



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 1025 OF 2012**

**BENTA A. KHAYO.....CLAIMANT**

**VS**

**MARGARET NDERITU T/A OLIVE GARDENS.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by way of Memorandum of Claim dated 14th June 2012 and filed in Court on even date is for unfair termination of employment and failure to pay terminal dues. The Respondent filed a Memorandum of Reply on 10th July 2012 and the Claimant presented her case on 13th June 2013. The Respondent elected not to call any witnesses. Both parties filed written submissions.

**The Claimant's Case**

2. According to the Memorandum of Claim, the Claimant was employed by the Respondent as a house maid effective 1st April 2010 at a salary of Kshs. 18,000. The Claimant worked for the Respondent until 3rd March 2012 when her employment was terminated on allegations of having committed a criminal offence for which she was arrested but not charged. The Claimant was not paid her terminal dues. It was the Claimant's case that the termination of her employment was unlawful.

3. The Claimant claims the following:

- a. 12 months' salary in compensation for wrongful dismissal.....Kshs. 216,000
- b. 1 month's salary in lieu of notice.....18,000
- c. Leave pay.....18,900
- d. Off days.....50,000
- e. Costs and interest
- f. Any other relief the Court may deem just to grant

**The Respondent's Case**

4. In her Memorandum of Reply, the Respondent admitted having employed the Claimant on 1st April 2010. According to the Respondent, the Claimant's employment was terminated on 3rd March 2012 on grounds of gross misconduct. It was the Respondent's case that since the Claimant was summarily dismissed she was not entitled to terminal benefits.

**Findings and Determination**

5. From the pleadings on record, there is agreement between the parties that the Claimant was an employee of the Respondent effective 1st April 2010 and at paragraph 3 of the Respondent's Memorandum of Reply, the Respondent admitted having terminated the Claimant's employment for what was referred to as '*gross misconduct, insubordination, and the general lacking in her conduct*'. (sic)

6. However, in the final submissions filed on behalf of the Respondent on 17th December 2013, it was submitted that the Respondent never dismissed the Claimant and that in fact the Claimant absconded duty. In view of this contradiction and bearing in mind that the Respondent chose not to testify, the Court adopted her pleadings and arrived at the conclusion that the Claimant was indeed dismissed on 3rd March 2012.

7. I will now deal with the question whether the Claimant's dismissal was justifiable and fair. Section 45 (2) of the Employment Act, 2007 provides that:

**(2) A termination of employment by an employer is unfair if the employer fails to prove-**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason-**

**(i) related to the employees conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer and**

**(c) That the employment was terminated in accordance with fair**

**procedure.**

8. According to the Respondent's Memorandum of Reply, the Claimant was dismissed for '*gross misconduct, insubordination and the general lacking in her conduct*.' (sic). Apart from statements recorded by some of the Claimant's former colleagues at Hardy Police Station, the Respondent did not render any evidence in support of the allegations of misconduct against the Claimant.

9. From the statements it would appear that the Claimant was accused of uttering some defamatory words against the Respondent. On her part, the Claimant denied these allegations and the police to whom the Respondent made a complaint recommended that the Respondent seeks redress through the civil justice system. There was no evidence of any further steps taken by the Respondent in this regard. Upon examination of the evidence availed to the Court, I find that the Respondent failed to establish a valid reason for terminating the Claimant's employment.

10. Section 41 of the Employment Act, 2007 establishes the procedure for handling cases of misconduct as follows:

(a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

(b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

(c) That the employer has heard and considered any explanations by the employee or their representative.

11. In the case of ***Rebecca Ann Maina and Others Vs Jomo Kenyatta University of Agriculture and Technology [2014] EKLR***, this Court held that the practical application of the provisions of Section 41 at the work place will take different formats depending on the nature of the offence and the institutional sophistication of the employer and in determining compliance with Section 41, the Court is expected to

examine each case on its own merit.

12. In my view, the nature of employment in this case did not call for a sophisticated disciplinary process but the Claimant was entitled to some form of hearing prior to termination of her employment. Apart from interrogation at Hardy Police Station, there was no evidence that the Claimant was afforded any opportunity to defend herself before her employer.

13. An interrogation by police however through or fair does not vitiate the employer's duty to hear an employee facing disciplinary action. I therefore find that in effecting the termination of the Claimant's employment, the Respondent failed to adhere to the procedure set out in Section 41 of the Employment Act, 2007.

14. Overall, I find the termination of the Claimant's employment by way of summary dismissal unfair for want of substantive justification and procedural fairness and award her 4 months' salary in compensation. I also award her 1 month's salary in lieu of notice.

15. In response to the claims for leave pay and compensation for off days worked, the Respondent submitted an unsigned document showing calculation of the Claimant's salary and allowances. From this document, Kshs. 8,193 is assigned as minimum wage and the balance as allowances for leave and off days not taken.

16. The law places the responsibility of documenting the terms and conditions of an employment relationship on the employer and as was held by Mbaru J in the case of ***Robai Musinzi Vs Safdar Mohamed Khan [2012] eKLR*** where an employer fails to discharge this mandate, it behoves the Court to interpret the terms of the employment relationship.

17. In my view, the document produced by the Respondent on calculation of the Claimant's salary and allowances without more, is of no evidential value. That said and in the absence of any leave records, I allow the Claimant's claim for leave pay. The claim for compensation for off days worked was however not proved and is dismissed.

18. In the final analysis I make an award in favour of the Claimant in the following terms:

- a) 4 months' salary in compensation for unfair termination.....Kshs. 72,000
- b) 1 month's salary in lieu of notice.....Kshs.18,000
- c) Leave pay (18,000/30x42).....Kshs.25,200

**Total.....Kshs115,200**

I further award the Claimant the costs of this case

This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF MARCH 2014**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....*Claimant*

.....*Respondent*