



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**

**KENYA AT NAIROBI**

**CAUSE NUMBER 1444 OF 2013**

**ROBERT KAVUNZA KILONZO.....CLAIMANT**

**VERSUS**

**GOKUL LIMITED T/A MISTY GINGER CLUB.....RESPONDENT**

**JUDGEMENT**

1. The claimant pleaded that on or about July, 2009 he was employed by the respondent as a waiter and later promoted to a barman at a salary of Kshs 15,000/= per month. The claimant worked until 13<sup>th</sup> March, 2013 when he claimed the respondent terminated his services due to a misunderstanding with the respondent's manager.

2. According to him, the termination of his services was without any notice or letter to show cause as required by the Employment Act and rules of natural justice. He further averred that upon termination the respondent refused to pay his terminal dues. He further claimed that during the period he worked, he was never paid any overtime and further that he worked during public holiday without pay.

3. The respondent on the other hand admitted employing the claimant as alleged but on a two year contract renewable. On 13<sup>th</sup> March, 2013 his services were terminated on grounds of misconduct. According to the respondent the claimant was not a diligent worker as alleged but was dishonest and insubordinate to his supervisors and as such his dismissal was well founded and lawful.

4. The respondent averred that the claimant was on the morning of 13<sup>th</sup> March, 2013 given a lawful order by his manageress, a Ms Kalpana Galoria to proffer bar stock records under his custody for purposes of balancing precious day's accounts but he was reluctant and unwilling and on prompted further he became abusive and used unsavory language against the said manageress.

5. The claimant immediately after using the unsavory words against his manageress was afforded a chance to show cause in writing why he should not be disciplined for his actions and to appear before the management but instead he left behind an apology letter with a plea that the management gets in touch with him on his cellphone. He thereafter absconded duties and returned after two days absence and resumed work as normal but was dismissed for gross misconduct.

6. In his oral evidence the claimant further stated that he signed the letter of appointment and that he used to report at work at 1.00 p.m. and work until the following day. He further stated that he used to work for six days a week and also during public holidays but at no extra pay. He further stated that he went on annual leave only once and was once paid in lieu of leave. Hence he was claiming leave for two years and seven months.

7. According to him he left work on 13<sup>th</sup> March, 2013 after disagreeing with the manager over the format of orders placed by waiters. He was asked to go home and come back the next day. The next day he was asked to write an apology letter which he did and was dismissed two days later. He denied insulting the manager and that he absconded work for two days. In cross-examination he admitted he was paid some money but could not remember how much it was.

8. The respondent's witness Mr George Njoroge informed the court that on 13<sup>th</sup> March, 2013 he was called and told the claimant had abused the manager. He met the claimant the net day and spoke to the manager and staff who were on duty with the claimant and they confirmed the claimant abused the manager. According to him the claimant was issued with a termination letter together with payments. He further stated the workers used to work during public holidays and overtime was paid monthly where applicable.

9. In cross-examination he stated the Barman used to report around 4.00 p.m. and would work until the following day 8.00 a.m. The claimant according to him used to work for about twelve hours per day. He further stated that the respondent used to allow extra days off to compensate for those who worked during public holidays.

10. It would seem that there is no dispute that there was some altercation between the claimant and the respondent's manageress. The claimant in fact concedes to writing an apology letter in that regard. In the apology letter the claimant seems to regret the incident and blames it on the drink he was taking. Use of abusive or insulting language towards an employer or a person placed in authority of the employee is a valid ground for summary dismissal.

11. The apology letter does not state when it was written but it must have obviously preceded the dismissal letter dated 16<sup>th</sup> April, 2013. The averment by the claimant that he was dismissed without notice or letter to show cause cannot therefore be correct. An apology is an admission of the charges against an employee and merely seeks to mitigate the disciplinary action to be taken against such employee. There was therefore no need to issue the claimant with a show cause letter and or take him through disciplinary hearing. The claimant neither alleged nor produced any evidence to show he was coerced into writing the apology letter.

12. In the circumstance the court finds that the summary dismissal was justified and declines to declare the termination unfair. However, a summary dismissal does not disentitle an employee to terminal benefits. It merely justifies a dismissal with no notice or less notice than that which an employee is entitled to by statute or contractual term.

13. The claimant stated in his evidence in chief that he used to report to duty at 4.00 p.m. and leave the following day at 8.00 a.m. This was further confirmed by the respondent's witness Mr George Njoroge who stated that the claimant used to work for twelve hours a day and during public holidays. Although he claimed where staff worked during the public holidays such staff would be compensated by an off day, no evidence was tendered to vouch for this.

14. The court therefore awards the claimant the following terminal dues: \_

**Kshs**

- a. Overtime      51,840
- b. Salary for 16 days in April   8,000
- c. Public holidays      25,875

**85,715**

- d. Costs of the suit.

15. Items a, b, c are subject to applicable taxes.

16. The respondent shall issue the claimant with a certificate of service.

It is so ordered.

**Dated at Nairobi on this 29<sup>th</sup> day of June, 2018**

**Abuodha J. N.**

**Judge**

Delivered at Nairobi on this 29<sup>th</sup> day of June, 2018

**Abuodha J. N.**

**Judge**

**In the presence of:-**

..... for the Claimant

..... for the Respondent