



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

**AT NAIROBI**

**CAUSE NO. 1446 OF 2013**

**NICHOLAS MUTINDA MUTUA.....CLAIMANT**

**VERSUS**

**L.K. MUCHEKE T/A**

**MARU'S QUALITY CAFE.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for his unfair termination of employment. It was averred that he was employed on 28<sup>th</sup> July 2008 as a waiter. He averred that he was terminated on 8<sup>th</sup> April 2013 without any notice or notice to show cause. He thus claimed one month's salary in lieu of notice - Ksh. 9,400, leave balance for 2 years 9 months – Ksh. 18,800/=, salary under payment 2,900x57 months – Ksh.165,300/=, house allowance of Ksh.80,370/= being 15% of the basic pay 1,410x57 months, service gratuity for 4 years Ksh. 10,810/=, overtime of Ksh.299,520/=. Compensation for wrongful dismissal 10,810x12 – Ksh. 129,720/= as well as certificate of service and costs of the suit.
2. The Respondent defended the claim and filed a Response of Claim and counter claim. The Respondent averred that the Claimant earned Ksh. 9,380 a month and that he owed Ksh, 4,000/= which was float money which he did not refund. The Respondent urged that the suit be dismissed with costs as the Claimant was dismissed for just cause for being drunk and fighting a customer.
3. The Claimant testified on 18<sup>th</sup> February 2014. He stated that he earned Ksh.6,500/= per month and was not paid house allowance. He stated that he had only gone for annual leave once. He claimed that the dismissal came about as a result of a delayed order due to rain on 8<sup>th</sup> April 2013 which was on a Monday. He was not given a notice before termination and he was not even given a letter to show cause.

He sought leave pay for 2½ years. He testified that he received Ksh.6,500/= a month and not 9,300/= a month. He admitted taking advance at times. He claimed house allowance and overtime pay. He also sought service as he did not have NSSF deductions. He worked 4 hours extra daily. He thus claimed the compensation for wrongful dismissal and certificate of service.

4. In cross exam the Claimant reiterated that he worked as a waiter for the Respondent though he did not have formal training as a waiter. He admitted receiving 50/= daily for lunch and Ksh. 60/= each evening. The allowance was for fare and he sought Ksh. 9,400/= a month in lieu of. He

however denied earning 9,400/= a month. He conceded he sought Ksh.9,400/= as notice pay in his claim and that he worked from 9.00 a.m. to 9.30 p.m. for 6 days a week with no lunch. He sought 4 hours overtime for 5 days. He went on leave once and sought leave pay for the balance of his leave, due for 2 years and 9 months. He denied being inebriated. He admitted an amount of 4,000/= was due to the Respondent from him. He admitted he declined to accept the payment he was given by the Respondent as final dues. He stated he was employed on and off as a waiter. He refused to accept payment since underpayment, house allowance and overtime were not included.

5. In re-exam he stated the document he was given to sign had 27,000/= less 4000/= owed. The amount of 9,400 he sought was because there is an underpayment. That marked the end of the Claimant's case.
6. The Respondent called 3 witnesses – Mr. Martin Mwenda Mugambi, the proprietor Lawrence Kamau Muceke and James Wambu a cashier at the Respondent.

Mr. Mugambi a security officer at the Diamond Plaza Complex where the Respondent's restaurant is situated testified that he was called often to deal with the Claimant when the Claimant had altercations with customers due to drunkenness and gave details of the incident of 8<sup>th</sup> April 2013. He stated that the Claimant was handed over to police but was not charged. He testified the Respondent's proprietor gave the Claimant a chance to resume on previous occasion when there had been similar incidents of altercation. He testified that the Claimant works for another restaurant at the food court at Diamond Plaza and on occasion is found drunk and disorderly.

7. In cross exam he testified that he did not have a report on the alcohol levels of the Claimant nor was there any evidence availed of the drunkenness of the Claimant. He also did not have the evidence of the reports made to the police. He was however adamant the Claimant had been drunk on many occasions in the premises and that he had received many a complaint from customers. He reported the incident of drunkenness and affray to the police and the Claimant was arrested but not charged.
8. In re-exam he confirmed he had been called on 8<sup>th</sup> April 2013 when the Claimant had an altercation with a client and he found the Claimant staggering and drunk. The Respondent then called the proprietor Mr. Muceke who testified that he employed the Claimant and paid him Ksh.9,360/= a month at the time of termination. He started off at Ksh.5,000/= which was increased to Ksh.6,500/= plus a daily allowance of Ksh. 110/=. He testified that the Claimant was drunk on occasion but he gave the Claimant a chance to continue working. He stated that he dismissed the Claimant in April 2013 as the Claimant wanted to beat a customer. He was summarily dismissed on 10<sup>th</sup> April 2013 by the proprietor. He gave the Claimant the dismissal letter but the Claimant declined to receive it.
9. In-cross-exam Mr. Muceke confirmed he employed the Claimant on 28<sup>th</sup> July 2008 but did not give him a letter of employment. He stated the salary was inclusive of house allowance through he had no document to that effect. He admitted that he did not give the Claimant a notice to show cause. He admitted he did not have a document showing hours of work but stated that the restaurant was open from 10.00 a.m. to 10.00 p.m. He testified the minimum wage per the General Wages Order was 8,000/ a month and that he paid above that.

