



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 737 OF 2013**

JOSEPHINE MOGAKA PAUL.....**CLAIMANT**

**VERSUS**

PRIDE IN HOTELS & INVESTMENTS LIMITED.....**RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed this suit on 21<sup>st</sup> May 2013 seeking the resolution of a dispute between her and the Respondent which she framed as unfair and unlawful dismissal. She claimed that she was paid remuneration below the lawful wages as recommended in the Regulation of Wages (General) Order and that she was not given any warning by the Respondent prior to termination and was in addition entitled to overtime as she worked beyond the stipulated 8 hours per day. She testified on 5<sup>th</sup> March 2014 and stated that she was employed on 2<sup>nd</sup> January 2011 and worked for 5 years with the Respondent as a Cleaner. She testified that the name of the hotel changed and that she had worked from 2008 when the name was Glory Hotels before the change to Pride Inn. She testified that she was told by the General Manager Mr. Lawrence Kinyua not to report to work on 3<sup>rd</sup> September 2012 but report to the head office. She testified that she was given a letter of commendation dated 1<sup>st</sup> October 2012. She was not given a letter of termination. She denied deserting work as stated by the Respondent's lawyer since she was given the commendation letter in October 2012 at the Rhapta Road Branch of the Respondent and at the time of receiving the commendation letter she was pursuing her terminal benefits or return to work. She thus claimed notice, leave for 2012, house allowance, compensation for unfair termination and service for 5 years as well as underpayments. She testified that she earned 7,000/- at the time of joining and at the time of leaving earned 9,000/-.
2. In cross examination the Claimant was hard pressed to demonstrate an address through which she could be reached. She testified that the letter of termination was with the Respondent as she never received it. She stated the Respondent has her cellphone number and the Respondent never gave her or her lawyer the termination letter. She testified that she was on talking terms with the General Manager who wrote her the commendation letter and she was never told she had been fired. In re-exam she testified that there was no letter of termination attached to the lawyers letter. That marked the end of the Claimant's case.
3. The Respondent denied the Claim and refuted that the Claimant was entitled to any of the sums claimed in her statement of Claim. The Respondent's Response to Claim was filed on 10<sup>th</sup> July 2013. In it, the Respondent averred that the Claimant was made aware that the remuneration paid to her was inclusive of house allowance. The Respondent denied the Claimant was verbally

informed not to report to work. The Respondent contended that the Claimant deserted work for the whole month of September forcing the Respondent to terminate the Claimant. The Respondent called Mr. Johnstone Matara Kibwaro the Administration Officer of the Respondent. He testified that he joined the company in October 2005 in the same capacity. He testified that the Claimant joined Pride Inn in 2011 as a cleaner/housekeeper at Rhapta Westlands. He stated that her salary included house allowance of 15% and any other overtime that could be worked on any day of the week. He testified that in the industry timings are not fixed as guests may delay and the Claimant was paid per hour. He testified that the Claimant never brought any claim for overtime. He testified that the Claimant deserted work and resurfaced later to claim her dues. He added that the Claimant's letter of commendation was signed by the General Manager Mr. Lawrence Kinyua at the behest of the Claimant to enable her pursue other prospects.

4. In cross exam by Mr. Nyaanga, the witness testified that the employees of the Respondent had to sign new contracts when the company changed name from Glory Hotel to Pride Inn Hotels. He admitted that the law provided that the employer has to state the name, age, permanent address of employee and the name of the employer in the contract of employment and if the employer does not get the address of the employee then that was a fault attributable to the employer. He admitted that the contract of the Claimant was not specific on house allowance as there was no provision only mention of gross salary. He stated that the Claimant did not come to work from September 30<sup>th</sup> and when the payroll was reconciled it was confirmed that the Claimant had not been at work. He testified that the letter of employment and payslip are prepared by the employer.
5. In re-examination by Miss Bukachi, the witness testified that the Claimant freely signed the contract of employment and there was no proof of coercion. He testified that the only thing that changed was the name and everything on the ground remained the same. He testified that the company paid NSSF and NHIF dues. He testified that he was not aware of any other employee who was told not to come to work. He stated that he was not in agreement that the Claimant was told not to come to work.
6. The parties closed their respective cases and filed submissions reiterating their various positions. The issues that are crystalised for determination are
  - i. Whether the Claimant was wrongfully terminated or whether she absconded duty
  - ii. Whether the Claimant was underpaid
  - iii. Whether the Claimant was paid house allowance or not
  - iv. Whether the Claimant was entitled to overtime pay
7. On the letter of her appointment exhibited, the Respondent took on the liabilities of Glory Hotels the predecessor of Pride Inn Hotels, as a result of a name change. There is no dispute that any liabilities that may fall will be borne by the Respondent.
8. The Claimant contends that she was unfairly terminated a claim resisted by the Respondent. In the evidence tendered by the Claimant, she stated that she was told not to report to work and after unsuccessfully following up on her deployment sought a letter of commendation. She stated that she was not told why she was terminated. The Respondent on the other hand testified that the Claimant was advised to collect her termination letter but she failed, neglected and/or refused to do so. It is apparent that the Claimant was terminated on or around 3<sup>rd</sup> September 2012 when she was asked not to report to work effective the following day. There is no letter of termination exhibited and as such the reason for termination if at all, is anyone's guess. The termination of an employee is provided for under Part VI of the Employment Act 2007. In order to ascertain whether a termination was proper or not enquiry has to be made as to the cause or reason for the same. The fact that the Respondent asserts that the Claimant was terminated and no reasons have been proffered, the Court is inclined to agree that the termination was unlawful. Section 35 of the Employment Act provides that if an employee who receives notice of termination is not able to understand the notice the employer shall ensure that the notice is explained orally to the employee in a language the employee understands. There is no iota of evidence that the Respondent

complied with this Section and I find that the termination was unlawful in terms of Section 47(5) of the Employment Act. The employer has not justified the grounds of termination merely stating that there is a termination letter whose contents are confidential. The evidence adduced suggests that the Claimant did not abscond from duty. If she had done so, the letter of commendation would not have been issued. If the termination was procedural she would have received the letter in October when she was given the letter of commendation.

9. The Claimant testified that she was paid Kshs. 9,000/- at the time of her termination but failed to produce evidence of the alleged underpayment. The Court cannot therefore hold that she was underpaid. As regards the third issue on whether there was house allowance paid, there is no proof adduced by the Claimant that she was not paid house allowance. He who asserts must prove and it was the duty of the Claimant to prove the sums were unpaid. No evidence was tendered regarding the non-payment to enable the Court find in her favour. Equally the fourth issue collapses as she was not able to prove that she worked overtime. She was in an industry where there are no fixed times and if there was a claim on overtime there ought to have been demands for payment for overtime made each month instead of at time of drawing pleadings. Evidence of such claims would have been letters or notes requesting for the said overtime.
10. The upshot of the foregoing is that I find the Claimant was unfairly terminated from service in terms of the Employment Act. Since no evidence was tendered regarding the payment of NSSF dues, the provisions of Section 35 apply. The Claimant is entitled to reasonable notice assessed at one month's salary as well as service. Service is the sum payable for the years worked. The Claimant worked for 4 years and her last salary was Kshs. 9,000/-. She is entitled to 15 days pay for each year worked totaling to Kshs. 18,000/-. As the termination of the Claimant's services was unlawful and not in conformity with the Employment Act I will award her compensation for 6 months totaling Kshs. 54,000/-.
11. The Claimant was substantially successful in the suit and will thus have costs of the suit.

Orders accordingly.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of April 2014**

**Nzioki wa Makau**

**JUDGE**