



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 2002 OF 2011

BETWEEN

SAIRABANU AKBARKHAN..... CLAIMANT

VERSUS

KAHAWA THE COFFEE HOUSE LIMITED.....RESPONDENT

Rika J

CC Leah Muthaka

Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates for the Claimant

Ms. Gikunju instructed by S.M. Righa & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant commenced the proceedings against her former employer the Respondent herein, through a Statement of Claim filed on 25th November 2011. The Respondent filed its Statement of Response on 14th December 2011. The Parties presented and closed their respective cases on 28th May 2013. The Claimant gave evidence in support of her position, while the Respondent testified through its Director Zulfiqarali B. Mawani and Cashier Daniel Mwangi. The Respondent also filed a Statement from Nagris Jessa, attached to the Statement of Reply as appendix 3. The dispute was last mentioned on 5th July 2014 when Parties confirmed the filing of their Final Arguments and were advised by the Court Award would be delivered on notice.

2. The Claimant was employed by the Respondent Coffee Joint, in or around January 2006 as a Supervisor. The contract was oral, and she was paid a basic monthly salary of Kshs. 18,000. She worked assiduously until or around 19th February 2011, when the Respondent unfairly terminated her contract of employment. She states termination offended Sections 41 and 45 of the Employment Act 2007. The Respondent alleges she deserted duty, an allegation which was untrue. She prays from the Court:-

- a. Salary for 18 days worked in February 2011 at Kshs. 13,153;
- b. 1 month salary in lieu of notice at Kshs. 18,000;
- c. Leave balance of 3 months at Kshs. 54,000;
- d. Leave traveling allowance at Kshs. 20,000;
- e. Salary underpayment at Kshs. 1,320,000;

- f. Service pay at 15 days' salary for every year completed in service at Kshs. 45,000;
- g. Overtime worked at 3 hours every day for 60 months at Kshs 467, 316; and
- h. 12 months' salary in compensation for unfair termination at Kshs. 216,000

Total Kshs. 2, 153, 469

The Claimant seeks a declaration that termination was unfair and unlawful; terminal benefits and compensation as outlined above; costs, interest; and any other orders the Court may deem just to grant

3. The Claimant testified that the Respondent operates a Restaurant along Kaunda Street in Nairobi. She was recruited by Zulfiqarali. She opened the business on Saturday 17th February 2011. At the end of the day, she was advised by Zulfiqarali not to report to work on Monday 19th February 2011. She worked from 7.00 a.m. to 3.00 p.m. She was not given any reason why she should not report. No disciplinary proceedings took place. There was no notice of termination. From Monday to Friday, she worked from 7.00 a.m. to 6.30 p.m. There was no overtime paid. She was not paid for the days worked in February. She was not availed her certificate of service. She did not desert employment. She did not open a shop of her own, and was not married at the time of dismissal. At one time in 2010, Mrs. Zulfiqarali had quarreled with the Claimant, and asked her not to report to work. The husband overruled his wife, and asked the Claimant to continue working. The Respondent deducted National Social Security Funds contributions from the Claimant's salary, but failed to remit to the N.S.S.F.

4. Cross-examined, the Claimant stated she worked at the Respondent from January 2006. She was recruited through a Social Worker by Zulfiqarali. There was no letter of employment. Her salary was Kshs. 18,000 per month. She had been promised increment. She had asked for increment to Kshs. 30,000 per month. She was asked by Zulfiqarali not to report to work on Monday 19th February 2011. The Accountant Mwangi retrieved the premises Key from the Claimant later on the same Monday. She had not been asked to hand over the key when she left. It was a duplicate key. It was not true that she deserted. It was not true that Mwangi collected the key from the Claimant at the Claimant's shop. She did not have a shop then. She was only granted leave for 2 weeks the whole period in service. She was entitled to 28 days of annual leave every year. She did not know the exact months when the Respondent deducted N.S.S.F deductions from her salary and failed to remit. She was not paid travel allowance. It was not in the contract. She seeks 3 hours overtime pay for each day. Redirected, she testified that her employer had the obligation to give her a written contract and pay advice. There was no letter from the Respondent enquiring about the Claimant's alleged desertion. The Respondent did not call the Claimant, despite having her cell phone contact. She called the Respondent, but there was no response. She was not availed the attendance register by the Respondent while in employment. There were 2 keys- one ordinarily retained by Mwangi, and the other by Zulfiqarali. Mwangi collected his own key from the Claimant on Monday 19th February 2011.

