



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 155 OF 2012

RACHEL OWANO ANAKOLI.....CLAIMANT

VERSUS

SANTA FE LOUNGE & GRILL.....1ST RESPONDENT

MANAGING DIRECTOR MR. ERNEST MBURU.....2ND RESPONDENT

JUDGMENT

Rachel Owano Anakoli the Claimant herein alleges unfair termination of her employment by the Respondent Santa Fe Lounge & Grill and its Managing Director Mr. Ernest Mburu. She prays for the following orders in her Memorandum of Claim dated 31st January and filed on 3rd February 2012:

- i. The sum of Kshs.120,335.00 as particularized in paragraph 7 of the claim.
- ii. Compensation for defamation/character assassination amounting to Kshs.500,000.00.
- iii. Cost of this suit
- iv. Interest in (i) and (ii) above
- v. Any other relief as the court may deem just.

The Respondents filed a Memorandum of Reply dated 3rd August and filed in court on 21st August 2012.

The case was heard on 10th June 2013 and 17th July 2014 when the claimant's evidence and the Respondents evidence were taken respectively.

The Claimant appeared in person and called one witness Mary Namatsi Matekwa while the 2nd Respondent testified on behalf of the Respondents. The Respondents were represented by Mr. Osoro instructed by D.B. Osoro & Company Advocates. Thereafter the parties filed written submissions.

The Claimant testified that she was employed by the Respondents on 8th August 2011 to work as a waiter. The hotel was at the basement of The Mall, in Westlands Nairobi. Her engagement was verbal. The agreed salary was Kshs.8,000/= per month. On 3rd November 2011 she was accused of stealing from the counter. She reported to the police station that she had been framed with theft and was advised by the

police station to go back and agree with her employer but they did not agree. She resumed duties and worked until 21st December 2011 when her employment was terminated unfairly. She was not paid salary for days worked in November and December 2011. She worked in the night shift in August and September 2011 from 5 pm to 6 am the following day from Monday to Sunday. She worked day shift in October, November and December 2011 from 7 am to 6 pm everyday including Sunday.

The termination of her employment was communicated to her by the manager who was sent by the 2nd Respondent.

The Claimant denied that she was a stranger as alleged in the Memorandum of Reply. She stated that employees signed a register upon reporting to work and again at the time of leaving work. She stated that there was another register with names of employees. She was not issued a work identification. She was engaged by the 2nd Respondent. At the time of employment the manager was called Elizabeth. At the time of leaving a manager by the name Stephen is the one who was sent to tell her that she had been terminated.

She explained that during the day shift there were 2 waiters and the supervisor who also worked as a waiter. During the night shift there were 5 waiters and the supervisor.

The Claimant prayed for payment of salary for November and December 2011, notice of 1 month, overtime for extra work done on Monday to Sunday, days off and certificate of service. She also requested that the Respondent produces the records of employees.

Claimants witness (CW2) Mary Namatsi Matekwa testified that she owns a stall at Westlands market and used to take tea at 10.00 am and lunch at about 2 pm everyday at Santa Fe Hotel while the Claimant was working there. She did not know when the claimant started working there but discovered in February 2012 that the Claimant was no longer working at the hotel. She knew the Claimant and the other waiters who worked with her.

For the Respondents the 2nd Respondent testified that he is a businessman and a director of the 1st Respondent. He was not familiar with the Claimant as he only dealt with the manager, head chef and bar man. He was not directly involved in the day-to-day running of the business. He stated that the 1st Respondent is a bar and restaurant. It operates between 7 am and midnight and operates 2 shifts. The 1st shift is from 7 am to 5.30 pm while the 2nd shift runs from 5.30 pm to 11.30 pm. The restaurant gets busy when they have functions and on Wednesday, Fridays and Saturdays. The manager is the only one who engages staff to work during the busy periods. He was not aware whether it was the same people or different people who were engaged during the busy periods. He was not aware if his manager recruited the Claimant. He owns 3 businesses and only knew employees hired with documents. There were no waiters who were permanent. He testified that in 2011 the waiters were being paid Kshs.8,900 per month. He stated that most waiters left when they got better jobs. Whenever employees worked overtime the manager paid overtime and arranged for transport. There were no employees who worked the whole week. They were given one day off every week.

The 2nd Respondent testified that he was not aware that money was stolen or that the Claimant was accused of the theft. He was also not aware that the matter was reported to Parklands Police Station. The 2nd Respondent admitted that there was a register signed by employees when reporting and leaving work.

In the written submissions the Claimant repeated the averments in the Memorandum of Claim and her testimony.

In the submissions filed on behalf of the Respondents it is submitted that the Claimant did not present any proof that she is entitled to the reliefs sought, that there was no contract or job identification, that in the absence of no evidence the Respondents were unable to verify her claim, that the claim by the Claimant that she knew other employees is not sufficient proof of her working relationship. The Respondents submitted that the testimony of the Claimant's witness (CW2) cannot be trusted as she failed to testify on

the nature of the contract and terms of the Claimants employment. The Respondents prayed that the claim be dismissed with costs.

