



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 979 OF 2010**

**AMINA BAKARI BABU ..... CLAIMANT**

**VERSUS**

**INDU FARM (EPZ) LIMITED ..... RESPONDENT**

Mr Aketch for Claimant

M/s Oyombe for Respondent

**JUDGEMENT**

1. This suit is for wrongful termination of employment and non payment of terminal dues. The Claimant was employed by the Respondent in 2002 as a cleaner at the Respondent's premises on Mombasa Road earning a salary of Kshs. 295 per day exclusive of overtime.

2. The Claimant avers that she worked diligently and competently until the 15<sup>th</sup> of July 2009 when her employment was verbally terminated by the Respondent. The Claimant did not have a written contract of employment and the Respondent declined to give her a certificate of service upon termination of the employment.

3. The Claimant seeks compensation following unlawful termination and payment of terminal benefits to wit;

- (a) Severance pay for 7 years
- (b) Accrued annual leave for 7 years
- (c) Pay for Public Holidays worked for 7 years
- (d) Non-payment of overtime for 7 years.
- (e) Costs and interests on the award

4. The statement of claim is supported by a verifying affidavit of the Claimant sworn on the 24<sup>th</sup> of August 2010 and prays that the suit be allowed.

5. The Respondent filed a memorandum of defence on the 15<sup>th</sup> of February 2011 in which the Respondent avers that the Claimant was employed by the Respondent as a casual employee and annexed the Claimant record of attendance marked '1(a – g)' to the response.

6. That on 15<sup>th</sup> July 2009, the Claimant was employed alongside others by the Respondent as a casual for the day. However in the course of the day, one of the workers and a colleague of the Claimant Ms Josephine Akinyi realised that her locker was opened and her personal belongings including a purse, mobile phone and necklace was missing from the locker which had hitherto been locked.

7. A snap search was organised by the park housing manager upon report and statement recording by the affected employee. The missing items were found with the Claimant. The Claimant refused to record a statement upon request. The Claimant never returned for the casual employment thereafter.

8. The Claimant surprisingly reported a criminal case against her colleague Josephine Akinyi who was her victim on the day claiming that she had been assaulted. The matter was pending at the Magistrates Court in Makadara by the time the suit was filed.

9. It is the Respondent's case that the Claimant never worked continuously at any one time and where she worked on Public Holidays or overtime she was paid. The Claim for leave pay, severance pay, overtime and for public days worked is denied in totality.

10. The record of payment duly signed by the Claimant was produced by the Respondent as evidence of the casual nature of employment.

### **Determination.**

11. The burden of proving the particulars of claim lies squarely on he who asserts. The claimant opted not to adduce evidence in support of the averment's made in the Memorandum of Claim which averments are not substantiated by any documentary evidence.

12. The averments by the Claimant that she worked continuously for 7 years and she was not granted annual leave days during that period remain hollow and unsubstantiated due to lack of evidence.

13. Equally, the claimant has been unable to demonstrate that she worked overtime on normal working days and also worked during public holidays without requisite double payment due to lack of oral of documentary evidence to support those bare averments.

14. These claims were denied by the Respondent and the Claimant did not file a reply to the Statement of Response to join issues for determination by the court.

15. To this extent, the Claimant has failed to discharge the burden of proof on a balance of probabilities and the court has no alternative but to find that the Claimant worked for the Respondent from time to time and was paid a daily wage. That whenever she worked during public holidays or overtime on normal days, she was duly paid.

16. The Court also finds that the Claimant having failed to reply to the memorandum of defence leaves the Court with no alternative but to accept the version given by the Respondent to the effect that the Claimant was caught red handed with stolen property of a colleague and subsequently never returned to work for the Respondent.

17. The averments by the Claimant that she was wrongfully dismissed from work are bare and unsupported by any evidence.

The court therefore dismisses the entire suit for lack of proof to the standard required with Costs to the Respondent.

**DATED at Nairobi this 9<sup>th</sup> day of December, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**