



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Cause 1871 of 2011

STEPHEN NDAIGA WAGANA..... CLAIMANT

VERSUS

AMBASSADEUR HOTEL.....RESPONDENT

JUDGMENT

The Claimant has sued the Respondent claiming Kshs.58,800/- being employment terminal dues plus 12 months wages as compensation for wrongful dismissal. He also prays for costs and interest.

The Respondent did not file any response to the claim despite being served with the claim and a Hearing Notice. As such the trial proceeded *'ex-parte'* after the Court was satisfied that proper service had been effected by a competent Court Process Server.

The Claimant testified alone and did not call any witnesses. The summary of his evidence is that the Claimant was employed by the Respondent under a Contract of Service as a Maintenance of Machines and Electricals among others. His salary was Kshs.8,000/- at the start but the same had been reviewed to Kshs.13,000/- per month as at the time of his dismissal.

The Claimant did not produce any appointment letter because the Respondent does not give any appointment letters to his employees. He, however produced termination letter dated 14-7-2011 which was delivered to the claimant on the same day in the afternoon while on duty. The ground for dismissal was that the Respondent was undergoing restructuring and as such the Claimant could not be retained. The letter is for summary dismissal and is marked 'SN3' on the Memorandum of Claim. The Claimant was not dismissed for any wrongdoing.

He did not produce any payslip but a bank statement to prove that he was paid his salary directly through his bank. He relied on all the documents in his Memorandum of Claim and prayed for an award of Kshs.58,800/- plus costs and interests. The pleadings and the evidence adduced by the Claimants all

establish an employment relationship between himself and the Respondent. As such this court has the jurisdiction to entertain the dispute and make a decision on the same.

The issues for determination are:-

- (1) whether the summary dismissal of the claimant by the Respondent was wrongful?
- (2) whether the Claimant is entitled to any terminal benefits and if any, how much?

To answer the first issue, and in the absence of any written contract adduced in evidence, the Court will only rely on the uncontroverted testimony of the Claimant that he was employed by the Respondent in January 2007 and worked continuously until his summary dismissal on 14-7-2011. Under Sec.9(a) of the Employment Act 2007, a Contract of Service for a period or a number of working days which amount in aggregate to equivalent of three months or more shall be in writing. It is the duty of the employer to prepare the contract. The written Contract of Service is the one to provide among other things the terms of the contract. Section 10(7) provides that if the employer fails to produce a written contract or written particulars, he shall bear the burden of proving or disproving any alleged terms of employment stipulated in the Contract. In this case, the Respondent has neither filed any defence nor adduced any evidence to disapprove the employment contract by the Claimant in his case. I am satisfied in the absence of such contrary evidence from the Respondents that the Claimant has on a balance of probability proved that he was employed by the Respondent for a continuous period of more than three months at a salary of Kshs.13,000/-.

Under the Employment Act 2007, the said contract of employment could only be terminated under Section 35, 40 or 44. Section 35 of the said Act provides for termination of employment by either party to the contract by giving a Notice in writing equivalent to twenty eight (28) days for contract where wages or salary are paid periodically paid at intervals of or exceeding one month.

Section 40 of the Act on the other hand provides for termination on account of redundancy. Section 2 of the Act defines redundancy as:-

“the Loss of Employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment”.

Section 44 of the Act provides for summary dismissal for gross misconduct.

An evaluation of the foregoing three methods of terminating employment contract in relation to the summary dismissal of the Claimant on grounds of restructuring of the Respondent one would reasonably find that the dismissal was neither in accordance with Section 35, 40 nor 44 of the Employment Act, 2007.

It was not under Section 35 because no written notice of intention to terminate was given 28 days before the termination. The termination letter is for summary dismissal dated 14-7-2011 intended to take effect on 15-7-2011. To that extent, it was an unlawful and unfair termination. The Claimant was not given an opportunity of being heard although the Respondent was willing to pay terminal dues to him.

The termination, though on ground which is akin to redundancy, the same was in breach of Section 40 of the Employment Act, 2007. The Respondent did not give one month's notice of intention to declare the Claimant redundant to the area Labour Officer and the Claimant. The Respondent did not also pay any dues as provided for, under Section 40 of the said Act.

The termination was also not in accordance with Section 44 because the reason given for the summary dismissal was not one of gross misconduct but restructuring of the Respondent, this was therefore, unlawful and unfair because the Claimant was not accorded any opportunity to be heard.

Having found that the dismissal was unlawful and unfair. I will consider whether the Claimant should be paid any employment terminal dues as prayed in the claim. The answer to this question is in Section 35(4) and 50 of the Employment Act.

Section 35(4) provides that an employee has a right to file a dispute on the lawfulness or fairness of the termination of his employment. Section 50 provides that this Court shall be guided by Section 49 of the said Act in determining a complaint or suit for wrongful dismissal or unfair termination of employment of an employee.

Section 49(1) provides for employer to pay an employee the following for unlawful summary dismissal or termination:-

- (a) wages equal to the pay for the Notice period;
- (b) unpaid wages for the period;
- (c) Gross monthly salary for not more than 12 months.

Section 35(5) provides that an employee whose employment is terminated under Sec. 35(1)(c) shall be entitled to service pay for every year worked. Section 35(5) contemplates employees who are employed to earn a salary every month like the Claimant in this case. It is my finding that the Claimant was entitled to termination by a Notice in writing of at least 28 days in advance. In computing his terminal dues under Section 50 of the Employment Act, I will also be guided by Section 35(5) of the Act.

The Claimant has in his claim specifically prayed for Kshs.58,800/-, made up of:-

(a) Service (13,000/30 x 15 days x 4 years)	=	26,000/-
(b) Leave	=	9,099/-
(c) One month's pay in lieu of notice	=	13,000/-
(d) House allowance 15/100 x 13000 x 4	=	<u>7,800/-</u>
TOTAL	=	<u>Kshs.58,800/-</u>

He has also claimed for compensation of upto 12 months salary for wrongful dismissal under paragraph 6 of the claim. Although he has not included this prayer specifically as required in pleadings, this court will excuse that error as a mere technicality which should not be visited on an ordinary litigant who was not represented by an Advocate. I will therefore, consider the claim as a prayer as if pleaded as a prayer in the claim.

The following will be my assessment of dues payable to the Claimant by the Respondent:-

(a) One month's salary in lieu of Notice of	-	Kshs.13,000/-
(b) Service pay as prayed at	-	Kshs.26,000/-
(c) Leave pay as prayed of	-	Kshs. 9,099/-
(d) Compensation for wrongful dismissal		
for three months	-	<u>Kshs.39,000/-</u>
TOTAL	=	<u>Kshs.87,099/-</u>

I am guided by Sec.49(4) of the Employment Act, 2007 in according this figure especially the fact that the Claimant was not guilty of any misconduct and also the fact that he had not secured a similar job as at the time his testimony which was over a year since his dismissal.

I will not award the prayer for house allowance because the Claimant did not explain why he had not demanded for it before dismissal. He should at least have showed to the Court that the Kshs.13,000/- salary did not include house allowance.

The decision of this Court is therefore, that the Respondent unlawfully dismissed the Claimant from his employment and is ordered to forthwith pay to the Claimant Kshs.87,099/-.

The Claimant will also be paid costs of this suit.

Ordered accordingly.

DATED and DELIVERED at Nairobi this 18th day of September, 2012.

Onesmus N. Makau

JUDGE