



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 63 of 2012**

**JANE ANSELINE MWALISHI MANONO.....CLAIMANT**

**-VERSUS-**

**1. THE AFRICA LABOUR CONSULTANTS INSTITUTE**

**2. BORA BORA HOTEL (PETER INGIRA MATSIOLA-PROPRIETOR.....RESPONDENT**

**AWARD**

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1. The Claimant has sued the Respondent Bora Bora Hotel Limited together with the Proprietor for unlawful termination of employment. She seeks the following orders:-

- i. **Declaration** that the dismissal of the Claimant by the Respondent was unlawful, un-procedural, unconstitutional and unfair.
- ii. **Declaration** that the failure to pay the Claimants due allowances was unlawful.
- iii. **Declaration** that the refusal to issue the Claimants with certificates of service pursuant to Employment Act No.11 of 2007 Section 51(1-2) was unlawful and the Respondent to pay a fine of Kshs.100,000 and be committed to civil jail for 6 months, pursuant to the Employment Act No.11 of 2007 Section 51(3).
- iv. **Commit** the Respondent to pay a fine of Kshs.100,000/= and be committed to civil jail for 2 years for refusing to give the Claimants Appointment/Contract Agreement on Employment pursuant to the Employment Act No.11 of 2007 Section 15(4).
- v. **THAT** this honourable Court orders the Respondent to pay Claimant due salary and allowances in arrears due to under payment and maximum compensation and damages for unfair and unlawful termination calculated as in paragraph 11 in the submission herein totaling Kshs.5,767,210.68.

2. The respondent filed a Statement of reply to the claim in which it denies unlawfully terminating the Claimant.

3. The case was heard on 29<sup>th</sup> November 2012 when the Claimant testified on her behalf while **MR. MUTHORA PETER KIRIA** testified on behalf of the Respondent.

4. The main facts of the case are not contested save for the date of employment which the Claimant alleges commenced on 16<sup>th</sup> June 1992 while the Respondent alleges she was employed in August 1993.

5. The Claimant's case is that she was employed on 16<sup>th</sup> June 1992 as a cleaner. In 2005 she was given additional duties as a bouncer. She reported on duty at 6.00 a.m. and stayed on to do bouncer duties until the last customer left. She worked until 1<sup>st</sup> February 2011 when she was sent on leave. She reported back from leave on 22<sup>nd</sup> February 2011 but was told not to start working until she is called. She was never called back to work so after waiting she called the employer herself and was eventually paid 4 months salary and told her employment had been terminated. Her starting salary was Shs.600 and at the time of termination she was earning a gross salary of Shs.5,000/= for both jobs. She went on leave each year but the money paid during leave was deducted as a loan. The four (4) month's salary she was paid was Shs.20,000/= for February, March, April and May 2011 and was made in February 2011. She denied seeing the letter of warning appended as Exhibit 3 to the respondents Statement of Reply. She prayed for payment of leave, overtime, notice, off days, house allowance, service and compensation.

6. The Respondents case is that the Claimant was employed as a cleaner in August 1993 on an oral contract. She was paid a consolidated salary of Shs.5,000/=. The Claimant used to apply for loan when going on leave which was deducted at the rate of Shs.1,000/= per month. The Claimants employment was terminated in January 2011 after a warning given on 13<sup>th</sup> January 2011 following complaints by customers and her quarrels with colleagues. The Claimant was paid 3 months salary in lieu of notice and ex-gratia pay of Shs.5,000/= which she signed for. The respondent denied that the Claimant worked as a bouncer. The Respondent submitted that the Claimant used to go to the place of work in the evening but not to work. The Claimant was not a member of NSSF. She took all her annual leave. She worked from 10.00 a.m. to 4.00 p.m. with a break between 12.00 a.m. and 3 p.m. The Respondent alleges that the Claimants employment was terminated for good cause.

7. Section 10 of the Employment Act 2007 provides for records to be kept by employers. Subsection 10(7) provides that where in any proceedings an employer fails to produce a written contract or the written particulars prescribed in Sub Section 6(1) the burden of proving or disproving an alleged term of employment shall be on the employer.

8. In this case the employer has admitted to not keeping records of employment. Both the appointment and dismissal of the Claimant were verbal. This is in contravention of Section 9 which requires any contract for a period exceeding 3 months to be in writing, and Section 41 of the Employment Act which requires an employer to give reasons for termination and give an employee an opportunity to be heard before termination.

10. I find that the Claimant was unfairly terminated for reason that she was never given a letter of termination or an opportunity to defend herself. It is not even clear what date her employment was terminated as both parties have given different dates of termination.

11. The Claimant has prayed for the following orders:-

(a) **Overtime**

The Respondents witness admitted that the Claimant stayed at the work place in the evening though he denied that she was at work. Having failed to produce records to confirm the actual working hours, I will presume pursuant to Section 10(7) referred to above, that the Claimant was at work for 1 hour every evening for 11 months. I will however limit this to 3 years prior to her dismissal, this being the limitation period provided for under the Employment Act. This would add up to 33 months for 3 years. This works out to 864 hours. At an hourly rate of 29.98x1.5 times, she is entitled to Kshs.25,892.10.

(b) **House Allowance**

I will deal with this item under underpayments.

(c) **Annual Leave**

The Claimant testified that she was never paid salary during leave as the salary was recovered as a loan. The Respondents witness corroborated this by confirming that the Claimant was given a loan equivalent to her salary when proceeding on annual leave. This means that she was never given paid leave as provided for by law. I therefore grant her payment of 21 days salary being annual leave for the 16 years that she worked for the Respondent based on her last salary at statutory minimum rate of Shs.6743 comes to Kshs.75,521.60.

**(d) Leave Travelling Allowance**

This is not provided for by law unless specifically included in an employment contract. Since the Claimant had no employment contract, the claim is dismissed.

**(e) Severance pay**

The Claimant was not declared redundant and is therefore not entitled to severance pay. She is however entitled to service pay as provided for in Section 35(5) of the Employment Act as the Respondent admitted to not paying NSSF. I award her Kshs.62,032 as Service pay.

**(f) Underpayments**

The statutory minimum rate of pay for general worker was as follows over the years. The Claimant did not specify when she started earning a salary of shs.5,000/= or the progression of her salary from date of employment to date termination.

I will therefore grant her underpayments based on basic salary plus House Allowance for 2 years only. This amount to the following:-

From May 2009 - 7,049.50 less 5,000 = 2,049.50 x 12 months = 24,594

From May 2010 - 7,754.45 less 5,000 = 2,254.45 x 9 months = 20,290.05

I therefore award her Shs.44,884.05 being underpayment from May 2009 to January 2011.

**(g) Maximum compensation**

Having been in employment for more than 16 years before being terminated unfairly, it is my opinion that the Claimant is entitled to maximum compensation of 12 months gross salary at the consolidated minimum rate of pay of Kshs.7,754.45x16= Kshs.124,071.2 which I hereby award her.

**(h) Damages**

No evidence was submitted in respect of this head. The same is dismissed.

**(i) Certificate of Service**

The Claimant is entitled to a Certificate of Service.

In conclusion, the Claimant is awarded the total sum of Kshs.306,508.85. The same should be paid by the Respondent within 30 days from the date hereof failing which the Claimant may apply for execution. Interest at Court rates will start accruing after 30 days should payment not have been made by then.

Orders accordingly.

Read in open Court and signed on this 27<sup>th</sup> day of February, 2013.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE.**

**In the Presence of:-**

Jane Anselina Mwalishi Manono

\_\_\_\_\_ Claimant

No Appearance

\_\_\_\_\_ Respondent