



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 475 OF 2013**

**BRIDGET KARWITHA .....CLAIMANT**

*VERSUS*

**DOUGLAS WARUI T/A LINK-UP SERVICES.....RESPONDENT**

Mr. Kurauka for claimant

Mr. Mbuthia for respondent

**JUDGMENT**

1. The claimant relies on the memorandum of claim filed on 11<sup>th</sup> April 2013 in which she seeks maximum compensation equivalent to twelve (12) months salary for unlawful termination of employment and payment of terminal benefits to wit;

- a) leave pay Kshs.30,000;
- b) notice pay Kshs.45,000;
- c) service pay Kshs.45,000;
- d) house allowance Kshs.94,500;
- e) overtime Kshs. 242,922.

**Facts of the case**

2. The claimant states that she was employed vide a written agreement by the respondent on or about August 2009 and became a branch manager in one of the respondent's store in July 2010.

3. The claimant worked continuously for three (3) years and five (5) months. That she was honest and diligent and had no warning letters during the period of service.

4. On 15<sup>th</sup> December 2012, the respondent terminated the employment of the claimant without notice, show cause letter, reason and without opportunity to explain why her services should not be terminated.

5. The claimant attributes the termination to malice and sets out particulars of malice in the plaint in that the respondent completely disregarded the circumstances of the claimant and did not pay her any terminal dues upon termination.

6. The claimant testified under oath in which she denied allegations by the respondent that she was rude to employees or was dishonest.

7. The claimant told the court that the respondent started to pay for NSSF in March 2012 and so she is entitled to gratuity for the period no contribution was made.

8. The claimant stated that she worked overtime for three (3) hours per day because she was supposed to work from 8.00 a.m. to 6.00 p.m. but worked up to 8.00 p.m. daily, making three (3) hours overtime from 5.00 p.m. to 8.00p.m.

9. She also seeks payment in lieu of notice and certificate of service.

10. The claimant added that she was not given leave at all. She also claims salary for the days worked in November and December 2012. The claimant added that her monthly salary of Kshs.15,000 excluded house allowance and she is entitled to Kshs.5,000 house allowance per month. The agreement was verbal.

### **Response**

11. The respondent called one Joyce Wamaitha Ndung'u. She told the court that she was an Auditor and knew the claimant. That she was employed by the respondent on 10<sup>th</sup> March 2012.

12. That on 29<sup>th</sup> November 2012, she noticed Maua Branch where the claimant worked was not performing. She carried out an audit on the Branch and found a shortfall of Kshs.63,170.

13. On 19<sup>th</sup> December 2012 RW1 carried out another audit and discovered a phone worth Kshs.8,000 was missing. A shortfall of Kshs.14,300 and a debt of Kshs.5,277.50. This led to the dismissal of the claimant.

14. Under cross examination, RW1 said she was a holder of CPA III but had no practicing certificate as an auditor. That the total loss in the store was Kshs.48,720. That she did not issue any written warning to the claimant. That the claimant was dismissed verbally. She was not given a show cause letter but was given opportunity to explain the losses.

15. RW1 said that the employees worked overtime at times and they also worked on Saturdays.

16. RW1 also said that the claimant was not paid terminal benefits upon termination.

17. Under re-examination RW1 stated that the claimant lost Kshs.48,720.50 individually and Kshs.393,197.25 in stock.

### **Determination**

18. The issue for determination are;

(i) Whether the termination of the employment of the claimant was lawful.

(ii) Whether the claimant is entitled to the terminal benefits and compensation claimed.

### **Issue i**

19. The respondent accused the claimant of causing loss of money and stock at Maua Branch where she worked as Branch Manager.

20. The claimant denies having lost any money or stock at the Maua Store and attributes her dismissal to

malice.

21. RW1 testified in chief that the claimant lost a total of Kshs.63,170 worth of stock in the first audit carried out on 29<sup>th</sup> November 2012 and gave the claimant verbal warning. That she carried out a second stock take on 19<sup>th</sup> December 2012 and discovered a missing phone worth Kshs.8,000 which was being used by the claimant; a stock short fall of Kshs.14,300 and a debt by the claimant of Kshs.5,277.50. This led to dismissal of the claimant. That she was not given a show cause letter nor was a disciplinary hearing held although she explained herself during the stock-take.

22. However, during re-examination RW1 changed her testimony and told the court that the claimant lost Kshs.48,720 individually and caused stock loss of Kshs.393,197.25.

23. These two versions are inconciliable and the court finds the testimony of RW1 not credible and therefore incapable of believe.

24. The claimant has the onus of showing that the termination of her employment was wrongful and unfair. She denied loss of any stock and told the court that she was maliciously removed from employment without notice, a disciplinary hearing and without payment of terminal benefits.

25. The court finds, in view of the incredible testimony by RW1 that the claimant has proved on a balance of probability that the termination of her employment was wrongful and that the respondent did not follow a fair procedure in terminating her employment.

26. The court finds therefore that the termination was in violation of section 45 of the Employment Act, and the claimant is entitled to compensation in terms of section 49 (1) (c) as read with section 49 (4) of the Employment Act, 2007.

27. In this respect, the claimant had served for about three (3) and a half ( $1/2$ ) years, was separated from the employer without notice, without a disciplinary hearing and without payment of terminal benefits. The claimant suffered loss and damage. She was also not given a certificate of service to help get another job. At the time of the hearing she had no other employment and depended on her sister.

28. The claimant is awarded five (5) months salary as compensation for the wrongful and unfair termination of employment in the sum of Kshs.75,000.

### **Terminal benefits**

29. RW1 did not adduce evidence rebutting the claims by the respondent in respect of overtime; leave pay; salary arrears and service pay. The court finds that these claims have been proved on a balance of probability and awards the claimant;

a) Kshs. 15,000 in lieu of one month notice;

b) Kshs.30,000 in lieu of leave days not taken;

c) Kshs.28,500 in lieu of salary arrears; and

d) Kshs.45,000 service pay for the period the claimant was not registered with NSSF and contribution were not made in terms of section 35(5) & (6) of the employment Act, 2007.

30. The claim for housing allowance has no basis and same is dismissed.

31. With respect to overtime, the claimant told court that she worked three hours overtime per day between the hours of 5 p.m. to 8 p.m. in terms of the verbal agreement of employment. She was supposed to work from 8 a.m. to 6 p.m. Overtime is supposed to be paid double the daily rate. In this case the

court finds that the hourly rate of the claimant was Kshs.62.5 x 2592 hrs x 2) Kshs.137,376.

**32. Total award to the claimant is Kshs.272,376.**

**33. The award is payable with interest at court rates from date of filing suit except the award of compensation in respect of which interest is payable from date of judgment.**

**34. Costs to follow the outcome.**

**Dated and delivered at Nairobi this 4<sup>th</sup> day of August, 2017.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**