



**REPUBLIC OF KENYA**

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

**CAUSE NO. 64 OF 2014**

**HARRISON OKALLO ALINDA**

**CLAIMANT**

**v**

**DOUBLE DELIGHT RESTAURANT & SUPERMARKET RESPONDENT**

**JUDGMENT**

1. Harrison Okallo Alinda (Claimant) was employed by Double Delight Restaurant & Supermarket (Respondent) on 4 October 2012 as a cleaner.
2. On 13 March 2014, the Claimant commenced legal action against the Respondent and he stated the issues in dispute as
  1. Unfair termination
  2. Overtime/off duties
  3. Underpayment of wages
  4. Annual leave.
3. The Claimant sought a total of Kshs 566,952/- as compensation and other entitlements due from the contractual relationship.
3. The Respondent filed its Response on 2 May 2014, which prompted the Claimant to file a rejoinder on 9 May 2014 and the Claimant's case was taken on 15 June 2015.
4. At the close of the Claimant's case, the Respondent sought and got an adjournment. When the Respondent's case came up for hearing on 18 November 2015, it sought an adjournment which was declined because sufficient reasons were not tendered.
5. Immediately after the Court ruled on the adjournment application, the Respondent's advocate informed Court that she had not been able to communicate with her client and therefore she renewed the application for adjournment.
6. The Court declined the renewed application for adjournment and ordered that the Respondent's case be deemed closed.
7. It is very telling that the Respondent's counsel had failed to disclose that she had not managed to communicate with the Respondent to avail a witness (ess) at the first instance when seeking adjournment.
8. A party desiring an adjournment must not only provide sufficient reason but must make full and candid disclosure at the first instance. The lack of communication or availability of a witness was a material fact to the application for adjournment and should have been disclosed earlier, rather

- than being tendered during the renewed bid to secure an adjournment.
9. The Court directed the parties to file submissions before 30 December 2015 but only the Claimants submissions were on file by this morning.
  10. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the employment of the Claimant was terminated, whether such termination was unfair, whether the Claimant worked overtime, whether the Claimant had pending leave, whether Claimant was underpaid and appropriate remedies/orders.*

### **Whether Claimant's employment was terminated**

11. The Claimant testified and stated that on 20 January 2014, he reported to work as usual and at about 7.00pm he was summoned by Ms. Jerioth Gikonyo (owner of Respondent) to the office and she informed her that due to the government ban on night travel his services were no longer required.
12. He stated that he handed over to a fellow colleague Grace Kariuki and left and returned after one week to collect his final dues but instead the Manager, Alex Maina handed over a letter to him.
13. The letter was a suspension letter and the suspension was for an indefinite period. He refused to sign the letter and the Manager therefore took back the letter.
14. During cross examination, the Claimant maintained that he was dismissed and the reason given was the ban on night travel by public service vehicles.
15. The Claimant's narration on the circumstances surrounding the separation were not challenged or controverted.
16. In paragraph 7 of the Response, it had been contended that the Claimant's services had not been terminated but he had only been sent off temporarily due to low business arising from the night travel ban on public service vehicles.
17. The facts as pleaded by the Respondent suggest that the narration by the Claimant reflected the correct facts as to the separation.
18. The purported suspension of the Claimant on 28 January 2014 therefore came after the Respondent ended the relationship and was of no legal consequence or effect.
19. The Court therefore finds that the Respondent terminated the employment of the Claimant.

### **Whether termination of employment was unfair**

20. Sections 41, 43, 45 and 47 of the Employment Act, 2007 govern the termination of an employment relationship.
21. The Claimant testified and the same was not controverted that he was not given notice of termination of employment. This was contrary to section 35 of the Employment Act, 2007, and in this regard, the Claimant has satisfied the test placed upon employees by section 47(5) of the Employment Act, 2007.
22. There was no suggestion that the Respondent complied with the procedural fairness requirements of section 41 of the Act. On this account, the Court finds that the termination of employment was procedurally unfair.
23. Pursuant to sections 43 and 45 of the Employment Act, 2007, an employer has a statutory burden to prove the reasons for termination of employment, and that the reasons were valid and fair.
24. The Respondent did not offer any evidence, and the Court can only conclude that the termination of the Claimant's employment was substantively unfair.
25. However, the Court takes judicial notice and this is in the public domain, that the night travel ban, for the period it was in place occasioned losses to several businesses and operators.

### **Overtime (normal and off duties)**

26. The Claimant's testimony was that he used to report to work at 7.00am and leave at 8.00pm. He also stated that there were day and night shifts and that day shift was from 7.00am to 8.00pm while the night shift was from 4.30pm to 9.00 am.
27. The Claimant produced copies of attendance registers for 18 August 2013, 19 August 2013, 20 August 2013, 29 September 2013 and 30 September 2013.

