



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 556 OF 2014**

**KENYA UNION OF DOMESTIC, HOTELS,  
EDUCATIONAL INSTITUTIONS & HOSPITAL**

**WORKERS**

**CLAIMANT**

**v**

**COOL RIVERS HOTEL LTD**

**RESPONDENT**

**JUDGMENT**

1. In a Memorandum of Claim filed in Court on 28 October 2014, the Kenya Union of Domestic, Hotels, Educational Institutions & Allied Workers (KUDHEIHA) stated the issue in dispute as the Unfair/Wrongful termination of Ms Nancy Wanjira (Grievant).
2. KUDHEIHA also alleged that the Grievant was underpaid, was not paid overtime, house allowance and for days worked in August 2014.
3. Cool Rivers Hotel Ltd (Respondent) in its Response and Counterclaim filed on 3 December 2014 denied having a recognition agreement with KUDHEIHA and underpaying the Grievant. It also asserted that the Grievant, a casual employee serving as Kitchen Assistant deserted work/resigned.
4. The Respondent counterclaimed for breach of contract by the Grievant.
5. KUDHEIHA filed an Amended Memorandum of Claim on 17 March 2015 in which computations of reliefs/dues sought were provided.
6. The Cause was heard on 2 March 2017 when the Grievant testified and was adjourned to 21 March 2017 when the Respondent was expected to present its witness.
7. However, the witness was not presented and the Respondent opted to close its case without calling any witness.
8. KUDHEIHA filed its submissions on 28 April 2017, while the Respondent filed its submissions on 12 May 2017.
9. The Court has duly considered the evidence placed before it and the submissions and identified the issues arising for determination as, *whether the Grievant deserted work or was dismissed, if dismissed, whether the dismissal was unfair, whether the Grievant was underpaid, whether Grievant's pay included house allowance, whether the Grievant worked overtime, whether Grievant was paid wages for August*

2014, counterclaim and appropriate remedies/orders.

### **Desertion or dismissal?**

10. The question of what constitutes desertion in employment law is not a straight forward one.

11. Desertion is not the same as being absent from the place appointed for work without permission or lawful cause as envisaged under section 44(4)(a) of the Employment Act, 2007.

12. It needs no debating that absence without permission or lawful cause attracts summary dismissal. But the employee who is absent has no intention of not resuming work.

13. Desertion on the other hand in employment law is a repudiation of the contract of employment. The employee who deserts is in breach of contract and an employer is entitled to dismiss him on the ground of repudiation of contract. This is because he has no intention of turning up for work.

14. Repudiation of contract, as a general rule in common law, does not terminate an employment contract. The innocent party should accept the repudiation (see my decision in *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).

15. The Court also wishes to observe that in *Geys v Societe Generale, London Branch* (2012) UKSC 63, the Supreme Court of the United Kingdom confirmed the principle that a repudiated employment contract does not end until the repudiation is accepted.

16. Where an employer alleges desertion, it must prove the ingredients of desertion. A primary ingredient of desertion to be proved by the employer is that the employee has no intention of returning to work. The employer must also demonstrate that it accepted the repudiation (the same would apply to an employee who asserts an employer has repudiated a contract).

17. Establishing the intention not to return to work will depend on the facts as presented in evidence.

18. The Respondent did not present any facts from which the Court could conclude that the Grievant had no intention to return to work. The Respondent failed to discharge the burden of proving that desertion was a reason for termination of employment as required by section 43 of the Employment Act, 2007.

19. Further, under the statutory framework in our jurisdiction, even the deserting employee is entitled to a hearing. And to ensure that due process is followed, the employer should make reasonable attempts to contact the employee. This can be through phone, email, colleagues or even contact details in the employee's file (records).

20. An employer can also issue an ultimatum such as through a show cause letter addressed to the employee's contact details on its records.

21. There was no suggestion here that the Respondent made any or any reasonable attempts to reach out to the Grievant to explain his absence or alleged desertion.

22. The Court therefore finds that the Grievant did not desert duty.

23. As to the contention that she was dismissed, the Grievant's testimony that on 17 August 2014 the son of a director of the Respondent called Dan informed her that her services were no longer required, that the director promised to look into the issue and that she wrote to the Respondent on 26 August 2014 (letter produced) were not controverted.

24. The Court would therefore conclude that she was dismissed.

## **Whether dismissal was unfair**

25. The Grievant's testimony that the director's son simply told her to leave is unchallenged.

26. In terms of section 35 of the Employment Act, 2007, there should be written notice of termination of employment. There was no indication here that one was given.

