



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 96 OF 2014**

**LILIAN**

**MUTUNE.....**

**CLAIMANT**

**VERSUS**

**JACKSON MUIRURI WATHIGO T/A MURTOWN  
SUPERMARKET..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 15<sup>th</sup> October, 2015)

**JUDGMENT**

The claimant filed the statement of claim on 22.08.2014 through Kirubi, Mwangi Ben & Company Advocates.

The claimant prayed for judgment against the respondent for:

- a. Payment of Kshs.273,373.00 for annual leave, salary arrears, rest days, public holidays and underpayment.
- b. Costs and interest of the suit.
- c. Any other or better relief the honourable court may deem fit to grant.

The respondent filed the statement of response on 24.09.2014 through Kimere Josphat & Company Advocates.

The respondent prayed that the claimant’s suit be dismissed with costs.

The claimant’s case is that she was employed by the respondent as a shop assistant from August 2010 to November 2013 when her services were terminated for no apparent reason. The claimant testified that she worked through the week including Saturdays, Sundays, public holidays, and she was never given a rest or annual leave. The claimant testified that she left employment in November when Mrs. Wathigo told her to leave job and to wait for the outstanding pay being salary arrears. The unpaid salary was for 4 months being July to October 2013. It was the claimant’s testimony that throughout her service she was paid Kshs. 4,000.00 per month.

After the November 2013 separation she was never recalled and she was never paid prompting her to report a dispute at the labour office at Murang’a County. The respondent failed to co-operate with the Labour Officer one Bernard Mutisya Mbuvi (claimant witness No. 2 – CW2).

CW2 testified that he came to know the claimant on 29.05.2014 when she filed a dispute against the

respondent at the County Labour Office. CW2 narrated how the respondent and Mrs. Wathigo failed to co-operate and later on 25.07.2014 he computed the claimant's terminal dues as claimed and as filed in court. He relied on legal notice No. 71 of 1.05.2012 wage order to compute minimum wage for a shop assistant. CW2 testified that the claimant had told him that the employment was oral and the respondent had failed to provide relevant documentation. CW2 further relied on the correspondence on record to show how the respondent had refused to co-operate with the labour office.

The respondent RW1 testified that he owned the supermarket in issue and he knew that the claimant worked at the shop. It was his evidence that the claimant was introduced by her sister, she applied for the job but was not given the job because she held class 8 certificate and not O' level certificate. It was considered that she was not qualified and the job was not given. RW1 further testified that despite her qualifications, he offered the claimant a job to wash the floors, dust the shelves and she worked whenever the job to be done was available. He testified that she worked twice or thrice a day at Kshs.500.00 per day. He denied all claims and prayers made by the claimant in the suit. In cross-examination he testified that the claimant was also assigned to assist in selling cakes. RW1 admitted that he kept no records on the claimant's employment. RW1 stated his lawyer had advised him not to co-operate with the labour officer and in re-examination he stated that he received no communication from the labour officer and that Mrs. Wathigo negotiated the salary.

RW2 was Mrs. Marie W. Muiruri Wathigo. She testified that the claimant was introduced to her by the claimant's sister but she declined to offer the claimant a job because the claimant did not have the relevant qualifications. She also testified that she agreed to assign the claimant the duties of cleaning the shop. Further the claimant only worked when RW2 needed her services. She assigned her to clean the floor, to arrange goods on shelves and to dust the shelves. RW 1 had testified that there were casual workers and he assigned the claimant duties but RW2 testified that she had no other casual workers. RW2 stated that she kept no register for casual workers. RW2 met the labour officer at the shop and she did not know if the respondent eventually met the labour officer.

The **1<sup>st</sup> issue** is whether the parties were in employment relationship. The claimant says she was employed without a break until her termination. The respondent says she was a casual worker. Section 10 (7) of the Employment Act, 2007 provides that if in any legal proceedings an employer fails to produce a written contract or the written particulars of employment prescribed in subsection (1) of that section, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer. The issue before the court is whether the respondent has discharged that burden.

The court has considered the evidence. The court finds that the respondent's evidence as the employer was contradictory. First the respondent's witnesses were incoherent about the scope of the job assigned to the claimant. Second, the respondent's witnesses stated that the claimant was assigned to clean the floor of the shop and to dust shelves but only when needed. It was not shown how that otherwise daily job was done on days it was said the claimant was not needed. It is the opinion of the court that the kind of work the respondent assigned the claimant was of a permanent nature. Contradictory evidence was given on if the respondent employed casual workers when the claimant was allegedly not needed at work. Thirdly, the respondent stated that the claimant lacked desired qualifications and at the same time admitted to have employed the claimant but, unbelievably, on casual basis only. In all, the court finds that the respondent's contradictory evidence was not believable and the claimant has established that the claimant was employed as a shop assistant without a break as set out in the statement of claim and her evidence.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The respondent refused to co-operate with the labour officer. The respondent failed to keep the relevant employee records while at the same time decided to withhold all the information about the oral employment until the hearing of this suit when incoherent and incredible testimony was made for the respondent. The court has considered the computation by the labour officer against the pleadings and the evidence. The claimant's evidence has been found credible and the court finds that the evidence as set out earlier in this judgment has established that the claimant is entitled as prayed for and on all heads of claims. The labour officer's computation has not been faulted in any manner and it is found justified.

In conclusion judgment is entered for the claimant against the respondent for:

- a. The respondent to pay the claimant **Kshs.273,373.00** by 1.12.2015 in default interest at court rates to be payable thereon from the date of the suit 22.08.2014 till full payment.
- b. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Thursday, 15<sup>th</sup> October, 2015.**

**BYRAM ONGAYA**

**JUDGE**