28. The attendance registers do not demonstrate that there were consistent reporting hours or leaving times.
29. Working hours are contractual, but the statute has intervened to set the maximum working hours within certain sectors/industries beyond which an employee would be entitled to overtime.
30. The Claimant did not lead any evidence as to the contractually agreed working hours per day/per week.
31. He equally did not prove the sector/industry the Respondent was operating in or which particular Regulation of Wages Order prescribed the working hours within the sector.
32. The statute provides for only 1 rest day per week. The Claimant did not lead evidence that he was not getting the 1 week rest day.
33. The Court is therefore unable to make a finding as to whether the Claimant worked beyond the contractually agreed or statutorily prescribed hours.

## **Leave**

34. Among the issues identified by the Claimant as being in dispute was annual leave.
35. Annual leave is a statutory right and the Employment Act, 2007 has provided the minimum as 21 days after every 12 months consecutive service.
36. Although the obligation to keep and maintain employment records is placed upon employers who should produce the same in Court, the Claimant did not seek the production of his employment records in Court, he did not lead any evidence as to the period he was seeking leave or how many days.
37. Pleadings alone are not enough and a party should be alert to produce evidence to support the facts as alleged in a pleading.
38. In the circumstances of this case, the Court is unable to find that the Claimant had pending leave or to make an adverse finding against the Respondent.

## **Underpayments**

39. The Claimant's testimony was that he was initially employed (4 October 2012) as a cleaner at a wage of Kshs 6,000/- and that the basic wage for a cleaner was Kshs 7,915/90 (Kshs 9,103/30 inclusive of 15% house allowance) pursuant to Legal Notice No. 71 of 2012.
40. He also contended that from 1 March 2013 to April 2013 he served as a waiter and the prescribed minimum wage for a waiter was Kshs 8,221/20 (Kshs 9,454/40 inclusive of house allowance) but instead he was earning Kshs 7,500/-.
41. He further contended that he became a supervisor/storekeeper on 1 May 2013 and that pursuant to Legal Notice No. 197 of 2013 he was entitled to basic wage of Kshs 12,081/30 (Kshs 13,893/50 inclusive of 15% house allowance) but instead he was earning Kshs 11,500/-.
42. Prescribed minimum wages go hand in hand with one's occupation/designation.
43. In his testimony, the Claimant narrated the positions and responsibilities he carried out. The Respondent did not controvert the testimony.
44. Further, section 9 of the Employment Act, 2007 makes it mandatory that an employer shall draw up a written contract of service (when contract is for certain duration) with certain prescribed particulars.
45. It is apparent that the Respondent did not issue a written contract and therefore by operation of section 10(3) and (7) of the Employment Act, 2007 the Court finds that the Claimant served as cleaner, waiter and supervisor cum storekeeper and was thus underpaid.

## **Appropriate remedies/Orders**

### ***1 month pay in lieu of notice***

46. With the conclusion reached that the termination of employment was unfair, the Claimant is entitled to payment of 1 month pay in lieu of notice by dint of section 35(1)(c) of the Employment

Act, 2007 in the sum of Kshs 12,081/- this being the prescribed minimum wage for storekeeper at time of separation.

### ***Wages for January 2014***

47.The Claimant is entitled to earned wages upto time of separation. He quantified the same as Kshs 12,132/85 and he is entitled to the same.

### ***Underpayments***

48.The underpayments were computed as Kshs 40,966/80 and the Court having found that he was underpaid would award Kshs 44,607/90 as sought.

### ***Overtime (normal/off duties)***

49.This head of claim is declined for reasons given in paragraphs 26 to 33 above.

### ***Compensation***

50.The Court has found the termination of the Claimant's employment unfair.

51.He served the respondent for slightly over a year. Considering the length of service, the Court would award him the equivalent of 2 months gross wages assessed as Kshs 27,786/- as compensation.

### **Conclusion and Orders**

52.The Court finds and holds that the employment of the Claimant was terminated unfairly and awards him and orders the Respondent to pay him

|                                   |               |
|-----------------------------------|---------------|
| a. 1 month wage in lieu of notice | Kshs 12,081/- |
| b. January 2014 wages             | Kshs 12,132/- |
| c. Underpayments                  | Kshs 40,966/- |
| d. Compensation                   | Kshs 27,786/- |

TOTAL **Kshs 92,965/-**

53.Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 23<sup>rd</sup> day of March 2016.**

**Radido Stephen**

**Judge**

### **Appearances**

|                 |  |
|-----------------|--|
| For Claimant    | Mrs. Ndeda instructed by Ndeda & Associates          |
| For Respondent  | Ms. Magani instructed by Dola Magani & Co. Advocates |
| Court Assistant | Nixon  |