Ochieng v Kaskazi Beach Hotel Limited (Cause 15 of 2020) [2024] KEELRC 445 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 445 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 15 OF 2020

AK NZEI, J

FEBRUARY 29, 2024

BETWEEN

KEVIN TOM OCHIENG ..... CLAIMANT

AND

KASKAZI BEACH HOTEL LIMITED ..... RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant vide a memorandum of claim dated 4/3/2020 and filed in this Court on even date. The Claimant pleaded therein that he was employed by the Respondent as an Operations Manager with effect from 15/1/2019, earning a net salary of kshs. 150,000 per month, payable in arrears at the end of each month; and that his letter of employment was dated 12/1/2019. It was the Claimant's further pleading that he worked diligently until 7/10/2019 when the Respondent unfairly terminated his employment after unsuccessfully attempting to force a resignation on the Claimant.

2. The Claimant further pleaded that upon unfairly terminating his employment on 7/10/2019, the Respondent issued the Claimant with an invoice dated 7/10/2019, claiming that the Claimant owed the Respondent ksh. 3,276,800 on account of accommodation, yet Section 31 of the *Employment Act* obligated the Respondent to provide housing to the Claimant at its cost. That indeed, it was Respondent who was indebted to the Claimant regarding unpaid salary as follows:-

    i. June 2019.....ksh. 206,424

    ii. July 2019.....ksh. 206,424

    iii. August 2019.....ksh. 206,424

    iv. September 2019.....ksh. 206,424

    v. October 2019.....ksh. 206,424

Total ksh. 1,032,120

3. The Claimant sought the following reliefs:-

   a. A declaration that termination of the Claimant's employment was procedurally and substantively unfair.

   b. Outstanding salary amounting to ksh. 1,032,120

   c. 12 months' salary being compensation for unfair termination of employment...ksh. 2,477,088.

   d. Damages for unfair labour practice and violation of Article 41 of *the Constitution* of Kenya.

   e. Costs of the suit and interest at Court rates.

4. Documents filed by the Claimant alongside the memorandum of claim included the Claimant's written witness statement, the Claimant's employment contract dated 12/1/2019, a termination of contract letter dated 7/10/2019, acceptance of resignation letter dated 4/10/2019, a letter dated 7/10/2019, a demand letter dated 29/1/2020 and a bundle of payslips.

5. The Respondent entered appearance on 9/11/2022 and filed a memorandum of Reply and a Counter-Claim on 9/11/2020. The Respondent denied the averments and claims made in the Claimant's memorandum of claim and pleaded that the Claimant voluntarily resigned after being queried on his perpetual absenteeism and dishonesty, that the Claimant was unable to perform his duties as captured in an email dated 4/10/2019; and that termination of the Claimant's employment was proper, procedural, and devoid of any malice as alleged by the Claimant. That Section 44(1) of the *Employment Act* provides for summary dismissal of an employee on account of gross misconduct.

6. The Respondent denied the jurisdiction of this Court.

7. In its counter-claim, the Respondent counter-claimed against the Claimant a sum of ksh. 3,276,800, being accommodation charges accruing from the Claimant's occupation and enjoyment of the Respondent's premises. The Respondent pleaded that upon confirmation, the Claimant moved in and occupied a single room within the Respondent's premises, before relocating to a double superior Director's sea view suite in direct contravention of paragraph 7 of his employment contract. That the Claimant's refusal to vacate the suite as directed by the Respondent attracted charges.

8. Documents filed by the Respondent alongside its memorandum of Response and counter-claim were a witness statement of Maureen Sekonde Otara dated 27/10/2020 and an evenly dated list of documents, listing 5 documents. The listed documents included the employment contract dated 12/1/2019, a letter dated 1/10/2019, an email dated 4/10/2019, Rack Rate for 2019-2020 and an accommodation invoice dated 7/10/2019.

9. The Claimant filed a Reply to the Counter-Claim on 1/2/2022 and denied the same, and thus joined issues with the Respondent.

10. Trial commenced before me on 6/2/2023 when the Claimant testified and adopted his filed witness statement as his testimony. He also produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified:-

    a. that he was not summoned to any disciplinary hearing prior to his termination.

    b. that the Claimant did not resign, and that when he received the Respondent's letter dated 4/10/2019 purporting to accept his resignation, the Claimant wrote to the Respondent on

7/10/2019 indicating that he had not resigned and was not intending to resign, and demanding to be availed a copy of the purported letter of resignation, which was not availed.

c. that the Respondent's allegations that the Claimant absented himself from work were untrue, as the Claimant was always in the hotel, and only travelled to Nairobi when looking for business, as the hotel usually dealt with conferences which came from Nairobi.

d. that the Respondent's counter-claim was malicious, and should be dismissed.

11. Cross-examined, the Claimant testified that he lived in the Respondent's hotel premises for 8 months, first pursuant to Clause No. 7 of his employment contract and subsequently on the Respondent's director's directions as the Claimant was being paid in bits, according to what the hotel could pay whenever the Claimant asked to be paid, since the business was struggling. That the Claimant complained of non-payment in his letter dated 1/10/2019 and stated that his salary had not been paid for 3 months. That the date of the invoice forming the basis of the Respondent's counter-claim was 7/10/2019, the date of the Claimant's termination letter. It was the Claimant's further testimony that the Respondent's director lived in the Hotel and had full knowledge of the Claimant's occupation of the hotel premises/director's suite. That the director's suite was at the top, and that the director had vacated it as he was on wheelchair.

