



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 92 OF 2013

JANE WANGUI

WAGURA.....CLAIMANT

-VERSUS-

EDDY KURIA KAHURA T/A PYRAMID

RESTAURANT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 27th September, 2013)

JUDGMENT

The claimant **Jane Wangui Wagura** filed the memorandum of claim on 19.04.2013 through Orina & Company Advocates and claimed for judgment against the respondent for:

- a. Salary for 22 days worked in January 2013 – Kshs.4,400.00
- b. One month pay in lieu of notice – Kshs.6,000.00
- c. Overtime – Kshs.170,769.20
- d. Public holidays worked –Kshs.16,246.10
- e. Rest days/ off duties worked in December 2011 – Kshs.5,169.20
- f. One annual leave – Kshs.5,000.00
- g. Compensation based on section 49(1)(c) – Kshs.72, 000.00
- h. Total claim – **Kshs.279,584.50**

The respondent **Eddy Kuria Kahura T/A Pyramid Restaurant** filed the reply to the memorandum of claim on 07.05.2013 through Achieng Owuor & Company Advocates and prayed that the claim be dismissed with costs. The claimant filed a response to the memorandum of response on 20.05.2013.

The parties gave evidence to support their respective cases.

The claimant was employed to serve as a waitress on 1.11.2011 at a consolidated salary of Kshs.6,000/=. She successfully served the probationary period of three months and she remained in employment until 22.01.2013 when, as she testified, her employment was terminated.

The respondent testified that in November, 2012 a lady by the name of Mrs. Gichuki went to the restaurant and an unpleasant confrontation ensued between her and the claimant in full view of the respondent's customers about the accusations that the claimant had an affair with the husband to the said Mrs. Gichuki.

The claimant denied in her evidence that such event ever happened. The respondent further testified that on 21.01.2013, the said Mrs. Gichuki went to the restaurant to hunt for the claimant but the claimant was

then on off duty. Upon resuming duty on 22.01.2013, the respondent asked the claimant to hand in her uniform and to resolve the domestic issue to avoid creating another scene at the restaurant that could cause an embarrassment.

The claimant's evidence was that on 22.01.2013, she reported on duty and the respondent summoned her to his office and informed her that he had fired her. No notice was given and no reason was offered. She was told that she would be paid her terminal dues the following day though, the respondent told her that he may anyway not pay her the terminal dues. The dispute reported to the labour officer was not resolved hence the filing of the court case.

The court has considered the pleadings, the evidence and the submissions. The issues for determination are whether the termination ever took place; whether, if it took place, was fair or unfair; and if the claimant is entitled to the remedies as prayed for.

The respondent has denied that he ever terminated the claimant's employment. The court has considered the evidence. It is the respondent's case that the confrontation between the claimant and the alleged Mrs. Gichuki was inconsistent with the running of the restaurant. The court considers that it was the respondent's obligation to treat the allegation as a grievance or as a misconduct or poor performance on the part of its employee, the claimant. The court finds that the respondent abdicated that employer's obligation. There is no evidence that the respondent engaged in any grievance management or due disciplinary process in view of the allegations leveled against the claimant.

It was not for the respondent to require the claimant, as submitted for the respondent **"...to go and sought her problems out of work...."** The respondent was obligated, in the opinion of the court, to manage the alleged complaint through a fair grievance management process because the same is said to have emerged and related to the claimant's work place and work. If the respondent considered it as misconduct or poor performance, a notice and a hearing in due process was expected as envisaged in section 41 of the Employment Act, 2007.

In absence of such steps by the employer, the court finds that the claimant was entitled to consider herself terminated in view of the respondent's indefinite request to leave. In alternative, the claimant's account that she was told by the respondent that she had been terminated is highly probable. In either event of constructive or actual termination, the court finds that it was unfair and the court awards the claimant **Kshs.42,000/=** being six months gross salaries. The court in making the finding has taken into account the period so far served being 2 years and the respondent's willingness to submit to conciliation by the labour officer.

The final issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a. Salary for 22 days worked is the claimant's entitlement and the court finds that **Kshs.4,400.00** as prayed for is fair. There is no evidence of payment of that amount because on a balance of probability, **exhibit R2** cannot be trusted because it is not signed by the claimant and there was no evidence that Kshs.200 was deducted and remitted for National Social Security Fund as alleged for the respondent.
- b. As no termination notice was issued, the court finds that the claimant is entitled to **Kshs.6,000.00** as prayed for.
- c. The respondent conceded to **Kshs.7,000.00** for 21 leave days and for public holidays worked and the court finds that the claimant is entitled as such in absence of any other evidence by the claimant to prove her higher claims.
- d. The court has considered the claim for overtime. The claimant testified she worked from 6.30 am to 12.30 pm. The respondent testified he had three employees serving on shifts for not more than 8 hours per day. The claimant did not show or give any evidence for claim of overtime on monthly

basis and the respondent's refusal to pay as claimed. The court finds that the claim is unfounded as it is an afterthought and it shall fail. On the same account, the claims for rest days and off duties in December 2011 shall fail for want of evidence.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to pay the claimant **Kshs.59,400.00** by 1.11.2013, failing interest at court rates to be payable from the date of the judgment till full payment.
- c. The respondent to pay costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 27th September, 2013.**

BYRAM ONGAYA

JUDGE