



**REPUBLIC OF**

**KENYA**

**THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1352 OF 2013**

**JAMES MUREITHI WANGOMBE.....CLAIMANT**

**VERSUS**

**RACHAEL KUTHI MUA (Sued as Proprietor of PIZZA PAN RESTAURANT)**

**.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed the suit herein seeking the determination of an issue he framed as wrongful and unfair termination of the Claimant’s services and failure by the Respondent to pay terminal benefits to the Claimant. He pleaded that he was hired in December 2011 by the Respondent as a Chef at the Respondent’s restaurant Pizza Pan Restaurant at a monthly salary of 20,000/- and that he served the Respondent with loyalty and diligence until October 2012 when his services were unlawfully terminated without notice. He thus sought the payment of the balance for the salary for August 2012, unpaid salary for September 2012, unpaid salary for 12 days worked in October 2012 and one months salary in lieu of notice and NSSF contribution deducted but not remitted. He also sought 12 months compensation for the wrongful dismissal. He sought interest on the sums and also costs of the suit.
2. The Respondent opposed the suit and filed the Response to the Memorandum of Claim and averred that the Claim was defective and that security for costs would be sought. The Respondent admitted employing the Claimant as a Chef at Pizza Pan Restaurant situated at Heron Court in Kitengela. She pleaded that due to harsh economic times business slumped and compounded by the charging of parking fees by the landlord forced customers away. She fell into arrears of rent and attachment ensued and in May 2012 when it became apparent there was no option but to close, met with her employees and explained that the Restaurant had to close. She averred that the Claimant suggested aggressive marketing of the restaurant but this did not bear fruit as the Restaurant was forced to close due to eviction in early October 2012. At the time the Respondent owed the Claimant 12,000/- being pay for August, salary for September 2012 and Kshs. 3,000/- for October. She wrote to the County Labour Officer Kajiado seeking to settle the sums due. She admitted owing the Claimant Kshs. 35,400/-. She averred that the Claimant was not dismissed wrongfully and thus was not entitled to compensation for the wrongful dismissal.
3. The Claimant set down the suit for hearing and at the hearing testified that he worked as a chef for the Respondent and earned Kshs. 20,000/- a month. He sought judgment against the Respondent

for the unpaid arrears and compensation as well as payment in lieu of notice. He also demanded arrears of NSSF dues. The total he sought was 60,400/- plus 12 months compensation amounting to Kshs. 240,000/-. He also sought costs, interest and any other relief the Court may deem fit and just to grant.

4. The Respondent did not appear during the hearing though her counsel was dutifully served with a hearing notice an appropriate affidavit of service lodged. The Claimant did not make any submissions and left the Court to assess the evidence and give its judgment.
5. The Claim as far as regards the salary for August, September and part of October is admitted. The Claimant seeks 8,000/- for August, 20,000/- for September and 8,000/- for October making a total of 36,000/-. The Respondent admits owing Kshs. 12,000/- for August, 20,000/- for September and 3,000/- for October making a total of Kshs. 35,000/-. The difference is a mere 1,000/- and the Claimant will thus have the sums admitted being Kshs. 35,000/- as unpaid salaries for the months of August, September and October 2012. The Claimant averred that NSSF dues were unpaid and the Respondent did not deny that she did not remit Kshs. 4,400/- being dues deducted for NSSF but which remained unremitted. The Claimant is entitled to have his NSSF dues paid. Indeed there is an obligation placed upon the employer under the National Social Security Fund Act cap 258 of the Laws of Kenya in the following terms.

10(2) Every standard contribution shall be paid in the prescribed manner to the Fund within fifteen days that after the end of the month which the last day of the contribution period to which it relates falls.

6. In this case there is noncompliance with the law. The Respondent was therefore in breach of statutory provisions by failing to remit the sums due when they fell due as per the Act. The Respondent is liable for the payments which relate to the period of employment of the Claimant. In order that the Respondent remits all the statutory dues deducted from the pay of the Claimant within 7 days of today failing which the Respondent will pay a fine of Kshs. 100,000/- for failure to remit statutory dues.
7. The Claimant sought compensation for his unlawful termination. The pleadings suggest that there was a redundancy arising from harsh economic downturn and factors which led to the closure of the Respondent's business. The Employment Act provides that where a redundancy such as the one here is declared, the provisions of Section 40(1)(b) must be adhered to.

40.(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy:

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer ;

8. There is no letter to the Labour Officer indicating that there was to be a redundancy. There are letters admitting indebtedness post *facto*. The Respondent thus terminated the employment unfairly in terms of the law. In the premises adequate notice ought to have been given. 1 month salary in lieu of notice is thus payable. The Claimant is entitled to 2 months salary as compensation.
9. The upshot of the foregoing is that the Claimant is entitled to:-
  - a. Kshs. 35,000/- as unpaid salary;
  - b. An order directing the Respondent to remit NSSF dues amounting to 4,400/- within 7 days;

- c. One month salary in lieu of notice – Kshs. 20,000/-
- d. 2 months compensation Kshs. 40,000/-
- e. costs of the suit

10. The payments to the Claimant to be subjected to the statutory deductions where applicable.

Orders accordingly.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of May 2014**

**Nzioki wa Makau**

**JUDGE**