5. The Respondent conceded it employed the Claimant on the terms given in her evidence, but denied terminating her contract of employment. She deserted employment on 19th February 2011. The Respondent made efforts to have the Claimant return to work through emissaries, which proved futile. She deserted and opened her own shop. The Respondent filed two Witness Statements- one by David Mwangi Thiong'o and the other by Nagriss Jessa.

6. Zulfiqarali testified he serves as one of the Directors of the Respondent. The Claimant was employed by the Respondent in 2005, not 2006. She served as a Hostess. The Respondent did not advertise for the job. Mrs. Zulfiqarali approached the Ismailia Community Social Security Worker to get someone to assist the Respondent for one or two weeks. Zulfiqarali had taken his wife to India for cancer treatment.

7. On 19th February 2011, the Claimant was at work and served the whole day. This was on Saturday. On Monday 21st February 2011, she did not report to work. On Tuesday 22nd February 2011, Zulfiqarali sent his Accountant Mwangi to find the Claimant. He came back with the information that he found her at a Mobile Phone shop along Luthuli Avenue. Mwangi asked her to call Zulfiqarali. She did so, saying her brothers had forbidden her from continuing with employment at the Coffee House. The brothers stated

they would continue to support her. She never returned to work.

8. She worked from 8.30 a.m. to 5.30 p.m. There was no leave traveling allowance given to employees on their annual leave. She took 81 days of annual leave from January 2006 to 11th January 2011. The Respondent remitted her N.S.S.F contributions from 2009. Mrs. Zulfiqarali later approached the Social Worker who confirmed the Claimant had opened a Shop. She initially stated it was her brother who opened the shop for her. The second time the Social Worker visited, she found the Claimant had changed her faith from Ismailia to Islam and was married. The Ismailia Community stopped paying her house rent, medical expenses and other utilities.

9. Zulfiqarali confirmed he employed the Claimant in 2005 by word of mouth. He has 10 employees, all of whom he has issued letters of employment. The Claimant was not issued a letter of employment because she came in on temporary basis. She was not given itemized Pay Advice. She took 81 days of leave. The leave forms were not availed to the Court. Employees received Kshs. 3,000 in leave traveling allowance. The Claimant was not paid leave traveling allowance. Her record was clean. She was not advised by the Witness not to return to work. She was advised she could return to work when she called the Witness. He did not write to the Claimant advising her to return to work. She did not write saying she was no longer interested in working. He did not issue her a letter of termination. There were no months between 2009 and 2011 when the Respondent failed to pay the Claimant's N.S.S.F contributions. He conceded she is entitled to salary for days worked in February 2011 and to 39 days of leave. Her position remains vacant. Reexamined, Zulfiqarali told the Court the Claimant never contacted the Respondent prior to engaging her Advocates, to be paid the sums due.

10. Mwangi confirmed that the Claimant did not report on duty on 21st February 2011. He was off duty on 19th February 2011. He resumed on 21st February 2011. The following day 22nd February 2011, he was asked by Zulfiqarali to search for the Claimant at her house. He found her and her husband at their Mobile Phone Shop at Luthuli. She stated her husband had instructed her to work at the Shop. She gave Mwangi the key to the Coffee House.

11. Mwangi joined the Respondent in 1986. He testified further on cross-examination that he was employed through a letter of appointment and took annual leave of 28 days each year. The leave traveling allowance depended on the destination of the employee. Employees reported at 7.00 a.m. and left at 5.30 p.m. He was not on duty on 19th July 2011. He did not know the terms of the Claimant's employment. She told Mwangi at her Mobile Phone Shop that she did not desire to go on working for the Coffee House. It was not true that the Respondent recruited another employee Sheila, on 21st February 2011. Mwangi testified on redirection that he could not insist on asking the Claimant why she did not wish to return to work, after she had made it known to him she had been instructed by her husband to stop working.

12. The Statement filed by Nagris Jessa revealed that the Claimant and her husband Karim were necessitous and were assisted by the Ismailia Community to meet their costs of life. Her husband passed away, and the family's condition worsened. The social assistance was sustained, and a job found for her by the Community to work at the Coffee House. Around March 2011, the Community was informed she had left her job. When Jessa and other Members of the Community visited the Claimant, she informed them she left on the advice of her brother who had bought her a Phone Shop at Luthuli Avenue. There was a man living with her in the house, who she introduced as her brother. It later turned out she had remarried. She said she would not need the assistance of the Ismailia Community any more, and did not wish her children to continue in this Faith, as the family had converted to Islam. The Community stopped further assistance and asked the Claimant to vacate its Flat which she complied with in October 2011, but vacated without paying rent. The Respondent prays the Court to dismiss the Claim.