12. The Respondent's witness, Maureen Sekonde Otara (RW-1), testified on 12/4/2023. She adopted her filed witness statement as her testimony and produced in evidence the documents referred to in paragraph 8 of this judgment. RW-1 further testified:-

a. that the Claimant worked for the Respondent as an Operations Manager from 15/1/2019, and stayed in the Respondent's hotel for the entire employment period. That he was given a room for 3 months' stay, and thereafter moved into a suite within the hotel, hence blocking it from being sold out to customers; and stayed there until he left employments.

b. that according to the Respondent's account's records, the Claimant owed the hotel kshs. 3,000,000 or thereabout.

c. that according to the witness (RW-1), the salary arrears owed to the Claimant by the hotel amounted to ksh. 400,000 or thereabouts, and that the Respondent could pay up the same within 4 months as they could not afford to pay the same at once.

d. that on humanitarian grounds, the Respondent did not want to pursue the Claimant over what he owed the hotel. That the Respondent would pay the Claimant what he worked for, his arrears.

13. Cross-examined, RW-1 stated that the Claimant did not resign, and did not write a resignation letter. That there were reports of misconduct on the part of the Claimant, though these were not explained in the Claimant's termination letter. The witness further testified:-

a. that she (RW-1) was a co-director of the Respondent and the Operations Manager, and that the Claimant was not given any warning letter on the alleged misconduct, and was not subjected to disciplinary proceedings.

b. that the Claimant was not provided with housing allowance, and that his payslips indicated his basic pay.

14. Re-examined, RW-1 testified that the Claimant had not been paid his salary for 4 months and 7 days. That the Respondent did not want to be paid by the Claimant, and that all that the Respondent

wanted was to be allowed to pay the Claimant's arrears by instalments, as it could not afford to pay at once.

15. Having considered the pleadings filed herein and evidence presented by both parties, issues that present for determination, in my view, are:-

    a. whether this Court has jurisdiction over the claim herein.

    b. whether the Claimant is entitled to plead unfair termination of employment and to seek compensation thereon.

    c. whether the Claimant is entitled to the reliefs sought in the memorandum of claim.

    d. whether the Respondent is entitled to the relief sought in the counter claim.

16. On the first issue, it was a common ground that there existed an employer-employee relationship between the Claimant and the Respondent from 15/1/2019 to 7/10/2019. According to the pleadings filed by both parties herein, both the Claimant's memorandum of claim and the Respondent's Counter-claim are based on the said relationship, and stem therefrom. The whole suit herein is within the parametres of Section 12 of the *Employment and Labour Relations Court Act*, and this Court is seized of jurisdiction to determine both the claim and the counter-claim.

17. On the second issue, it was a common ground that the Claimant worked for the Respondent from 15/1/2019 to 7/10/2019, for a period of 8 months and about 22 days. By dint of Section 45(3) of the *Employment Act*, the Claimant does not have the right to complain that he was unfairly terminated. The said provision of the *Employment Act* provides as follows:-

    > " An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated."

18. In view of the foregoing statutory provision, the Claimant was not entitled to plead unfair termination of employment.

19. On the third issue, the Claimant's claim for compensation for unfair termination of employment cannot succeed, and is declined, in view of the aforestated statutory provision. The claim for salary arrears succeeds, based on the Claimant's pleadings and evidence regarding the claim, and admission by RW-1 that there were unpaid salary arrears for 4 months and 7 days. The Claimant pleaded that his net salary was kshs. 150,000. He however exhibited copies of payslips indicating that his basic pay was kshs. 206,424, while the net pay (after statutory deductions) was kshs. 150,000. The Claimant's contract of employment states that his monthly net salary was kshs. 150,000.

20. In view of the provisions of Sections 49(1) (c)of the *Employment Act*, I award the Claimant kshs. 873,861.6 being his salary arrears for 4 months and 7 days, calculated based on his gross monthly salary and subject to Section 49(2) of the *Employment Act*. The claim for damages based on the alleged violation of Article 41 of *the Constitution* is declined. It is worthy noting that the Article 41 rights are enacted in the *Employment Act*, and that the Claimant cannot be allowed to anchor an employment claim on *the Constitution* directly without challenging the constitutionality of the relevant Act, which in this case is the *Employment Act*. Further, the Claimant did not set out with precision which of his

constitutional rights were violated, and how. It was stated as follows in the case of ANARITA KARIMI NJERU -VS- REPUBLIC [1979] eKLR:-

> " ...We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

21. The claim for damages cannot, in view of the foregoing, be allowed, and is declined.

22. On the fourth issue, the Respondent abandoned its claim against the Claimant at the trial herein. RW-1, who told the Court that she was a co-director of the Respodnent and the Respondent's Operations Manager, testified that the Respodnent did not wish to pursue the Claimant over the counter-claimed sum.

23. I will treat the Respondent's Counter-Claim as having been abandoned.

24. In sum, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the Claimant for a sum of kshs. 873,861.6 being unpaid salary arrears.

25. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*. Interest is awarded on the net sum payable to the Claimant, to be calculated at Court rates from the date of filing suit.

26. The Claimant is awarded costs of the suit.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH FEBRUARY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent