



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**  
**CAUSE NO 1106 OF 2013**

**KAKUVI CHRISTINE MBILI ..... CLAIMANT**

**VERSUS**

**ZANZY BAR & RESTAURANT LTD ..... RESPONDENT**

**JUDGMENT**

1. The issue in dispute herein is the unlawful termination of the Claimant by the Respondent and non-payment of terminal dues.
2. The claim was filed on 16<sup>th</sup> July 2013. The Claimant acting in person made various efforts to serve the summons herein but was not successful. The court directed the Deputy registrar of the Court to allocate the Court process server to effect such Service and to further send such summons through the address of the respondent. This was effectively done vide notice dated 12<sup>th</sup> May 2015 and an Affidavit of Service was filed in confirmation of service. Despite such efforts, the Respondent failed to enter appearance or file a defence. The court directed the Claimant to proceed with her case noting the Respondent was thus aware of the matter in court against them.
3. The claim is that in March 2003 the Claimant was employed as a cleaner by the respondent, a firm operating a bar and restaurant along Tom Mboya Street in Nairobi central business district. The Claimant was paid Kshs.6, 000.00 per month until 28<sup>th</sup> March 2012 when she was unlawfully terminated without payment of any terminal dues or being given notice and the reasons for the termination. The Respondent business was running smoothly and the Claimant rendered service without any problems and was shocked when she was told that there was no more work for her. She had served diligently without taking leave for 12 years and or being paid for her service.
4. The Claimant is seeking notice pay; house allowance; leave due for 12 years and service due. There was no contract of employment issued spelling out her terms of service.
5. The Claimant gave evidence in support of her claim.
6. It is trite that every employer should issue each employee with an employment contract as under section 8 of the Employment Act. Where no such contract is issued and the employee remains under casual terms, by operation of the law section 37 of the Employment Act automatically converts the same into a full time employment thus;

*37. (1) notwithstanding any provisions of this Act, where a casual employee—*

*(a) works for a period or a number of continuous working days which amount in the aggregate to*

*the equivalent of not less than one month; or*

*(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.*

*(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.*

*(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.*

7. Where the Claimant continued to work as a Cleaner for a period of over 12 years without any contract of service, such employment became full time. This was a continuous engagement without break and for the same tasks that did not end each day as this had to be done on a daily basis. Failure to issue a contract spelling out the terms of employment is an unfair labour practice as under article

8. Where the Claimant continued to work as a Cleaner for a period of over 12 years without any contract of service, such employment became full time. This was a continuous engagement without break and for the same tasks that did not end each day as this had to be done on a daily basis. Failure to issue a contract spelling out the terms of employment is an unfair labour practice as under article 41 of the Constitution.

9. Upon termination of employment such as in the case of the claimant, all owing dues not paid as at the time of such termination is due as of rights. House allowance and leave due is payable as of right where earned and not taken or pay in lieu of provision for housing or taking such leave. In this case house allowance is awarded at Khs.86, 400.00. The Claimant is seeking leave allowance. I find no justification for such a claim. Where leave days are due, as of right this is due but a claim to an allowance over leave, unless agreed upon by the parties, no such allowance is payable as a right.

10. Notice is due and where not issue, a payment is due. The Claimant is awarded kshs.6, 000.00.

11. Service pay is due in a case where there is no remittance of statutory dues under the provisions of section 35 of the Employment Act. For the 12 years served and no dues were remitted to the NSSF or NHIF the Claimant shall be awarded 15 days' pay for each year served all being kshs.36,000.00.

12. Compensation is also due in a case of unfair termination.

**Judgement is entered for the Claimant against the Respondent in the following terms;**

- a) A declaration that the Claimant was unfairly terminated;**
- b) Compensation awarded at kshs.72, 000.00;**
- c) Notice pay at kshs.6, 000.00;**
- d) House allowance due at kshs.86, 400.00;**
- e) Service pay at Kshs.36, 000.00;**
- f) Costs of the suit.**

**Delivered in open Court , dated and signed in Nairobi on this 10<sup>th</sup> day of June 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

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