The Court Finds and Awards:-

13. There is overwhelming evidence to show the Claimant left employment after remarrying; setting up her own family Mobile Phone Shop; and converting from the Ismailia Faith of her employer to Islam. She was taken in as an employee under the banner of social welfare within the Ismailia tenets, but deserted on conversion to Islam. She left with effect from Monday 21st February 2011. The Respondent enquired about her whereabouts through its Accountant Mwangi and Director Zulfiqarali. She told them in no uncertain terms that she had reached a point of no return. The Respondent cannot be held liable for unfair termination of her contract of employment. The Claimant left on the advice of her husband. She was not

forthright with the Respondent about her decision to leave, remarry and open her own enterprise. Why would she lie that the man in her house was her brother? It was improper that she would go on to play the part of a wronged employee, while she was fully aware of her new situation. She perhaps was apprehensive about the reaction the Ismailia Community who had played a major role in making her ends meet over the years would have, if she openly announced to them she had terminated her contract of employment, converted and remarried. She nonetheless went overboard by manipulating the facts and crafting a Claim for unfair termination. The Court is satisfied her contract was not terminated by the Respondent, fairly or unfairly, and notice pay and compensation are not merited.

14. The Respondent conceded it owes her 39 days of annual leave. ***The Court grants her 39 days' salary as annual leave pay at Kshs. 27,000.*** There was no clear explanation by the Respondents' witnesses on leave traveling allowance. Zulfiqarali testified employees were paid Kshs. 3,000 as leave traveling allowance. The Claimant was never paid leave traveling allowance, and there was no explanation why this was so. Mwangi the Accountant testified that the amount of leave traveling allowance depended on the employee's destination. It still does not help the Court in understanding why the Claimant was not paid the leave traveling allowance. ***The Court grants her leave traveling allowance at Kshs. 3,000 for 6 years amounting to Kshs. 18,000.*** There is no dispute that she worked up to 19th February 2011, and was not paid for the days worked. ***The Court grants her 19 days' salary for her work in February 2011, calculated at Kshs. 13,153.*** There was no case made out for underpayment of salary. The Claimant earned Kshs. 18,000 per month. She did not show the Court any contractual or statutory provision that demanded she is paid anything more than this. She simply demanded to be paid Kshs. 30,000 and when it was not paid she assumed the claim for underpayment was now due. Employees do not act as their own wage fixing mechanisms. Wage increment must flow from the contract of employment, wage order, employer's practice or policy, or some other legal or quotidian employment instrument. The Respondent conceded it did not pay the Claimant's N.S.S.F contributions prior to 2009. It only paid these after 2009, which is a period of 2 years as of the time the Claimant left. The Claimant is entitled to service pay for the period she was not covered under the N.S.S.F, a period of 4 years. ***The Claimant is awarded a minimum of 15 days' salary for 4 years at Kshs. 41,538 in service pay.***

15. The hours of work were not made clear to the Court by the Parties. The Claimant stated she worked from 7.00 a.m. to 6.30 p.m. Monday to Friday and 7.00 a.m. to 3.00 p.m. on Saturdays. Zulfiqarali testified it was 7.00 a.m. to 5.00 p.m. Monday to Friday and was not clear on the hours worked on Saturdays. Mwangi gave the hours as 7.00 a.m. to 5.30 p.m. Monday to Friday but did not indicate the hours for Saturday. The Claimant prays for overtime of 3 hours each day. The normal working week under the Regulation of Wages [General] Order and the Regulation of Wages [Hotels and Catering Trades] Order, is 52 hours spread out over 6 days a week. The Court is prepared to find that the Claimant worked 9 hours Monday to Friday from 7.00 a.m. to 5.00 p.m. and 7 hours on Saturdays from 7.00 a.m. to 3.00 p.m. She worked 45 hours Monday to Friday and 7 hours on Saturdays, which brought her working week to 52 hours, well within the normal hours allowed under the Law. Her Claim for overtime pay is disallowed. In sum:-

- a. ***The Claimant left employment of her own volition;***
- b. ***She is granted her annual leave pay at Kshs. 27,000; leave traveling allowance at 18,000; salary for 19 days worked in February 2011 at Kshs. 13, 153; and service pay at Kshs. 41, 538- total Kshs. 99, 691;***
- c. ***The amount of Kshs. 99,691 shall be paid by the Respondent to the Claimant in full and final settlement within 30 days of the delivery of this Award;***
- d. ***No order on the costs.***

Dated and delivered at Nairobi this 7th day of February 2014

James Rika

Judge