



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

CAUSE NO. 137 OF 2015

NANCY WARUINU MWANGI.....CLAIMANT

VERSUS

PITHON IRUNGU GACHENDU.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 21st July, 2017)

JUDGMENT

The claimant filed the statement of claim on 10.08.2015 through J.M Mbuthia & Company Advocates. The claimant prayed for payment of Kshs. 651, 339.00 upon the headings of compensation for unfair termination , pay in lieu of termination notice, pay on public holidays, accrued leave, service gratuity for 9 years served, house allowance, and underpayment of basic salary.

The response to the statement of claim was filed on 08.10.2015 through Gori Ombongi & Company Advocates. The respondent prayed for dismissal of the suit with costs.

The parties are not in dispute that the respondent employed the claimant as a bar attendant and as per the respondent's evidence. The parties are also in agreement that the claimant's employment was terminated on or about 15.12.2014.

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

1. The respondent testified that he bought the bar in December 2009 as a going concern and he could not have employed the claimant before owning the bar. The respondent exhibited the relevant purchase agreements and the court returns that he bought the bar in December and the tenancy was commencing 01.01.2010. The court returns that the claimant worked in the bar prior to the purchase and is therefore deemed to have become the respondent's employee effective 01.01.2010.
2. The court returns that claimant worked for the respondent from 01.01.2010 to 15.12.2014 as a general labourer. The court returns that she is entitled to be paid all withheld pay due to the underpayment as per applicable wage orders filed for the claimant over that period.
3. The evidence is clear that the claimant was terminated effective 15.12.2014 following the fight involving patrons on 14.12.2014. The claimant is therefore awarded 3 months' gross statutory pay as at 15.12. 2014 and as per relevant wage order. While making that finding the court considers that she had served for about 5 years but as per respondent's testimony, she had been warned about her misconducts and the court returns that she substantially contributed to her termination in a manner to suggest that she was not keen to keep her job. Further, the court has considered that the

respondent had failed to give notice and hearing per section 41 of the Employment Act, 2007 so that the termination was procedurally unfair.

4. The court awards the claimant one month pay in lieu of the termination notice and at the monthly statutory pay as at time of termination, 15.12.2014.

5. The claimant is awarded 5 months salaries for pay in lieu of annual leave for the about 5 years served and at the rate of one month basic salary as at time of termination per the then prevailing wage order.

6. As there was no evidence that the claimant was a member of the NSSF, the court returns that she is entitled to service pay or gratuity under section 35 of the Employment Act, 2007 fixed at half monthly pay for each of the 4 completed years of service at the rate of last statutory prevailing statutory pay.

7. The claimant is awarded house allowance for the period serve as per the prevailing wage order.

While making the findings the court returns that the claimant was in unbroken service of the defendant throughout the period of service being 01.01.2010 to 15.12.2014 and the allegations of casual service were not established at all. The evidence was that the claimant was paid on monthly and which was inconsistent with causal employment. The court further returns that the claim for unpaid holidays was not established at all as the holidays in issue remained at large.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The claimant to compute the amount found due in this judgment and to serve in 14 days from the date of this judgment with a view of recording quantum on a convenient date.
2. The respondent to pay the amount found due by 01.11.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 21st July, 2017.

BYRAM ONGAYA

JUDGE