



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1124 OF 2017**

**TREVAR MARAMBE.....CLAIMANT**

**VERSUS**

**FOR YOU CHINESE RESTAURANT.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant lodged a claim against the Respondent on the 19<sup>th</sup> of June, 2017, seeking payment of salary for days worked in November, 2016, accrued house allowance, accrued annual leave, leave travel allowance, payment of a gratuity, three months' salary in lieu of notice and a 12 months' salary in compensation for unfair termination.
2. The Respondent filed a response to the claim on the 8<sup>th</sup> of December, 2017, to which the Claimant responded to on the 20<sup>th</sup> February, 2018.
3. During the trial, the Claimant testified in support of his case. The Respondent did not call any witnesses.
4. The Claimant filed submissions to support his positions and which submissions, have been dully considered.

**The Claimant's Case**

5. The Claimant's case is that he was employed by the Respondent as a chef on or about 1<sup>st</sup> September, 2011, earning a basic salary of Kshs. 12,000.
6. It is his further case that his salary was later increased to Kshs. 15,000. He states that he was not paid a house allowance during his service with the Respondent
7. It is the Claimant's case that he was not given a written contract of service.
8. It is his case that he was issued with a staff identity card and that it is the only document he has to show his relationship with the Respondent.
9. It is the Claimant's further case that he was a member of Kenya Hotels and Allied Workers Union from September, 2012.
10. The Claimant further states that he never took his leave and neither was he compensated for the unutilized leave days.
11. It is the Claimant's case that his termination from the service of the Respondent is unprocedural, premature, hence wrongful and unfair.
12. The Claimant seeks the following reliefs:
  - i. Reinstatement
  - ii. Salary for days worked in November, 2016 at Kshs. 17,250/=

- iii. Accrued house allowance of Kshs. 135,000.00/=
- iv. Accrued annual leave of Kshs. 86,250/=
- v. Outstanding leave and travel allowance of Kshs. 20,000/=
- vi. Gratuity for 5 years of Kshs.
- vii. 3 months' pay in lieu of notice at Kshs. 51, 750/=
- viii. 12 months salary as compensation for unfair termination at Kshs. 207,000/=
- ix. General damages and emoluments of Kshs. 554,750/=
- x. Costs of the suit

### **The Respondent's case**

- 13. The Respondent in its response filed on 8<sup>th</sup> December, 2017, admits that the Claimant was their employee, employed vide an oral contract on 1<sup>st</sup> November, 2011.
- 14. The Respondent states that the Claimant was employed by them as a general labourer, designated as a kitchen assistant and deny that he was a chef.
- 15. The Respondent further states that the Claimant does not have qualification in Chinese cuisine that would qualify him as their chef.
- 16. The Respondent avers that the document produced by the Claimant as his staff identity card and which indicates that he was a chef, is not their staff identity card.
- 17. The Respondent states the Claimant's date of employment is 1<sup>st</sup> November, 2011 and not 1<sup>st</sup> January, 2011, as stated in his statement of claim and 1<sup>st</sup> September, 2011, stated in his witness statement.
- 18. It is the Respondent's assertion that the Claimant earned a consolidated salary of Kshs. 15,000= comprising of both basic salary and house allowance and that the consolidated salary, is pursuant to an oral agreement between the Respondent and the Claimant.
- 19. The Respondent denies knowing that the Claimant was a member of the Kenya Hotels and Allied Workers Union.
- 20. The Respondent denies that the Claimant worked for long hours, as its work is organized in shifts to avert accidents arising from exhaustion.
- 21. It is the Respondent's position that the Claimant was always compensated when he worked on public holidays.
- 22. It is the Respondent's further position that the Claimant took his leave days contrary to the assertion in his claim.
- 23. The Respondent states that it issued written notice to the Claimant to respond to issues raised against him upon being tipped by one of its staff that the Claimant had stolen food items from the Respondent's pantry.
- 24. It is the Respondent's position that the Claimant on receiving the show cause letter, absented himself from duty without justification, and has to date not returned to the service of the Respondent.
- 25. The Respondent states that it did not terminate the employment of the Claimant and that it had only begun the disciplinary process and could not conclude the same, as the Claimant voluntarily left their service without notice and without reason.
- 26. It is the Respondent's case that the Claimant is not entitled to the reliefs sought for the reason expressed herein.
- 27. The court identified the following as issues for determination:
  - i. whether the termination of the Claimant was un-procedural hence unfair; and
  - ii. whether the Claimant deserves the reliefs sought
  - iii. who bears the costs of the suit.

