed her that her employment had been terminated. No reasons were given.

The claimants were terminated without notice or being given a right to hearing. The salary due for December, 2016 was paid but the owing terminal dues for leave, off days and underpayment over the years were not paid.

The 1st claimant is seeking the following dues;

- a) Notice pay Ksh.26,751.80;
- b) Underpayments Ksh.311,527.80;
- c) Leave for 2 years ksh.42,365.65
- d) Work during public holidays Ksh.23,620.30;
- e) Off days Ksh.309,038.80;
- f) Compensation.

The 2nd claimant is seeking the following;

- a) Notice pay Ksh.32,500.00;
- b) Underpayments Ksh.76,816.10;

- c) House allowance Ksh.31,500.00;
- d) Leave for 3 years Ksh.66,500.00;
- e) Off days Ksh.340,833.20;
- f) Work during public holidays Ksh.67,979.70
- g) Compensation.

The 1st claimant testified that upon employment by the respondent she was working in a shift of 8 hours as Cashier. She had an off day a week but when there was no reliever she would be made to report for work. No annual leave was allocated or paid for and the same thing happened during public holidays when the claimant was required to be at work.

The claimant also testified that in the defence the respondent has attached a warning letter which was never issued to her. The letter is addressed to senior accountant which position she did not hold. The respondent has also attached a letter of summary dismissal for January, 2017 but dismissal was done verbally on 22nd December, 2016.

The claimant also testified that upon employment she was issued with letter of appointment as a cashier and there is no letter of promotion. Upon working during public holidays or on the rest day the respondent was to give her two days off which was not done. On 4th April, 2016 the claimant had a personal commitment and she applied for time off which was allowed.

The 2nd claimant testified that upon employment as senior cashier she worked diligently and her salary was increased from Ksh.22, 000.00 to Ksh.30, 000.00 per month. The work shift was 8 hours from 8am to 5pm and would be at work during the public holidays without compensation. On 23rd December, 2016 when the claimant reported to work and the manager told her to go home and wait for his call. No reasons were given and the call was not made.

The claimant also testified that there was a contract of employment with work terms and conditions which she accepted. Her salary was reviewed and a house allowance paid. New duties were allocated and this was taken to be a promotion.

The claimant also testified that the off day was Sunday and Saturday she worked half day. When there was work during the public holidays, these were compensated with two days off. The claimant would apply for the days off and the respondent would approve.

In defence the respondent case is that the 1st claimant was employed as Cashier on 22nd August, 2012 and was sent to assist the accountant on 1st June, 2015. The claims made are without merit and should be dismissed.

The respondent has policy where each employee had the duty to apply for annual leave failure to which this would be forfeited.

The 1st claimant was not at work during the public holidays and the claims made in this regard are not justified. Each employee was given 4 days a month off being 48 days in a year. The claimant commuted 66 days in the year 2016 which were in excess of what was due.

The 1st claimant was not committed to her work and was issued with several warning letter. There was a disciplinary hearing on 14th December, 2016 and a decision was to be taken but the claimant deserted duty and which led to summary dismissal.

The defence is also that the 2nd claimant was entitled to 4 off days per month which were 48 days per year and the claimant commuted 77 days in the year 2016 which were in excess of 29 days. The claimant was absent from work on 1st May, 2016 and 12 December, 2016 all public holidays. The claimant deserted work forcing the respondent to outsource her duties. Such desertion was without notice or payment in lieu thereof. The claims made are not justified and should be dismissed.

In evidence the respondent called Alfred Kitur who testified that he is the Hotel Manager and worked with the claimants. The respondent ensured all employees including the claimants took their off days and when they worked during the public holidays such was compensated by taking two days off. The policy was to have each employee apply for leave each year and where no application was made the employee forfeited such leave days.

The 1st claimant failed to report to work resulting in her summary dismissal. All terminal dues were paid.

The 2nd claimant was on 23rd October, 2013 given duties to assist the Accountant but her terms of service remained the same. The claimant was allowed to take off days and or was allowed compensation by taking two days off when business was low. This was also done when she worked during public holidays.

On 23rd December, 2016 the claimant deserted duty and this resulted in her summary dismissal.

At the close of the hearing the parties filed written submissions.

By letters dated 5th and 7th December, 2017 the respondent dismissed the claimants on the grounds that their whereabouts were unknown.

The respondent has also filed disciplinary hearing minutes and proceedings of 14th December, 2016 relating to the 1st claimant on charges that she had failed to conduct audit, collecting funds from customers who had credit facilities, allowing credit to customers who were not good credit risk, and disrespect to management. It is noted that the claimant agreed to the charges and a recommendation was taken to initiate disciplinary action against the claimant.

What followed was the letter of summary dismissal.

