



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**SUIT NO. 2146 OF 2012**

**CECILIA NDUTA KIMANI.....CLAIMANT**

**VERSUS**

**HIGHLANDS RESTAURANT.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit on the 23<sup>rd</sup> October 2012 seeking the resolution of a dispute she framed as failure by the Respondent to pay terminal benefits to the Claimant. She averred that she was employed by the Respondent on 16<sup>th</sup> July 2008 as a kitchen dispenser and at the time of termination of her services on 4<sup>th</sup> September 2012 she was earning Kshs. 8,000/-. She averred that the dismissal arose as a result of an assault by her supervisor which incident was reported to the Police and the supervisor charged in court. She pleaded that she was verbally dismissed and not paid her terminal dues and related benefits which were the unpaid salary for 4 days worked in September Kshs. 1,066/-, salary in lieu of notice Kshs. 8,000/-, unpaid leave for 4 years Kshs. 24,000/-, unpaid house allowance Kshs. 57,600/-, unpaid holidays worked 28 days – Kshs. 8,615/-, unpaid overtime 3 hours per day (3,744hrs) Kshs. 95,999.90 and service pay at 15 days per year for 4 years Kshs. 16,000/-. She also sought interest on the sums claimed, costs of the suit and any other relief the honourable court may give.

2. The Respondent filed a defence on 7<sup>th</sup> December 2012 and in the defence averred that the Claimant was not orally dismissed but instead that she absconded duty without advancing reasons to the Respondent. It was averred that the claim for terminal dues was misplaced as the Respondent paid the statutory charges among them NSSF and NHIF for the Claimant. The Respondent averred that at the time the Claimant absconded the claims were being investigated by the director who had undertaken to mediate and find a solution on the issue. The Respondent averred that instead of the Claimant waiting for the intended mediation meeting which had been set for 5<sup>th</sup> September 2012 the Claimant left work a day before and reported the matter to the Police and never reported to work again. The Respondent averred that the Claimant's house allowance had been computed in her salary and that the claims for the same were denied. The Respondent averred that the Claimant was not entitled to one month salary in lieu of notice as she was the one who absconded from work.

3. The Claimant testified on 16<sup>th</sup> October 2017 and stated that she was employed by the Respondent in July 2008 and was paid Kshs. 8,000/- a month. She stated that she was terminated on 4<sup>th</sup> September 2012 after being assaulted by her supervisor. She reported the incident at Central Police Station and the supervisor was charged. She claimed the 4 days that were unpaid in September 2012, notice, and her leave dues for the 4 years. She also sought house allowance that was unpaid for the 4 years and the service pay at the rate of 15 days for each year worked. She sought payment for holidays and for overtime. She testified that she did not abscond and was asked to withdraw the case and was dismissed. She stated that the arrest of the supervisor caused her dismissal. She testified that she was not called for mediation.

4. She was cross examined and stated that she had a NHIF card and employment card issued on 24<sup>th</sup> May 2010. She testified that she did not recall how long her card delayed before issuance and that she did not have an appointment letter. She stated that she was asked by Boniface Kamau the owner of the hotel to stop the case and if she did not do so she should leave and never come back to work. She testified that the criminal case was later withdrawn after she agreed to withdraw the case. She stated that she had no disciplinary issue and that she did not get any letter of termination. She denied deserting work and did not go on leave. She confirmed that NHIF and NSSF dues were paid.

5. In re-examination she testified that the Respondent had admitted that she was an employee and had not produced her record.

6. The Respondent did not call any witness and closed its case on 14<sup>th</sup> November 2017 when the case was slated for the hearing of the defence case. The Claimant filed submissions on 24<sup>th</sup> November 2017 and submitted that she was entitled to the sums claimed. She submitted that her evidence was not rebutted as the Respondent had two opportunities to call witnesses and failed to do so. She submitted that she had proved she was entitled to more than had been pleaded and therefore should be awarded the sums claimed.

7. The Claimant asserts that she was dismissed after reporting an assault by her supervisor. The Respondent asserts that mediation was scheduled for 5<sup>th</sup> September 2012 and the Claimant absconded work on 4<sup>th</sup> September never to return. The witness statement of Boniface Kamau the proprietor of the Respondent was to the effect that the Claimant reported the assault on 14<sup>th</sup> August 2012 and on 17<sup>th</sup> August he summoned the supervisor. He questioned him and the supervisor defended himself against the allegations and said the claims were driven by malice. He stated that he tried to interrogate some of the Claimant's colleagues with a view of establishing the truth of the matter and later scheduled a meeting to mediate but the Claimant went away and never returned. This when reflected against the Claimant's testimony seems rather hollow. If the Claimant was making up a story about assault then the Police must have been grossly incompetent as they charged the supervisor with assault a fact admitted by the Respondent. If indeed the charges were actuated by malice why was there evidence sufficient to sustain a charge of criminal assault? The Claimant's evidence was cogent in this regard. Under Section 74 of the Employment Act, it is the duty of the Respondent to maintain records. No record of the Claimant having gone on leave or house allowance payment was produced by the Respondent. The Claimant sought overtime but failed to prove the special damages of overtime and holidays worked. She ought to have produced documentation to support the same. She is also not entitled to service/severance pay as she was a contributor to NSSF. The

Respondent produced the statement showing that statutory deductions were remitted for the period of employment. Housing is provided for and under Section 31 and in the absence of housing the Claimant would be entitled to house allowance at the rate of 15% of her basic. Her basic pay was Kshs. 8,000/- and therefore she was entitled to house allowance of Kshs. 43,200/- for three years ( $15\% \times 8,000 \times 3$ ). She was dismissed for her refusal to withdraw criminal charges against the Respondent's supervisor. The Claimant was entitled to notice being one month's salary of Kshs. 9,200/-. She was not granted leave from the accounts before the court and she would be entitled to recover leave pay for three years which is Kshs. 27,600/- ( $9,200 \times 3$ ). She is also entitled to the 4 days worked in September 2012 being Kshs. 1,266.67. I will also award her 3 month's salary being Kshs. 27,600/- as compensation under Section 49 for the dismissal, as well as a certificate of service under Section 51 of the Employment Act. The Claimant was successful in her claim and will have the costs of the suit and interest on the sums from the date of this judgment at court rates till payment in full.

It is so ordered.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of December 2017**

**Nzioki wa Makau**

**JUDGE**