I have considered the pleadings, evidence adduced in court and the submissions. The issues for determination are:

1. Whether the Claimant was employed by the Respondents
2. Whether the Claimant's employment was unfairly terminated
3. Whether the claimant is entitled to the reliefs sought.

1. Whether the Claimant was employed by the Respondents

The Claimant alleges that she was employed by the Respondents as a waiter but was not issued with a letter of appointment or an employment identification. She explained in detail the people she worked with, the shift hours and the manner in which they were paid.

The Claimant's witness CW2 testified that she used to eat at the hotel where the Claimant worked and knew her as a waiter.

The 2nd Respondent stated that he did not run the hotel on a day to day basis and was not familiar with waiters as the waiters were recruited by the manager. He further testified that none of the waiters worked on a permanent basis, that they were paid a salary of Kshs.8,900 per month and that the employees signed when reporting for work and when leaving work. He however did not produce the employment register as requested by the Claimant. He agreed with the Claimant on hours of work and shifts, on the signing in and out of work by employees and on the fact that waiters were employed verbally and not issued with work identification. He did not deny that the people named by the Claimant as fellow workmates were employees of the 1st Respondent.

Section 10(6) of the Employment Act requires employers to keep records of employees and subsection 10(7) provides that where an employer fails to produce such records the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

The contention by the Respondents in their submissions that the Claimant did not produce any records and has not proved her case is therefore misplaced as the burden of proof is indeed the Respondents'.

I find that the Respondents have not discharged their burden of proving that the Claimant was not employed by the 1st Respondent. Having admitted that there was a record for signing in and out of work which would have verified or disproved all the allegations of the Claimant, I hold that the Claimant was an employee of the Respondents.

2. Whether the Claimant's employment was unfairly terminated

The Respondents having failed to submit any evidence disproving the Claimant's allegations on how her employment was terminated, the Claimant's testimony and allegations in the memorandum of claim remain unchallenged.

I find that the Claimant was terminated verbally, without being informed of the reasons for termination and without notice, and that the termination of her employment was therefore unfair.

3. Whether the claimant is entitled to the reliefs sought.

The Claimant prayed for the following reliefs:

1. Notice

The Claimant worked from 8th August to 21st December 2011. Having worked for more than 1 month continuously, she is entitled to one month's salary in lieu of notice as provided in Section 37(1) and (3) of the Employment Act.

I therefore award the Claimant Kshs.8,900/= being the amount admitted by the 2nd Respondent as the salary paid to waiters of the 1st Respondent.

2. Arrears of salary for November and December 2011.

The 2nd Respondent did not contest that the Claimant was not paid salary for November and up to 21st December 2011. Infact he had no clue as to whether or not the claimant was paid.

I find that the Claimant's contention is uncontested and award her Kshs.8,900 for November and Kshs.8,900 for December 2011 salary as prayed.

3. Annual leave

Having worked for 4 months the claimant is entitled to annual leave for the period worked as provided in Section 28(1) and 37(3) of the Employment Act. I award her Kshs. 2,077/= being 7 days leave for 4 months at the rate of 1.75 days per month.

4. Off duties

The Respondents failed to produce records to disprove the claimant's contention that she worked without a day off every week. Having worked from 8th August to 21st December 2011, she worked for 19 weeks and is entitled to payment at the rate of Kshs. 297 per day. According to the law days worked on rest days are paid for at double the normal daily rate. I award her Kshs. 11,273.30/=.

5. House allowance

The statutory minimum wage for a waiter in 2011 was Kshs.8,193. The Regulation of Wages (General) Order pegs house allowance at 15% of the statutory minimum wage. This means that the Claimant's salary of Kshs.8,000/= was not inclusive of house allowance.

I therefore award her house allowance for the period worked form 8th August to 21st December 2011 of 4 months and 14 days which amounts to Kshs.,5,530.30/=.

6. Overtime

The 2nd Respondent admitted that the day shift worked from 7 am to 5.30 pm while night shift was from 5.30 pm to 11.30 pm. This means that during the day shift employees worked for 10.5 hours for 6 days making 63 hours a week thus working 11 hours a week above the maximum of 52 weeks excluding work done on Sundays. For the 19 weeks worked she is entitled to 11 x 19 x 1.5 hours as over time. At the statutory rate of Kshs.73.85 per hour, I award her Kshs.23,152/=.

7. Compensation for Defamation in the sum of Kshs.500,000.00

The Claimant did not adduce any evidence in support of her claim for defamation. I therefore dismiss the claim on the grounds that it has not been proved.

Orders accordingly.

Read in open Court this 13th day of November, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Claimant Rachel Owano present in person

Njoroge holding brief for Mr. Osoro for the Respondents