He reprimanded the Claimant severally on drunkenness though he admitted he had no letter from a doctor certifying the Claimant was drunk. He agreed the Claimant is entitled to certificate of service though none was forwarded to the Claimant or his lawyer. He testified that the Claimant was entitled to pay for 2 years leave not taken.

10. In cross exam he stated that he paid over the statutory minimum and the salary paid to Claimant was inclusive of house allowance. The Claimant came to work drunk but the Respondent was keen to give another chance and even after the incident had offered to give him a chance to return. The Respondent then called Mr. Wambu the cashier who confirmed that the daily allowance paid

was part of the monthly dues. He also testified that the Claimant was holding some 4,000 and the said funds were a debt to the Respondent. He testified on the incident of 8<sup>th</sup> April 2013 when the Claimant had a tiff with a customer while the Claimant was drunk.

11. In cross exam he testified that he joined the Respondent in 2011 and found the Claimant already in employ. He too did not receive a letter of appointment. He paid Ksh.50/= for lunch and 60/= for employees who worked in the evening. He testified if an employee worked from morning to evening he received 110/=. The Claimant never reported before 10.00 a.m. The witness testified that he received complaints from customers but he did not accompany the Claimant when he went to see the second defence witness Mr. Muceke the proprietor. He reiterated the sum of 110/= was part of the salary.

12. Parties filed submissions basically reiterating the positions taken and from the pleadings, evidence adduced and submissions of parties 3 issues lend themselves for determination.

- i. Was the Claimant's termination wrongful or unfair?
- ii. Was the Claimant accorded a fair hearing?
- iii. Is the Claimant entitled to the dues in his claim?

Regarding the certificate of service, the Employment Act section 51 is amply clear. The Respondent admits readily the Claimant is entitled to receive the document which must of necessity be issued in strict compliance with section 51 forthwith.

13. The Claimant was accused of being inebriated at work causing drama and altercation with customers. The witnesses for the Defence were consistent on this. The Claimant on his part denied any wrong doing. Section(4)(b) of the Employment Act provides that becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly attracts summary dismissal. Section 45(1) of the Employment Act gives cover of an employer who terminates for just cause. Where summary dismissal is called for there is no time to call for evidence, show cause or other disciplinary processes contemplated for ordinary dismissal. In the premises I find that the dismissal of the Claimant was not contrary to section 45. The first issue is resolved in the negative.

14. Regarding the fair hearing, the Respondent called the Claimant to his office on 10<sup>th</sup> April 2013, the Claimant and Mr. Muceke had a meeting but the outcome was summary dismissal. The provisions of section 45 cover the employer and in my view the fact that no formal disciplinary hearing was held were not detract from the soundness of the decision to terminate. The second issue is also determined in the negative.

15. On the issue of dues to the Claimant, the Claimant claimed notice, leave pay, underpayment, overtime, compensation and costs of the suit. The Respondent conceded that the Claimant was entitled to leave pay for 2½ years. The Claimant claimed 2 years 9 months. In the termination the Respondent was not required to give notice as it was summary in nature. The notice is not due to the Claimant. However, he is entitled to the leave pay for 2 years 9 months. The 2 years leave amounts to 2 month's salary which is  $9,400 \times 2 = \text{Ksh. } 18,800/=$ . The Claimant's leave pay prorate for 9 months is Ksh. 6,714/= and therefore the total payable for leave not taken is Ksh. 25,514/=.

The Claimant is also entitled to service pay as he was not an employee of any scheme or under NSSF. He completed 4 years of service from 2008 to 2012 and was on his 5<sup>th</sup> year of service. He is only entitled to 4 years and this works out to Ksh. 18,800/=. The Claimant was paid Ksh. 9,360/= a month which was above statutory minimum for a waiter in Nairobi inclusive of house allowance. The evidence adduced however showed that the sum that was paid fluctuated between 9,360 and lower sums since the 9,360/= was inclusive of the allowance given daily at rate of 50/= plus 60/=. In the premise the basic house allowance was 6,500/= which was below the monthly rate under the General Wages Order applicable to the Claimant's trade. I thus would find that house allowance was paid but there was underpayment of Ksh.2,224/= which for 64 months works out as 142,336/=. The Claimant

is entitled to recover the underpayment of Ksh. 142,336/=. He is not entitled to overtime as no proof was availed of the same. The Court will also grant costs on the lower scale to the Claimant.

16.The Respondent filed a Response and counter claim but did not properly plead it. In spite of that the Claimant conceded he owed Ksh. 4,000/= to the Respondent which sum must be refunded to the Respondent. It shall be deducted from the sums awarded which shall be subject to statutory deduction where applicable.

17.As the Claimant has a notable problem with alcohol he is encouraged to seek professional help to overcome the challenge he faces as it will hinder or otherwise impair the Claimant's ability to hold any employment.

Orders accordingly

**Dated and Delivered at Nairobi this 6<sup>th</sup> day of May 2014.**

**Nzioki wa Makau**

**JUDGE**