27. Further, section 41 of the Act envisage a hearing. According to the material placed before Court there was none.

28. The Respondent also did not present evidence that it conducted a hearing, or bring witnesses to demonstrate compliance with sections 43 and 45 of the Employment Act, 2007.

29. The Court finds the dismissal was unfair.

## **Underpayments**

30. Although the pleaded claim for underpayments covered the period from May 2011 to December 2013, the Grievant during cross examination admitted that there were no underpayments after January 2013.

31. The Grievant's pleaded occupation was a cook. She gave similar testimony. She was not issued with a formal contract. Her pay was Kshs 6,500/- up to December 2012.

32. However, in January 2013, the wage was increased to Kshs 9,600/-.

33. The Respondent on the other hand pleaded that the Grievant was a kitchen Assistant. However, a recommendation letter it issued to the Grievant had the designation of chef.

34. In terms of Legal Notice No. 64 of 2011, the prescribed minimum wage of a cook was Kshs 7,269/- in all municipalities (exclusive of house allowance).

35. Legal Notice No. 71 of 2012 on the other hand prescribed a minimum wage of Kshs 8,221/20 for cooks.

36. For the period June 2011 to April 2012, the Grievant was underpaid by Kshs 8,459/-, while for the period May 2012 to December 2012, the Grievant was underpaid by Kshs 13,769/-.

## **House allowance**

37. The primary obligation of an employer is to provide housing accommodation to an employee and in default, to pay an allowance to cover rent.

38. There was no evidence that the Grievant was provided with housing accommodation or that the wage was consolidated in terms of section 31 of the Employment Act, 2007.

39. And also considering that the Grievant was underpaid, it leads to the logical conclusion that house allowance was not part of the remuneration.

40. The Grievant testified that she was seeking house allowance of Kshs 9,813/15 for the period May 2011 to April 2012; Kshs 14,798/16 for period May 2012 to April 2013; Kshs 16,869/60 for the period May 2013 to April 2014 and Kshs 4,217/- for the period May 2014 to July 2014.

41. The Respondent did not challenge or interrogate the figures in any substantial way, and the Court would find for the Grievant.

## **Overtime**

42. The Grievant testified that she worked during public holidays for 3 years without being paid overtime. She computed the total public holidays worked as 30 and calculated the amount not paid as Kshs 19,200/-.

43. However, in cross examination she admitted that she was not able to recall exactly how many public holidays there were in a year.

44. Because of the uncertainty and/or precise details as to the number of public holidays, the Court would decline this head of claim.

#### **Wages for August 2014**

45. It is not in dispute that separation occurred on 17 August 2014. The Grievant is entitled as of right to earned wages up to date of separation, which she computed as Kshs 5,440/-.

46. The Respondent did not interrogate the computation and the Court would find for the Grievant.

#### **Accrued Leave**

47. The Grievant's testimony that she did not take annual leave for 2012/2013 was not controverted by production of leave records.

48. The commuted leave was given as equivalent to Kshs 17,723/- and the Court would rule in favour of the Grievant.

#### **Counterclaim**

49. With the conclusion that the Grievant's employment was terminated unfairly, the question of breach of contract cannot arise and the counterclaim therefore fails.

#### **Appropriate remedies/orders**

50. KUDHEIHA had sought several reliefs including house allowance, underpayments, pay in lieu of notice, accrued leave, wages for days worked, pay for public holidays and compensation.

51. From the evaluation above, the Court concludes that the Grievant is entitled to the reliefs except for overtime.

52. As regards compensation, the Grievant served the Respondent for about 3 years and the Court finds the equivalent of 3 months gross wages as appropriate.

#### **Conclusion and Orders**

53. Arising from the above, the Court finds and holds that the Grievant was dismissed unfairly and awards her and orders the Respondent to pay her

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|-------------------------------------|---------------|
| (i) House allowance                 | Kshs 45,697/- |
| (ii) Underpayments                  | Kshs 22,228/- |
| (iii) 1 month pay in lieu of notice | Kshs 9,600/-  |
| (iv) Accrued leave                  | Kshs 17,723/- |
| (v) Earned wages                    | Kshs 5,440/-  |

(vi) Compensation

Kshs 28,800/-

TOTAL

**Kshs 129,488/-**

54. Each party to bear own costs considering there was no recognition agreement between the parties.

**Delivered, dated and signed in Nakuru on this 14<sup>th</sup> day of July 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Opondo, Industrial Relations Officer

For Respondent Mr. Chege instructed by Munene Chege & Co. Advocates

Court Assistant Nixon