



Nzioka v Kifaru Place Ltd & another (Employment and Labour Relations Cause E170 of 2022) [2024] KEELRC 40 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 40 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E170 OF 2022**

**MN NDUMA, J
JANUARY 25, 2024**

BETWEEN

DAVID MUANGI NZIOKA CLAIMANT

AND

KIFARU PLACE LTD 1ST RESPONDENT

KIFARU PLACE BAR & GRILL 2ND RESPONDENT

JUDGMENT

1. The matter proceeded as undefended suit following failure by respondents to attend the hearing on 26/9/2013. The hearing date had been taken by consent of the parties.
2. The suit had been adjourned on 5/6/2023 following application by the respondents who were not ready to proceed on the day. The respondents were ordered to pay Kshs. 10,000/= thrown away costs which had not paid as at 26/9/2023 when the matter proceeded to formal proof.
3. The claimant relied on a witness statement dated 16/3/2022 as his evidence in chief. The claimant also produced bundles of documents of even date in support of the claim marked exhibits 'I' to '11'.
4. Claimant (CW1) testified that he was employed by the respondents by a letter dated 1/9/2021 as the restaurant manager for the bars at a monthly salary of Kshs. 70,000/=. The salary was increased to Kshs. 90,000/= in December 2021.
5. The claimant worked well and the business attracted revelers with increased daily sales rising upto to Kshs. 1 million per month at some point.
6. The claimant testified that one director, Mr. Erick Mbiu doubted the sale figures presented by the staff led by the claimant from the main bar and VIP bar.



7. Mr. Eric suspected that some money paid vide till number were being directed to a private account of the co-director Dr. Joseph Mutie.
8. On January 16, 2022, Mr. Eric Mbiu instructed the claimant to withdraw the Mpesa Till No. 68xxxx for the VIP bar from operation and replace it with Till No. 68xxxx for the main bar which the claimant obediently did.
9. Dr. Mutie protested to the claimant the said change of till number and sent a message to the respondent WhatsApp management group dubbed ‘Kifaru Management’ comprising of the claimant Dr. Joseph Mutie and Eric Mbiu at 8:34 pm as follows:

“@Nzioka you are fired will pay your cash tomorrow.”
10. The claimant testified that the said sacking was unlawful, un-procedural and unfair. That the respondent had no valid reason to terminate his employment and the respondent did not follow a fair procedure in doing so.
11. The respondent did not pay the claimant his terminal benefits. The claimant claims for payment of:
 - a. One month salary in lieu of notice Kshs. 90,000/=.
 - b. Withheld salary for January 2022 Kshs. 90,000/=
 - c. Overtime taken
 - d. Untaken leave days
 - e. Under payments and
 - f. Maximum compensation for unlawful dismissal
 - g. Certificate of Service.
12. The suit is not defended and so the testimony by the claimant is not contested. However the claimant bears the burden to prove the reliefs sought in the suit on a balance of probabilities.
13. The court is satisfied that the claimant worked for the respondent for a period of one year and two months. The claimant served diligently and his employment was terminated without notice; notice to show cause and was not given opportunity to explain why the employment ought not to be terminated.
14. The respondent violated sections 36, 41, 43 and 45 of the *Employment Act*, 2007. It had no valid reason to terminate the employment of the claimant and the respondent did not follow a fair procedure in terminating the employment of the claimant. The termination was unlawful and unfair and the claimant is entitled to compensation in terms of section 49(1)(c) and (4) of the *Act*.
15. In this regard, the claimant had served for more than one year. The claimant did not contribute to the termination. The claimant was not paid any terminal benefits or compensation upon termination. The termination was sudden and without notice. The claimant suffered loss and damage for the loss of his means of livelihood and good career prospects with the respondent’s company.
16. The court has considered the case of *Mark Wafula versus Board of Management of Friends Secondary School Kabili* [2018] eKLR; *Postal Corporation of Kenya versus Andrew T. Tanui* [2019] eKLR and the Court of Appeal decision in *Bamburi Cement Ltd versus William Kilonzi* [2016] eKLR to find that all the elements of unlawful and unfair dismissal have been fully established by the claimant and award



the claimant the equivalent of two (2) months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 180,000/=.

17. Notice:

The claimant is also awarded Kshs. 90,000/= in lieu of notice which was not given to him upon termination. Indeed the claimant was summarily dismissed.

18. Arrear salary.

The claimant testified that the termination was on 16/1/2022. The claimant had therefore only worked for half a month. The court award the claimant Kshs. 48,000/= being salary for 16 days worked in January 2023.

19. Overtime and compensation.

The court is not satisfied that the claimant has proved on a balance of probabilities that he was owed any overtime; and under payments. Those two claims are therefore dismissed for lack of proof.

20. Leave days

The claimant was entitled to 21 working days as annual leave. The claimant had not taken annual leave for the year served. The court awards the claimant Kshs. 90,000/= being one month salary in lieu of leave days not taken.

21. Certificate of Service

The respondent did not provide Certificate of Service to the claimant to enable him get alternative employment. This is an aggravating circumstance the court took into account in the award of compensation. The court directs the respondent to obey the law and provide the certificate to the claimant forthwith.

22. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:

- a. Kshs. 180,000/= in compensation.
- b. Kshs. 90,000/= in lieu of notice.
- c. Kshs. 48,000/= being salary for 16 days served in January 2022.
- d. Kshs. 90,000/= in lieu of leave days not taken.
Total award Kshs. 408,000/=
- e. Interest at court rates from date of judgment till payment in full.
- f. Respondent to provide Certificate of Service to the claimant within 14 days of the judgment.
- g. Costs of the suit

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Midega for claimant

Ekale Court Assistant