### **Whether the termination of the Claimant was unfair:**

28. It is not disputed that the Claimant was an employee of the Respondent and the question then becomes, how he left the service of the Respondent.

29. The Claimant's evidence is that he reported to work as usual on the 26<sup>th</sup> of November, 2016, and worked until the end of his shift.

30. The Claimant's further evidence is that in the evening of 26<sup>th</sup> November, 2016, he was directed not to report to work the following day and that no reasons were given for the directive.

31. The evidence before court is that the Claimant had worked for the Respondent for five years as at the date he was directed not to report back to work.

32. The Claimant's further testimony is that he was not subjected to any disciplinary process and that the show cause letter said to have been written to him by the Respondent, is unknown to him as it was never served upon him.

33. It is the Claimant's evidence that he was not given reasons for the termination and that the allegations that he had stolen from the Respondent are unfounded.

34. The Claimant questioned the allegations of theft, as the same was neither reported to the police, nor shown to him on video as the Respondent's premises had security cameras that could have captured him entering the pantry where the items said to have been stolen were stored.

35. The Respondent filed a witness statement sworn by one Yan Liu, said to be the manager of the Respondent's restaurant, and a bundled of documents consisting of a letter to the Claimant (notice to show cause), the Respondent's Human Resource Manual and a sample of the Respondent's staff identification cards.

36. The Respondent did not call their manager to testify before court and to produce her witness statement and bundle of documents as evidence in this matter.

37. The court is left with no option but to construe the Claimant's evidence as uncontroverted and thus finds and holds that the Claimant was not given reasons for his termination and neither was he given a fair hearing contrary to *Sections 41, 43 and 45 of the Employment Act, 2007*.

38. The court finds and holds that the termination of the Claimant was both procedurally and substantively unfair, as the termination process was fundamentally flawed and fell short of the requirements of *Sections 41 and 43 of the Employment, Act, 2007*.

#### **Whether the Claimant deserves the reliefs sought**

39. A declaration that the Claimant was unfairly terminated, automatically entitles him to relief. The court will analyze each relief sought and make a determination based on the evidence before it.

#### **Reinstatement and General Damages**

40. Although the Claimant's claim carries these two reliefs, the Claimant withdrew the two during trial and hence the court will mark the two prayers as withdrawn.

41. The prayers for reinstatement was specifically withdrawn based on the fact that the Claimant had since gotten another job and no longer wish to pursue this prayer.

#### **Salary for Days Worked in November, 2016**

42. The Claimant's evidence is that he worked for 26 days in the month of November, 2016, and which days the Respondent did not pay for. The Respondent's Counsel in cross-examination challenged the amount the Claimant was claiming under this heading.

43. Although the Claimant denied that his entitlement in salary for the 26 days is Kshs. 13,000, the court finds and holds that the Claimant's monthly basic salary having been Kshs. 15,000, amounts to Kshs. 500/= per day and therefore Kshs. 13,000/= for 26 days.

44. The Claimant is hereby awarded salary for 26 days worked at Kshs. 13,000/=

#### **Accrued House Allowance**

45. Payment of a house allowance is a Statutory requirement and one that is couched in mandatory terms. Employers are bound by *Section 31(1) of the Employment Act, 2007*, to either provides an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary.

46. The Claimant's evidence is that he was not paid a house allowance for the five years he was in the service of the Respondent.

47. The Respondent on its part stated in its response to the claim, that the Claimant's salary was a consolidated figure of Kshs. 15,000, which consolidation, included housing allowance. Indeed *Section 31(2) of the Employment Act, 2007*, envisages such consolidation where then, the

employer is not expected to pay a separate amount as house allowance. Nothing was produced in evidence to show that indeed, the Claimant's salary was consolidated. A document such as a pay slip/payment instruction, is a document of the employer/Respondent, and which it could have easily produced to confirm this position.

48. The Respondent made no effort to prove to the court that this indeed was the position other than a plain and unsupported statement which is not convincing to this court.

49. The court finds and holds that the Respondent did not pay the Claimant a house allowance contrary to *Section 31 of the Employment Act*.

50. A house allowance is a monthly entitlement which accrues at the end of every month. *Section 90 of the Employment* provides that no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage, within twelve months next after the cessation thereof.

