



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 198 OF 2013

FRANCIS WABICHI BURUNDI.....CLAIMANT

-VERSUS-

TAIDY'S RESTAURANT.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2013)

JUDGMENT

The Claimant **Francis Wabichi Burundi** filed the memorandum of claim on 26.06.2013 in person and subsequently appointed Geoffrey Otieno & Company Advocates to act in the suit. The claimant has prayed for underpayment and overtime of Kshs.208,394.85; costs of the suit; and any other remedy the court may deem fit.

The respondent **Taidy's Restaurant** filed the defence to the claim on 17.06.2013 through R.W. Chege & Associates. The respondent prayed that the claimant's claim be dismissed with costs.

The claimant gave evidence to support his case and called a witness, Richard Kising'ani (**CW2**). The respondent's witnesses were Festus Kiprono Kigen (**RW1**) and Ephrahim Onuko Ochola (**RW2**).

The claimant testified that he was orally employed by the respondent on 1.11.2005 and issued with a letter of appointment dated 1.4.2006. The claimant's salary increased from Kshs.4,000.00 to Kshs.5,000.00 and at termination was Kshs.7,450 per month.

The claimant was a guard working from 6.00 am to 6.00 pm or 6.00 pm to 6.00 am depending on the shift assigned and for 6 days per week. He testified that he was not paid overtime for work done beyond 8 hours per day.

The claimant also testified that his pay was below the minimum statutory wage.

On 4.05.2012, the claimant reported at work in the morning. He was advised to see the manager one Richard Kising'ani being CW2. It was alleged that on the night of 20.03.2012, the claimant was seen carrying a black polythene bag and on that account, CW2 suspended the claimant indefinitely. The claimant was not recalled and after lapsing of considerable days, CW2 summoned the claimant and informed him that he had been fired. He was to sign in agreement to Kshs.16,000 as final dues payable by cheque at a future date but he declined to such agreement. The claimant testified that the labour

officer intervened in the dispute and fixed his terminal dues at Kshs.82,980.55 but the respondent refused to pay the dues. The claimant testified that he never took annual leave. He prayed for terminal dues in view of the sudden termination, payment for overtime, leave, house allowance and underpayment.

CW2 testified that investigations were undertaken but the black item the claimant was alleged to have stolen was never confirmed. Further, CW1 stated that he suspended the claimant under the instructions of the respondent's directors to do so. The letter of 21.09.2012 was the standard termination letter as per CW2's evidence and it was the directors' position that only the amount stated in the letter would be payable. CW2 also testified that he did not make a police report about the allegations of theft leveled against the claimant because the allegations lacked a basis.

RW1 testified that he did not receive the report of the specific item the claimant had allegedly stolen from the respondent. RW1 further testified that it was CW2's duty to investigate. Further, the claimant had refused to take his final dues. RW2 testified that he could not identify the specific item the claimant may have stolen on the material day.

The main issues for determination in this suit are whether the claimant's termination was fair and whether the claimant is entitled to the remedies as prayed for.

The court has considered the evidence and finds that the termination was unfair because the respondent has failed to establish the reason for the termination. The item allegedly stolen by the claimant was not established and there was no evidence to link the claimant to any theft at the time of the termination. The claimant's last monthly gross pay as per his testimony and which was not disputed was Kshs.7,450.00. For the unfair termination, the court awards the claimant **Kshs.67,050.00** being nine months gross salaries. In making the award, the court has considered that in this case, the respondent conducted a sham investigation and hearing in which the claimant was not accorded genuine due process.

The next issue for determination is whether the claimant is entitled to the remedies as prayed for. The first prayer is for underpayment and overtime. The court has perused the payslips as filed by the claimant. It is clear that the payslip included a provision for overtime and other payments. In absence of evidence of a grievance about payment for overtime while the claimant was in service, the court finds that the respondent paid the overtime as agreed and the claimant is not entitled to the prayer as made. Similarly, the alleged underpayment has not been established with specific references to the applicable statutory wage orders and the court finds that the claim shall fail. The respondent has conceded to one month notice in lieu of termination notice and pending leave amounting to **Kshs.12,657.00** as per exhibit **FWB 5** and the claimant is awarded accordingly.

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

1. A declaration that the respondent's termination of the claimant's employment was unfair.
2. The respondent to pay the claimant **Kshs.79, 707.00** by 15.12.2013, in default interest to be payable at court rates from the date of the judgment till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 29th November, 2013.**

BYRAM ONGAYA

JUDGE