The claimant has challenged the defence on the grounds that she reported to work on 22nd December, but on the next day she was denied access and sent to the manager whose secretary told her she had been dismissed from her employment.

The defence that the claimant deserted work is a serious act of gross misconduct. An employee who fails to attend work as required commits gross misconduct in terms of section 44 of the Employment Act, 2007. The employer is justified to summarily dismiss such an employee subject to adherence to the provisions of section 41(2) of the Act. The employer must issue notice to the employee and allow the employee to give their defence and state their whereabouts on the dates stated to be absent. Where the employee is summoned and fails to attend so as to exercise their right to a hearing, the employer is required to issue notice of summary dismissal and also inform the labour officer of such action such as to secure an employer whose employee is absent from work without just cause and to avoid claims resulting from such absence.

Where the employer thus fails to demonstrate to the court what action was taken to ensure the gross misconduct was addressed in accordance with the law, the resulting termination of employment is procedurally not fair. Where there were exceptional circumstances which prevented the employer from hearing the employee in defence due to absence from duty, the employer has the duty to demonstrate the same to the court as held in the case of **Standard Group Limited versus Jenny Luesby [2018] eKLR** held that;

There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal. That hearing is as important as the law made it mandatory even in the worst case scenario where an employee grossly misconduct oneself. The right to hearing is what amounts to meeting the true tenets of natural justice. Such a hearing in an employment relationship should be conducted in the presence of the affected employee together with another employee of her choice as this is the true meaning of a fair hearing. However senior an employee is, where the case is that of misconduct, the seniority is not justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employee to uphold. This was denied of the claimant and I find this to be an unfair labour practice.

The failure by the respondent to ensure procedural fairness to the claimant resulted in unfair termination of employment. Such is addressed with compensation under section 49 of the Act and payment of notice pay under section 35 of the Act.

The claimants seek payment of underpayments each on the grounds that upon employment as Cashier and accountant they were promoted but not paid the requisite wage therefrom. Each claimant however admitted that the terms and conditions of service were not changed. The respondent as the employer produced the employment contract noting the positions held by the claimant remained constant but the wages paid were increased. The holding of duty or allocation of other duties did not change the position held by each claimant. Such position subsisting, the claims made for underpayment are not justified.

Section 28 of the Employment Act, 2007 give every employee a right to take annual leave. The employer has the duty to ensure every employee has taken annual leave as and when due. The defence that the claimants failed to take annual leave and thus forfeited the same is not a position supported in law as held in the case of **Rajab Barasa & 4 Others versus Kenya Meat Commission [2016] e-KLR**. The employer must ensure each employee has taken the annual leave when due or make payment in lieu thereof.

Noting the various off days taken by the claimants in excess of the off days due, the respondent shall compute the leave days earned for the entire duration of employment and put the excess off days into account and pay for the annual leave. Such shall be addressed at the shop floor.

On the claims made for payment for off days, the 1st claimant testified that she was working in a shift of 8 hours and would be recalled when there was no reliever. The 2nd claimant testified that she had Sunday as her off day and on Saturday she worked half day.

On the claimant's evidence and without the 1st claimant distinguishing which days she was recalled attend work and when a reliever was not found and having confirmed that her shift was for 8 hours the claim for pay due for work on rest days in lot. The 2nd claimant also on her evidence cannot claim for pay for working on her off days.

The respondent as the employer has also produced the work record setting out the days each claimant was at work and on a day off. The claimants were each out of work on several days in a given month. Such record is to be believed noting the evidence by the claimants largely supports the same.

The 2nd claimant is seeking house allowance at Ksh.31,500.00 and on the grounds that from 1st January, 2015 to 31st July, 2015 for 7 months here due house allowance was not paid.

On the Wage Orders, for the position held by the 2nd claimant as Cashier, the paid wage of Kshs.30, 000.00 for the period 1st January to 31st July, 2015 was over and above the basic minimum. To seek payment for housing over this payment would be an unjust enrichment.

Accordingly, the court enters judgement for the claimants against the respondent with a declaration that employment was terminated without due process and thus procedurally unfair and makes the following orders;

a) 1st claimant shall be paid the following;

i. Compensation at one (1) month salary at Ksh.26,000.00;

ii. Notice pay Ksh.26,000.00;

b) 2nd claimant shall be paid the following;

i. Compensation at one (1) month salary Ksh.32,500.00;

ii. Notice pay Ksh.32, 500.00.

c) The respondent shall compute the leave days earned for the duration of employment for each claimant and take into account the excess days taken in off days.

d) Certificates of service shall issue in accordance with section 51 of the Employment Act, 2007.

e) As the claims have succeeded in part, each party shall bear own costs.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU

JUDGE

In the presence of: