



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 71 of 2013

MERCY KANINI LILIANCLAIMANT

V

RESTAURANT

MR. ALI ISHMAEL MWANGIT/A TUPELO

.....RESPONDENT

AFRICAN & CONTINENTAL DISHES

JUDGEMENT

This is the claim dated 22nd January 2013 by the claimant Mercy Kanini Lillian for unfair termination and failure to pay terminal dues as Cashier of the Respondent Mr. Ali Ishmael Mwangi trading as Tupelo Restaurant African & Continental Dishes. A defence was filed dated 20th February 2013 denying all the allegations in the claim in their entirety save that they had taken the claimant as a trainee cashier for six (6) months and was supposed to be on probation and hence the claim for underpayments is denied.

The Claimant stated that on 12th December 2011 she was employed by the respondents as a Cashier at Topelo Restaurant & Continental Dishes a catering establishment. Her salary was agreed at Kshs.15,000.00 a month but no housing was provided or the allowance due which according to her was 15% of her salary. That her salary was an underpayment under the applicable law. That her working hours were 64 hours a week as against 54 hours and claims an overtime of 10 hours a week for the duration of her employment. That on various public holidays she was at work but was never paid the legal pay for this purpose and claims the same.

That her services were terminated unfairly on 21st October 2012 when she became sick after she was accidentally knocked down by her supervisor which caused her teeth to undergo a root canal to correct and the treatment of which she had to pay Kshs.9,000.00. That arising from this accident, she experienced constant pain and headaches which prompted her to seek permission to attend to medical care and when away for treatment she was terminated without notice or being given reasons or being paid for it.

The claimants claim is therefore for;

1. One month salary in lieu of notice at Kshs 22,264.57
2. Balance of October 2012 salary at kshs.7, 664.57
3. Leave prorated for 11 months at kshs.16, 484.35
4. Underpayment of wages at Kshs.24, 751.35
5. Money for treatment (root canal) at kshs.9, 000.00
6. 800 hours weekday overtime at Kshs.66, 189.75
7. 270 hours worked for public holidays at kshs.22, 339.00

In evidence the claimant she was employed by the respondent who is situated along Argwings Kodhek road in Nairobi on the 12th December 2011 as a Cashier after undergoing an interview. She was however not issued with a letter of appointment or a contract of service. Her working time was from 6 am to 9 pm when the respondent restaurant opened and closed respectively. That she would work for 4 days in a week all being 16 hours for the 16 months that she was with the respondent. That her salary was kshs.15, 000.00 which was increased in May 2012 after completing her probation. That she was never paid any house allowance for the entire duration of her employment.

That her salary of Kshs.15, 000.00 that was paid until April 2012 when it was increased was an underpayment as it was supposed to have been at kshs.17, 118.00 per month and house allowance at kshs.2, 567.70 all amounting to kshs.19, 685.70 the same based on Legal Notice No. 64 of 1st May 2011 and was therefore being underpaid by Kshs.4, 685.70 for the 5 months she was earning Kshs. 15,000.00 only. That the total due from this underpayment was therefore Kshs.23, 428.50. That for the period she was earning Kshs.22, 000.00 per month, she was underpaid by Kshs. 264.57 for the 5 months she worked until her termination on 21st October 2012. The total due in this regard amounted to kshs.1, 322.85.

Claimant further gave evidence that under her terms of work she was serving for 64 hours instead of 54 against the Wages Regulations of Hotel and Catering Industry Order and she was not paid any overtime due. That in a week she would work for one day and rest on the following day but cumulatively her hours starting from 6 am to 9 pm were 16 all adding up to 64 hours a week. She therefore claims a double rate for these hours all amounting to 400 hours payable at Kshs.66, 189.75. That equally she was made to work on public holidays yet she was never compensated for it and for the 15 hours she worked on public holiday which she listed as 9 days being;

1. 12th December 2011 being Jamuhuri Day;
2. 25th December 2011 being Christmas Day;
3. 1st January 2012 being New years Day;
4. 1st May 2012 being Labour Day;
5. Eid al-Fitr;[\[1\]](#)
6. Easter Monday;[\[2\]](#)
7. Good Friday;[\[3\]](#)
8. 1st June 2012 being Madaraka day; and
9. 26/12/11 being Boxing Day – that she was not to be on duty on this day but her colleague had a problem and claimant agreed to seat in for her.

That for work during public holidays she claims 22,339.00 at double rate her daily wage.

That on 21st October 2012 due to sickness arising out of being knocked by her supervisor and injuring her tooth she developed headache that required medical attention and a root canal that she needed time out for which permission was granted. That her manager indicated that they needed a replacement for the

before the claimant could be given time off and was only released at 9 pm when she called a family member who took her to Mater Hospital where she was treated and went home. That she sent her mother to report her being unwell which she did and took her prescription and receipts amounting to Kshs.9,000.00 to the respondent. That the Mother was advised by the respondent that once the claimant got well, she was to report back to work and retained the hospital bills.

That after 4 days the claimant went back to work after the manager sent her a message to return the respondent uniform. She thought she had been terminated. The Respondent Director Mr. Ali Mwangi told her that her services were no longer needed at the respondent restaurant. The claimant stated that she protested as she had only been away for being unwell and could not understand why she had been terminated without notice. She however returned the uniform and decided to seek justice.

For October she was only paid for days worked and seek to be paid the balance of that month.

She also claimed her pro-rata leave for the 11 months she worked for respondent. That she was owed 19.25 days of leave.

That she was not given notice or payment in lieu of notice, she was underpaid, her root canal treatment was not paid for, her overtime was not paid and her 9 public holidays worked were never compensated. She computed all her demands as amounting to Kshs. 168,643.59. she also claimed costs of the suit and interest on her dues.

In cross-examination the claimant confirmed that she did not desert her place of work as she was away with permission to seek treatment for her aching tooth which had been knocked accidentally while at her work place under circumstance that the respondent was aware of. That when the accident occurred, the pain persisted and despite it being treated in June, the pain recurred in October necessitating that she seek medical attention. She paid bills for the treatment.

The claimant also called a witness Ms. Lillian Kingangi her mother, who stated that she was aware of the unfair circumstances of her daughter's termination by the resident. That initially the claimant was on probation and used to work for long hours and would be home way past midnight, working on Sundays and public holidays. That she even worked on Christmas Day. That while at work she got unwell and sought treatment for her teeth which was fixed. A friend to the family picked her and took her to Mater Hospital and the following day the witness took the treatment cards and bills to Mr. Ali Ishmael Mwangi and indicated that the claimant was unwell. That indeed Mr. Ali Ishmael Mwangi told the witness that once the claimant got well she was to go back to work. That she was surprised later to hear that the respondent did not want to employ a sickly person and her daughter was therefore terminated.

The witness further stated that the Claimant would report to work at 6 am and would leave past midnight and after her probation period she would work until 10pm. That when she got sick, the witness took the report to the respondent and restated her daughter's medical problem.

On the other hand the Respondent stated in defence that indeed the Claimant was their employee but had been taken in as a trainee Cashier about 2012 and that it was expressly agreed that she would be on probation for six months and thus the issue of underpayments and house allowances are not correct. That each Cashier of the respondent would work for a shift of 7 hours from 8 a.m. to 3 p.m. or from 3 p.m. to 10 p.m. for 6 days a week thereby making 42 hours per week and thus the claim for overtime is unfounded. That the respondent does not operate on public holidays at all.

That the claimant was not unfairly terminated on 21st October 2012 and that she worked until November 2012 when she absconded upon receipt of her salary and after the respondent found out there were several shortfalls into eh daily collections during the her shift and that the respondents was to reconcile the accounts and plead the shortfalls.

In evidence the respondents called Ms Sarah Mbugua the manager who supervised the Claimant. That the claimant was negligent and failed to come to work and did not follow protocol by talking to her colleagues who kept on covering for her and in the process the respondent lost lots of money and they had to get a new cashier to cover for her. That as some point the Director and the witness would take over the cashier duties in the absence of the claimant. That she did not report her sickness and instead told her colleagues instead of following the laid down procedure.

That the respondent does not open on public holidays and being next to Nairobi Hospital, most of their customers come from the areas around and do not work on public holidays. Opinion hours are 8 a.m. to 9 p.m. for about 14 hours a days and the staff has flexible hours for 4 days in a week with rest in between the week for 3 days and hence only work for 43 hours a week. Therefore the claimant could not have worked for 64 hours at all. That being the manager, she knew that the claimant was the best earning cashier of the respondent and was not entitled to overtime.

The witness also confirmed to the Court that as the person responsible for human resource she was responsible for giving staff directions and they reported to her as their supervisor. That she would ensure that receipts are issued and stocks taken carefully and would give her reports to the directors of the respondent at the end of the day. That she has a contract and the claimant had a contract but did not issue a copy of the contract to the claimant. That the staff report and record time in at the security gate and this record is kept at the gate. As the manger she kept a book where she recorded the staff on duty and the time of reporting.

Both parties filed their written submissions that were confirmed as part of the Court record. In note in submissions the Respondent has admitted to the claim of underpayment in the sum of Kshs. 24,751.35 and will confirm the same as due for payment to the claimant.

Assessment of the case

Under Section 74 of the Employment Act (the Act), it was the duty of the employer/Respondents to keep and maintain the employment records and failure to do so and produce the same to the court and, requiring the claimant to produce such documents amount to shifting the burden of proof from the employer to the employee; unfairly so; and The respondents did not produce any documents to show that the claimant's prayers were unfounded.

The Respondent Witness Sarah Karanja stated that there was a contract between the respondent and the claimant but that this was not issued to her or produced in Court. This is quite absurd as under Section 10 of the Act gives details of what should go into a contract. Part of these details includes;

- Employee personal particulars
- Employer particulars
- Job description
- The date of commencement
- Place of work
- The date on which the employee's period of continuous employment begun
- Entitlements, these to include annual leave, public holidays and the pay due, any pension scheme.
- Length of notice for termination

Just to mention a few details required in this document. Once this legal requirement is met, at Section 10 (6);

The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

Therefore, failure to produce these records to the Court is indicative that the respondent was not desirous of the Court been made aware of the agreed terms as between the parties and this operates to their detriment. It is however regretted that this continues to happen to many employee that their employers even where there is a contract keep the details from them under the belief that this will employer them. The unfortunate part is that this is against the law and when there is a dispute; failure to produce this record will work to the advantage of the claimant.

These provisions of Section 10 are further buttressed by section 79 of the Act as follows;

An employer shall keep a register in which the employer shall enter the full name, age, sex, occupation, date of employment, nationality and educational level of each of his employees and a return of employees for each calendar year, ending on 31st December containing such information shall be sent to the Director not later than 31st January of the following year.

This is the law. Did the Respondent comply?

There is no evidence to indicate compliance with these statutory provisions regarding the employment of the Claimant by the respondent.

The claim before this Court relate to the unfair termination of the Claimant by the respondents and failure to pay her terminal dues. In a case of unfair termination the issue for determination e is whether the termination of employment of the claimant by the respondent was unjust and unfair. To determine this issue, the court is guided by the provisions of section 45 of the Employment Act, 2007. Subsection 45 (2) of the Act provides that 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 employee's conduct capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(iii) That the employment was terminated in accordance with fair procedure.

The court will first consider the matter of validity of the reasons for termination in this case. The evidence of the claimant is reproduced as above. That she became unwell and had to be away and when her mother went to report that she was unable to be at work due to her being unwell, the claimant was called later and told to return her work uniforms. That the respondent was not ready to have a sickly person work for them. On the other hand the respondent in defence said that the claimant absconded from work. The Court was not given any written notification as to the circumstances of the termination of the claimant. If indeed she absconded from duty, it was the responsibility of the respondents to put this in writing before terminating her for absconding or for any other reason. If her accountings have failed to reconcile, the respondent could have taken action or lodge a counter-claim. I find the evidence of the claimant truthful in that she was terminated without any reasonable cause. There were no valid reasons for her termination; otherwise it should have been documented.

The second consideration on the validity of the reasons advanced by the respondent against the claimant is the nature of the grounds raised by the claimant in her replies. She had an accident at her work place and was taken ill where she required root canal due to injury to her teeth. This was not disputed in any material way by the respondent. The fact that she asked for permission to attend to her medical needs was not disputed. The evidence from Sarah Karanja that the claimant did not follow protocol in addressing her need is neither here or there. As the person responsible in supervising her staff, she did not produce the protocols that the claimant was required to follow if indeed they existed. Any employer, who does not share any work place policy with their staff, creates a gap in management as failure to inform staff of such a policy, administration procedure or any other work place practice leads to disorganisation and for staff to do as they wish. The staff kept in the dark as regards employer policy cannot be accused of not following protocol. They simply do not have anything to go by. They are left to their own judgment.

Such work place policies create a conducive environment where staff feels comfortable to work in. in the event of dispute there is a point of reference. Not based on individual whims. That is why many employers adopt work place policies to facilitate more productivity.

Equally employees have a responsibility to their employer. Where there is a work place policy they must be committed to its implementation in good faith. Employers are entitled to determine and prescribe such policies and programmes. In performance of their respective duties, employees are entitled to raise valid complaints or grievances in relation to the employer's operational policies and programmes and not frustrate this process as this is meant to ensure the smooth running of their employment. Employees are also entitled to raise grievances about their work place welfare but in a manner that is reasonable in every circumstance. Grievances or complaints may relate to fellow staff, clients or the employer. Where operational policies, manuals or systems expose the employee to risks, it is sufficient that the employee raises the deficiencies or reports them and, in particular circumstances, takes such decisions that shall be reasonable in view of the deficiencies. Where the claimant knew that the manager Ms Sarah Karanja was her supervisor, she ought to have reported all her complaints to her and similarly if in need to go for a medical check up, seek the permission of her supervisor before going to the Director. Employers expect employees to remain committed and take decisions of omission and actions towards satisfactory performance of the contract of employment.

In this case, the claimant was not afforded any policy to address her grievances. Her termination was without notice and not reasons were written down for her to be able to address. This was against the provisions outlined in Section 41 of the Act and Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably

be unfair and therefore unjust.

The Court therefore finds the termination of the Claimant was unfair in the circumstances of this case.

On the claim that notice for termination was not issued, based on the analysis above and noting that the claimant was simply told that her services were not required anymore, there was no notice and based on Section 35 of the Act, 28 days notification is required, the court will therefore grant one month pay in lieu of notice amounting to Kshs. 22, 264.00

The claim for balance pay for October 2012 has no legal basis as the termination and last day of work was on 21st October 2012 and this is what was due to the claimant. No balance is therefore due in this regard. Court will decline this prayer.

For every year worked an employee is entitled to 21 days leave but in the event that they have not done a full years under Section 28 (1) (b) leave due is computed as;

where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively. [Emphasis added].

Therefore for the 11 months the claimant served at the respondents, she was entitled to 19.25 days all amounting to Kshs. 16,484.00

On the claim for money for treatment, I find that the duty rests on an employer to provide sick leave of not less than seven days with full pay upon attendance to a medical practitioner and the employee shall notify or cause to be notified as soon as is reasonably practicable her employer of any absence and the reasons for it. That is why there are allowable deduction for medical schemes and aid under a government structure or a private scheme that ensure employees are attended to for their medical needs. I find the expense of kshs.9, 000.00 reasonable and will award the same to the claimant.

The overtime hours claimed are computed on the basis that the claimant worked from 6 a.m. to 10. P.m. without a contract to indicate the stipulated work hours, it is highly probable that the claimant worked overtime and was not paid for it. The respondent in their pleadings indicated that cashiers worked in two shifts of 7 hours but the witness stated that there were only 52 hours a week. The claimant also admitted that she would sometimes serve on exchange with her colleagues and this could have increased her hours tremendously. I will grant the hours claimed save that I will reduce them by half and give 400 hours amounting to Kshs. 34,000.00

The public holidays will also be granted as claimed in the absence of a contract indicating the contrary. I take the evidence of the claimant as credible. The sum of Kshs.22, 339.00 is granted to the claimant.

I take it no notice to sue was issued as the notice sent to the respondent from M/S A.O. Jacob Kenya Labour Consultant dated 8th November 2012 is not from the claimant, her legal representative or her union representative as she was not unionized. I have stated in various other decisions before and I reiterate the same here that labour consultants are not legal representatives for litigants before the Industrial Court of Kenya or before any other Court in Kenya under any written law, legal practice or the traditions of this Court. I refuse such interference of such actors with the work of this Court. Such individual, entities and masqueraders should desist such malpractices as they are misleading well intentioned citizens and committing criminal acts by receiving pay for their illegal acts purporting to be legal representatives.

If the claimant had given notice of her claim to the respondent, this matter may have been settled out of court. Costs will therefore not be awarded.

Based on the outlined reasons above, I will grant compensation for the unfair termination equivalent to one month pay amounting to Kshs. 22,264.57.

I enter judgment for the claimant as against the respondent in the following terms:

(a) A declaration that the claimant termination by the respondent was unfair.

- i. Compensation for unfair termination amounting to Kshs. 22,264.57;**
- ii. Notice pay amounting to kshs.22,264.57;**
- iii. Pro-rata leave at kshs.16,484.00;**
- iv. Overtime at kshs.34,000.00;**
- v. Work on public holidays amounting to Kshs. 22,339.00;**
- vi. Medical bill amounting to kshs.9,000.00.**

Total amounting to Kshs.126,260.00

(b) Certificate of Service be issued.

(c) Each party to bear their own costs.

Delivered in open court at Nairobi this 3rd day of May, 2013.

Monica Mbaru

JUDGE

In the presence of

.....

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Court clerk

[1] Variable dates depending on Muslim Calendar

[2] Variable dates depending on Christian Calendar

[3] Variable dates depending on Christian calendar.