51. For reason that house allowances accrue at the end of every month, none payment thereof amounts to a continuing injury. The Claim for accrued house allowances dates back to 1<sup>st</sup> January, 2011. This suit was lodged on 19<sup>th</sup> June, 2017, which means that the only valid part of this claim, is rent accruing from 19<sup>th</sup> June, 2016. The Claimant was terminated on 26<sup>th</sup> November, 2016. The Claim for accrued house allowances for the years 2011, 2012,2013,2014, 2015 and January to May of 2016, are Statute barred and are hereby dismissed. The Claimant is awarded five months' accrued house allowance for the months of June to November, 2016.

### **Accrued Annual Leave and Outstanding Leave and Travel Allowance**

52. The Employment Act, 2007, provides an employee 21 days paid leave for every year worked. The Respondent's assertion is that the Claimant took all his leave days and is thus not entitled to any relief under this heading.

53. It is not only good practice but a legal requirement that an employer keeps records relating to persons in their service and I have no doubt in my mind that these records includes a leave roaster or forms filled by employees when requesting to go on leave and the days for which they have asked to take. For the Respondent not to have produced evidence relating to the Claimant's leave, goes to confirm to this court that the Claimant worked for 5 years without taking leave. Moreover, no evidence was rendered to show that the Claimant was paid in lieu of the accrued leave days.

54. The court thus finds and holds that the Claimant is entitled to payment of accrued leave that he did not take and was not otherwise compensated and is hereby awarded payment for 21 days for the five years he was in the service of the Respondent amounting to Kshs,52,500/=

55. The payment for the accrued leave days for the years served, in the opinion of this court, sufficiently compensates the Claimant and the claim for outstanding leave and travel allowance is unmerited and is dismissed.

### **Gratuity/Service Pay for 5 years**

56. The Claimant amended this prayer during trial to service pay. Although the Respondent's counsel challenged the prayer to amend, the court, in the interest of justice allowed the Claimant's prayer and hence the prayer before court is one for payment of service pay and not gratuity.

57. The Respondent has not produced any evidence to show that the deductions were made from the Claimant's salary in relation to NSSF.

58. The court thus concludes that the Claimant is entitled to service pay and is awarded at Kshs. 37, 500/=

### **3 months' pay in lieu of notice at Kshs. 51, 750/=**

59. The Statutory notice period is one month. A court would however award for longer notice period if the same is agreed upon by parties in a written contract of service.

60. Parties agree that an oral contract existed between them. The court notes that it was not the Claimant's fault that the said contract was not reduced into writing.

61. The Claimant however, did not mention even in passing that the oral agreement he had with the Respondent entailed a 3 months' notice period or payment of a salary for a similar period in lieu of that notice.

62. For reason that the Employment Act carries a notice period, the court needs not look for the intention of the parties from a contract that is only in the minds of the parties.

63. The court finds and holds that the Claimant is entitled to a one-month salary in lieu of the notice and is hereby awarded Kshs. 15,000 to cover the Statutory notice period.

### **12 Months' salary as compensation for unfair termination**

64. In determining an award of compensation, the court is guided by the provisions of *Section 49 of the Employment Act, 2007, read with Section 50 of the Act.*

65. The Claimant according to evidence adduced was in the service of the Respondent for about 5 years.

66. It is the Claimant's evidence that he has since secured comparable employment, where he has been serving for the last four months.

67. That available evidence indicate that the Claimant did not contribute to his termination from the service of the Respondent.

68. Going by the provisions of Section 49 of the Employment Act, 2007, it is the opinion of the court that the Claimant has not convinced this court that he has established a case for maximum compensation, instead, the court awards him 2 months' salary in compensation for unfair termination.

**Costs of the suit**

69. The Claimant has proved a substantial part of his claim and for reason that costs follow the cause, the he is awarded costs of this suit.

41. In conclusion, Judgment is entered for the Claimant against the Respondent in the following terms:

1) A declaration that the termination of the Claimant from the service of the Respondent is unfair.

2) The Respondent shall pay the Claimant:

i. Salary for 26 days worked in November, 2016 at Kshs. 13,000/=

ii. 5 months Accrued House Allowance at Kshs. 11,250/=

iii. Accrued leave at Kshs.52,500/=

iv. Service Pay at Kshs. 37,500

v. One-month salary in lieu of notice at Kshs. 15,000/=

vi. 2 months' salary as compensation for unfair termination amounting to Kshs.30,000/=

vii. Costs of the suit

42. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

N/A for the Claimant

Ms. Ondoro h/b for Mr. Otieno for the Respondent

Ms. Christine Omollo-C/A