



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.188 OF 2016

ANDASERAH WANGUI MWANGI..... CLAIMANT

VERSUS

MICHAEL MURAYA KIRARA.....1ST RESPONDENT

HARISSON MBARU KIHARA.....2ND RESPONDENT

(BOTH RESPONDENTS TRADING AS METUMI BAR)

(Before Hon. Justice Byram Ongaya on Friday 12th May, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 07.09.2016 through Kirubi Mwangi Ben & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Payment of terminal dues of Kshs. 317, 959.00 being one month pay in lieu of notice Kshs. 10, 497.00; public holidays Kshs. 6, 998.00; annual leave for 2 years Kshs. 14, 696.00; service gratuity at 15 days per year for 2 years served Kshs.10, 497.00; underpayment of wages Kshs.105, 788.00; house allowance Kshs.42, 513.00; and 12 months pay for compensation for unfair termination Kshs.125, 964.00.
- b) Costs of the suit and interest.
- c) Any other or better relief the honourable court may deem fit to grant.

The response to the claim was filed on 11.10.2016 through Kimwere Josphat & Company Advocates. The respondent prayed that the respondent's claim be dismissed with costs.

The parties agreed that the suit be determined on the basis of pleadings, documents and submissions on record. The court has taken into account all the material on record and makes findings on the issues in dispute as follows:

- a) There is no dispute that the parties were in a contract of employment but they dispute the period the employment subsisted. The claimant says that the respondents employed her as a waiter at the bar from April 2014 to July 2016 when her services were terminated on account of redundancy. The respondents say that the claimant was employed on 10.08.2015 and not in April 2014. In absence of any other material on record, there is no reason to doubt the date as given by the respondent. While making that finding the court has noted the claimant's contradictory witness

statement that stated that she was employed for the period as pleaded and then at paragraph 3 of the statement that she had worked for 6 years.

b) As redundancy notice was not served per section 40 of the Employment Act, 2007 and taking into account the period of service of less than one year, the claimant is awarded one month pay in lieu of termination notice and a further one month pay under section 49(1) (c) of the Act. While making that award the court finds that the claimant was unfairly dismissed as relevant redundancy notice was not served. The award is for **Kshs.18, 744.00** the claimant's statutory monthly pay being Kshs. 9, 372.0 0.

c) The claim on public holidays is awarded at **Kshs. 2, 449.30** as submitted for the respondents.

d) As the claimant served for less than 12 months, no annual leave accrued in view of section 28(1) (a) of the Act. The prayer would fail under the section but in submissions the respondents offered to pay **Kshs.3, 500.00** and that amount is awarded.

e) As the claimant did not serve for a complete year, severance pay will fail in view of section 40 (1) (g) of the Act.

f) The claimant is awarded underpayment at 10 months served making statutory monthly wage Kshs. 9, 372 less monthly wage as paid Kshs.6000 per month and the difference is Kshs.3, 372.0 times 10months thus **Kshs.33, 720.00**.

g) There were no submissions on the claim for house allowance and the same is deemed abandoned as unjustified.

In conclusion judgment is entered for the claimant against the respondents for:

a) The respondents to pay the claimant **Kshs.58, 413.30** by 01.07.2017 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

b) The respondents to pay the claimant's costs of the suit

Signed, dated and delivered in court at **Nyeri** this **Friday, 12th May, 2017**.

BYRAM ONGAYA

JUDGE