



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 157 OF 2016

RISPAH WANGUI GICHERU.....CLAIMANT

VERSUS

LONGONOT BAR RESTAURANT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 23rd June, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 11.06.2016 through her union, KUDHEIHA. The claimant prayed for judgment against the respondent for:

- a) Salary for April 2014 Kshs.22, 070.
- b) Gratuity for 13 years Kshs. 165, 525.00.
- c) Underpayment per General Wage Orders being Kshs. 127, 416 for 01.05.2011 to 30.04.2012 (12 months); Kshs.154, 320.00 01.05.2012 to 30.04.2013; and Kshs. 186, 840.00 for 01.05.2013 to 30.04.2014.
- d) Total claim for Kshs.656, 171.00.

The respondent filed the statement of response on 15.08.2016 through Gathara Mahinda & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent's case is that it employed the claimant from May 2013 to 04.05.2014 when the claimant was found in possession of irregular stock of Kenya Cane Spirits. Following that discovery, the respondent's further case is that the claimant admitted the misconduct as she was carrying out her own business while in the respondent's employment and the claimant thereafter absconded duty voluntarily thereby ending the employment relationship.

The claimant's case on the other hand is that she was employed by the respondent from 10.09.2000 to 05.05.2014 as cleaner and general worker.

The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a) The prayer for underpayments accrued on 05.05.2014, the undisputed date of the termination. 12 months ended on or about 06.05.2014. The court returns that the claim was of a continuing injury

and the suit having been filed on 11.06.2015, the claim was time barred under the time of limitation of 12 months for suits based on a continuing injury under section 90 of the Employment Act, 2007. Thus, that claim and prayer will fail.

b) The claimant testified she left voluntarily upon giving a termination notice which was not filed at all. As submitted for the respondent, an employee is entitled to service pay under section 35(5) of the Employment Act, 2007 if the contract is terminated by giving of the prescribed notice under section 35(1) (c) of the Act. As the claimant has failed to show that she served the prescribed notice, the court returns that she is not entitled to the service pay or gratuity as prayed for. While making that finding the court returns that there is no reason to doubt the respondent's account that the claimant absconded duty voluntarily upon the misconduct being discovered and the claimant has confirmed she voluntarily left employment. The prayer will therefore fail.

c) The claimant testified that at termination she was paid Kshs. 6, 500.00 per month. There is no dispute that the claimant left employment on 05.05.2014 and there was no evidence that she was paid wages for April 2014 as the respondent's submissions are silent in that regard. She is awarded accordingly.

In conclusion judgment is entered for the respondent to pay the claimant **Kshs. 6, 500.00** by 01.07.2017 failing interest to be payable thereon at court rates and there be no orders on costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 23rd June, 2017**.

BYRAM ONGAYA

JUDGE