



Kieti v Ikons Hotel Limited (Employment and Labour Relations Cause E068 of 2021) [2024] KEELRC 2712 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2712 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E068 OF 2021
AN MWAURE, J
OCTOBER 25, 2024**

BETWEEN

ROBERT KITAVI KIETI CLAIMANT

AND

IKONS HOTEL LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 26th January 2021.

Claimant's case

2. The Claimant avers that he was orally employed as a Cook by the Respondent in November 2014, with a monthly salary of Kshs. 15,000, and he performed his job diligently and humbly, ensuring clients received good food and service.
3. The Claimant avers that in March 2020, hotels, restaurants, and bars were closed down by a presidential directive due to COVID-19. Subsequently, in September 2020, the presidential directives were lifted, allowing the respondent to reopen, but he was not recalled.
4. The Claimant avers that despite waiting for months, he did not receive any communication from the Respondent to report back to work. Additionally, the Respondent did not take any measures to declare the claimant's position redundant.
5. The Claimant avers that he worked from 6:00 PM to 6:00 AM six days a week and was not granted any leave for the years he worked for the respondent.
6. The Claimant avers that he was unlawfully terminated and the due procedure was not followed.



Respondent's case

7. In opposition to the Claim, the Respondent filed a statement of response dated 10th May 2021.
8. The Respondent admits that the Claimant was its employee.
9. The Respondent avers that following the presidential directives issued in September 2020, by mutual consent the claimant agreed to go on leave pending further directions from the president.
10. The Respondent avers after the lockdown was lifted, the employees were requested to return to work but the Claimant did not return as he had secured another job.
11. The Respondent prays that this Honourable Court dismisses the Claimant's suit with costs.

Claimant's evidence in court

12. The Claimant (CW1) relied on his witness statement dated 20th January 2020, as his evidence in chief, and adopted exhibits 1 and 2 as his exhibits.
13. During cross-examination, CW1 stated he was terminated from work during COVID-19 and was not recalled.
14. CW1 stated he was entitled to Kshs. 15,000/= as at termination and deducted Kshs. 2,000/= being advance money and Kshs. 2,500/= loan repayment.
15. In re-examination, CW1 stated that he was not given any contract and it was an oral agreement.

Respondent's evidence in court

16. The Respondent's witness (RW1), Peter Kariuki stated he was employed by the Respondent as a Director and he adopted his witness statement dated 19.6.2024 as his evidence in chief.
17. RW1 testified that the hotel was closed from March 2020 to April 2022 because of the Covid-19 pandemic.
18. RW1 testified that he made payments to the claimant when the hotel was closed.
19. During cross-examination, RW1 stated that the Claimant was not employed in the year 2014 as he cannot remember working for him since 2014.
20. RW1 stated that he did not have a written contract with the Claimant as he was a casual employee.
21. RW1 stated that the respondent recalled the employees and the claimant did not come back.
22. RW1 stated that the respondent put a notice on its a main door of the hotel to notify its employees and did not prove that the Claimant had another job.

Claimant's submissions

23. The Claimant submitted he was employed in 2014, showing a salary voucher from September 2016. The Respondent's director on the other hand argued that the Claimant was employed as a casual in 2019 but provided no evidence to dispute the Claimant's statement.
24. The Claimant submitted that under the *Employment Act*, a casual employee is defined as a person the terms of engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.



25. The Claimant submitted that he was a regular employee and entitled to the rights of an employee under Part V of the *Employment Act*.
26. The Claimant submitted that he is entitled to the reliefs sought including unpaid part salary for February and March amounting to Kshs. 5,500, accrued leave from November 2014, notice pay for one month in accordance with section 35(1) of the *Employment Act*, service pay for 5 years worked at 15 days for every full year worked and compensation for unlawful termination.
27. The claimant relied on the cases of Titus Muriuki Ndirangu V Beverly School of Kenya Limited [2022] eKLR, Bishar & 3 others V World Assembly of Muslim Youth (WAMY) EA & 3 others [2024] KEELRC 206 (KeKLR in support of his case).

Respondent's submissions

28. The Respondent submitted that it did not dismiss the Claimant from his employment due to the presidential directives on the COVID-19 pandemic.
29. In Christopher Okwako & 21 others V Sai Eden Roc Hotel [2014] eKLR the court held that the terminations were due to force majeure which was the fire that occurred and ordered the hotel to pay the employees 1 month's salary in lieu of notice, 17 days' salary for December 2013, and refund of 25% salary deductions.
30. The Black's Law defines Force Majeure as a "natural event that causes loss. No human force is used and the event cannot be controlled."
31. The Respondent submitted that due to the COVID-19 pandemic, it was not possible for the claimant to continue his employment.
32. The Respondent argues even after the lifting of the presidential directives, it closed its business due to the harsh economic environment. The Respondent requested to be persuaded by the reasoning in Christopher Okwako & 21 others V Sai Eden Roc Hotel(supra).
33. The Respondent submitted in the event this Honourable Court finds that the claimant was unfairly terminated, three months' salary would be adequate compensation.

Analysis and Determination

34. Having considered the pleadings, submissions, and evidence on record, the issues for the Court's determination are:
 - a. Whether the claimant's employment was frustrated by the COVID-19 pandemic
 - b. Whether the claimant is entitled to reliefs sought
 - c. Who should bear the costs.

Whether the claimant's employment was frustrated by the COVID-19 pandemic

35. The Black's Law Dictionary 9th Edition defines force majeure as follows:

"An event or effect that can be neither anticipated nor controlled"
36. It is not disputed that the claimant worked for the respondent as a Cook. In March 2020, there was a lockdown due to the COVID-19 pandemic, which affected many businesses, including bars, restaurants, and hotels.



37. The claimant testified that he was unfairly terminated while the respondent's director testified that the hotel was closed but it recalled its employees after the lockdown was lifted.

38. Section 47(5) of the *Employment Act* provides as follows:

For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

39. The evidence from both respective parties as presented in court is that the respondent's employees were released from employment around March 2020 due to the declared closure of businesses due to Covid-19 pandemic. The understanding was that the employees were to be recalled once the pandemic was over.

The respondent avers that in September 2020 when the shutdown was lifted up they put up a notice in their premises for their employees to resume work. They claim that the claimant did not resume work.

40. The claimant on the other hand avers he inquired severally from the respondent on the status of his employment but did not get a response. Finally, on 11th December 2020 he wrote a demand letter to the respondent inquiring of the status of his employment but got no response.

41. Infact the respondent did not provide any evidence that they wrote to the claimant recalling them back to work. Under the circumstances the claimant could only assume he had been terminated after the lifting of the lockdown due to the Covid-19 pandemic.

42. The court is persuaded to find that even if the initial release of the claimant in March 2020 was valid and reasonable due to the lockdown due to the Covid-19 Pandemic once the lockdown was lifted and the respondent re-opened their business they should have communicated to the claimant whether they wanted him to go back to work or if there was no more work they should have served him with the redundancy notice as provided in Section 40 of the *Employment Act*. As it is they left the claimant in limbo and that was contrary to fair labour practices.

43. The court therefore finds that the respondent terminated the claimant's employment unfairly and unprocedurally by failing to communicate to him their decision whether to take him back or to declare him redundant. The court therefore hereby enters judgment in favour of the claimant.

44. The court awards the claimant the underlisted reliefs in view of the foregoing:

- a. One month salary in lieu of noticeKshs.15,000/=
- b. Six (6) months equivalent salary or unfair termination compensation.....Kshs.90,000/=
- c. Prayers for unpaid leave and March and service charge are baseless and are not granted.
- d. Total awarded isKshs.105,000/= plus Interest at 14% per annum from date of judgment till full payment.

45. Costs are also awarded to the claimant. He is also to be given his certificate of service within thirty (30) days from today's date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF OCTOBER, 2024.



ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

