



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2362 OF 2012**

**MARY ANNE WACEKE KARONGO ..... CLAIMANT**

**VERSUS**

**OUTDOOR FOODS & BEVERAGES**

**LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN MUNIU ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPH NDABA ..... 3<sup>RD</sup> RESPONDENT**

Mr. Makori for Claimant

Mr. Githuka for Respondent

**JUDGMENT**

1. The Claimant was employed by the 1<sup>st</sup> Respondent as a Finance Administrator on 1<sup>st</sup> November, 2011. She earned a monthly salary of Ksh.40,000.00 a month.
2. The 2<sup>nd</sup> Respondent Mr. Stephen Muniu Ndaba was the Managing Director of the 1<sup>st</sup> Respondent whereas the 3<sup>rd</sup> Respondent Mr. Joseph Kanuri Ndaba is a Director of the 1<sup>st</sup> Respondent.
3. The date of termination of employment is in dispute.
4. **Claimant's Case**

The Claimant states that she was employed on 1<sup>st</sup> November, 2011 via a letter of employment dated 31<sup>st</sup> October, 2011 produced as Appendix 1 to the Statement of Claim.

5. In terms of this letter she was entitled to Ksh.40,000.00 monthly salary plus a medical cover. She reported to work from Monday to Friday from 8.00 a.m. to 5.00 p.m. and 8.00 a.m. to 1.00 p.m. on Saturdays.
6. The Claimant was also entitled to 21 days leave in each completed year of service. The letter of appointment is signed by both parties.

7. The Claimant produced a letter of resignation dated 5<sup>th</sup> September, 2012 effective on 30<sup>th</sup> September 2012 which was to be the last working day.

8. In the said letter the Claimant did not state the reason for resignation. She thanked the Respondents for the opportunity accorded to her to work for the Respondents.

9. **Testimony**

In her testimony before court, the Claimant told the court she was forced to resign due to non-payment of her salary from the months of March, 2012 until the date she left employment on 30<sup>th</sup> September, 2012.

10. The Claimant explained that during the four (4) months she received a salary the same was paid in piece meal inspite of her complaints to the employer. That as a result of this non- payment of salary, she was in rent arrears and her household goods were auctioned as a result thereof.

11. She claims;

(i) Seven (7) months' salary in the sum of Kshs.280,000.00

(ii) Damages for the auctioned goods in the sum of Ksh.200,000.00

(iii) Kshs.32,307.00 being payment in lieu of 21 days leave not taken since she had served from November, 2011 to September, 2012, a total of 11 months without leave

(iv) 12 months compensation for constructive dismissal

(v) Interest on the decretal amount and costs

12. The Claimant stated that she was still unemployed and had relocated temporarily to the rural area.

13. Under cross examination, she explained that she had sued the three Respondents jointly and severally since she was recruited by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on behalf of the 1<sup>st</sup> Respondent.

14. She refuted the claims by the Respondents that she had stopped working end of April, 2012 when the Respondent states that they closed shop. She told the court that she continued working from home as per the initial agreement using her personal telephone, laptop and internet facilities.

15. The Claimant added that she had emailed the resignation letter to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

16. She acknowledged that she had not served a demand letter on the Respondents prior to commencement of the suit.

17. **Respondent's Case**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a joint response to the claim dated 29<sup>th</sup> December, 2012.

18. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents deny having employed the Claimant stating that the claimant was employed by the 1<sup>st</sup> Respondent on 1<sup>st</sup> November, 2011 and worked continuously until April, 2012 when the 1<sup>st</sup> Respondent closed its offices at Land Mark Plaza along Argwings Kodhek Road, Nairobi due to financial constraints and a downturn of business expectations.

19. That the Claimant and the administrator of the business were well aware of the financial difficulties the company experienced due to its inability to access a credit facility from its bankers to pay for ordered stocks.

20. The 1<sup>st</sup> Respondent therefore denies that the claimant worked up to September, 2012 adding that this was not possible.

21. The 2<sup>nd</sup> Respondent testified under oath and admitted that as at the time the Claimant left employment due to closure of business in April, 2012, the 1<sup>st</sup> Respondent owed her Ksh.10,000.00 salary arrears for the month of March, 2012 and she was not paid Kshs.40,000.00 salary for the month of April, 2012. RW1 denied ever receiving a letter of resignation from the Claimant stating that as at that date, the Claimant had long stopped working for the 1<sup>st</sup> Respondent.

22. RW1 admitted that, the company paid the Claimant's salary in instalments, due to financial constraints. The business closed on 30<sup>th</sup> April, 2012. RW1 also admitted that the claimant did not take leave during the six months period she worked for the 1<sup>st</sup> Respondent and offered to pay her in lieu of leave. RW1 urged the court to dismiss the rest of the claims with costs to the Respondents.

23. **Issue for determination**

(1) Did the Claimant stop working on 30<sup>th</sup> April, 2012, when the company closed its office or did she continue to serve from her house till 30<sup>th</sup> September, 2012 when she tendered her resignation?

(2) If the answer to 1 above is in the affirmative, what remedy is she entitled to?

24. **Determination**

The testimony by the Claimant that upon closure of the office on 30<sup>th</sup> April, 2012, she was asked to continue working from her house does not appear credible because she has not produced any document showing that she was at work during the period in question.

25. She did not demand payment of the monthly salary between April to September, 2012 and one wonders how she could have worked for 6 months without pay.

26. The Court does not believe that the claimant continued working for the 1<sup>st</sup> Respondent until she wrote the letter of resignation.

27. The Claimant is therefore not entitled to payment of arrear salary except for the Ksh.10,000.00 for the month of March, 2012 and Ksh.40,000.00 for the month of April which amounts are admitted by the 2<sup>nd</sup> Respondent.

28. However, the 1<sup>st</sup> Respondent was under an obligation to formally retrench the Claimant from employment as at 30<sup>th</sup> April, 2012 when the alleged business closed due to financial difficulties. No such letter was produced written to the Claimant and copied to the Labour Office in terms of Section 40 of the Employment Act, 2012.

29. Accordingly, the Claimant was retrenched without following the statutory procedure under Section 40 of the Employment Act.

30. The Claimant has demonstrated that the termination of her employment was procedurally unfair. The admissions made by the 2<sup>nd</sup> Respondent have aided in this respect.

31. With respect to the claim for the loss incurred due to non- payment of house rent, the Claimant has not proved the necessary nexus between the loss and the 1<sup>st</sup> Respondent. Accordingly, the court finds that the Claimant is not entitled to payment by the 1<sup>st</sup> Respondent in respect thereof.

32. **Award**

In the final analysis, the Claimant is awarded as against the 1<sup>st</sup> Respondent;

- (a) Kshs.240,000.00 being 6 months compensation for the unprocedural and unfair retrenchment.
- (b) Kshs.32,307.69 being payment in lieu of 21 leave days not taken.
- (c) Kshs.50,000.00 being arrear salary.

Total award is Ksh.332.307.69

(d) The award is payable with interest at court rates from the date of the judgment till payment in full.

(e) The Claimant is also to be paid cost of the suit by the 1<sup>st</sup> Respondent.

33. Though the judgment is specifically against the 1<sup>st</sup> Respondent, this Court notes the commitment before court by (RW1), the 2<sup>nd</sup> Respondent to ensure that the unpaid terminal benefits due and owing to the claimant are timely paid.

**Dated and Delivered at Nairobi this 29<sup>th</sup> day of January, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**