



**Nginga v South Lake Junction Rocky Resort Limited (Employment and Labour Relations Cause 118 of 2018) [2023] KEELRC 1107 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1107 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 118 OF 2018**

**DN NDERITU, J**

**MAY 4, 2023**

**BETWEEN**

**FRANCIS MBINDA NGINGA ..... CLAIMANT**

**AND**

**SOUTH LAKE JUNCTION ROCKY RESORT LIMITED ..... RESPONDENT**

**JUDGMENT**

**I. Introduction**

1. In a Statement of Claim dated 3<sup>rd</sup> May, 2018 and filed in court on 4<sup>th</sup> May, 2018 through Wambeyi Makomere & Co Advocates the Claimant prays for: -
  1. One month wages in lieu of notice - Kshs. 30,000.00
  2. Salary for December, 2017 - Kshs. 30,000.00
  3. Leave *pro-rata* for 7 months - Kshs. 12,250.00
  4. Salary deductions for 7 months - Kshs. 2,520.00
  5. Normal overtime public holidays Compensation - Kshs.348,923.10
  6. Public holidays - Kshs. 20,923.10
  7. Compensation - Kshs.360,000.00
  8. Costs of the suit to be borne by the Respondent -  
Total - Kshs.804,616.20
2. Together with the Statement of claim was filed a verifying affidavit, Statement by the Claimant, and a bundle of documents in support of the claim.



3. On 14<sup>th</sup> December, 2018 the Claimant appointed Maragia Ogaro & Co Advocates to act for him in place of the above law firm.
4. On 28<sup>th</sup> June, 2021 the Respondent appointed Waigwa Ngunjiri & Co Advocates to act for it and filed a Memorandum of response to the claim on 21<sup>st</sup> July, 2021. In the memorandum of response, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. On 7<sup>th</sup> February, 2022 the Respondent filed an Amended response to the claim through their now advocates on record Mutonyi Mbiyu & Co Advocates wherein it is prayed that the Claimant's cause be dismissed with costs for want of merits. The Respondent has filed a bundle of documents in support of its position that this cause be dismissed with costs.
6. The Claimant filed a reply to the amended response to the claim insisting that his claim is merited and reiterated the contents of the Memorandum of claim.
7. This cause came up in court for hearing on 13<sup>th</sup> June, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on 27<sup>th</sup> July, 2022 when Brenda Maina (RW1) testified and the Respondent's case was closed.
8. Counsel for the parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant filed written submissions on 17<sup>th</sup> August, 2022 while Counsel for the Respondent filed on 23<sup>rd</sup> September, 2022. Counsel for the Claimant filed supplementary submissions on 26<sup>th</sup> September, 2022.

## **II. Claimant's Case**

9. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel, Mr. Maragia, and the same is summed up as hereunder.
10. In his Memorandum of claim, the Claimant pleaded that he was verbally engaged by the Respondent as operations supervisor on 8<sup>th</sup> May, 2017 at a consolidated gross monthly salary of Kshs.30,000/=.
11. He pleads that he served the Respondent until 26<sup>th</sup> December, 2017, without leave, working each day from 0600hrs until 2300hrs without overtime pay. He pleads that he worked on public holidays as well without compensation.
12. The Claimant pleads that the Respondent did not reduce the contract into writing and that on 26<sup>th</sup> December, 2017 he was terminated without notice when he was ordered by the director of the Respondent, Mr. Eliud Kimeria, to leave and vacate the premises. He was handed Kshs.3,000/= as fare to go home without any other dues and or benefits being paid.
13. The Claimant also filed a statement alongside the Memorandum of claim and testified along the foregoing pleading. He testified that he was the only Operations Manager supervising waiters and attending to customers and as such, his services were required from the time of opening the restaurant at 0700hrs to sometimes beyond 2300hrs.
14. He testified that on 26<sup>th</sup> December, 2017 the director sent a manager to him and he was ordered to vacate the premises as the director "did not want to see him again". The manager, Josephine Kimani, handed to him the sum of Kshs.3,000/= to vacate the premises and he thus vacated the premises as ordered. He was not paid the salary for November, which was paid later in January, 2018, and salary for the 26 days that he had worked for December, 2017. He testified that the statutory deductions made



from his salary were not remitted to the relevant institutions including NSSF and NHIF. No notice was issued and no dues and or benefits were paid to him.

15. The Claimant denied that he stole any money from the Respondent and he denied that he deserted duty as alleged by the Respondent in the response to the claim.
16. It is on the basis of the foregoing that the Claimant prays that judgment be entered against the Respondent as prayed in the claim as set out in the introductory part of this judgment. The submissions by Counsel shall be considered in the succeeding parts of this judgment alongside those by Counsel for the Respondent.

### **III. Respondent's Case**

17. The Respondent's case is contained in the amended response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel, Mr Mutonyi, as summarized hereunder.
18. RW1, the current Manager of the Respondent, adopted her statement on record and testified that the Claimant was employed as a restaurant supervisor on 8<sup>th</sup> May, 2017.
19. She stated that the Claimant worked for eight hours per day, excluding two tea breaks of half-hour each and one lunch hour break, and in case of any overtime worked payment was either made in petty-cash at the end of the day or alongside the salary at the end of the month. She stated that at the close of the Claimant's shift she took over the supervisory duties and that the Claimant worked overtime on very rare occasions and he was paid for that as stated above. She stated that the Claimant was housed within the premises of the Respondent.
20. RW1 produced muster roll for the period that the Claimant worked with the Respondent indicating the hours worked by the Claimant including any overtime worked and payments made therefor. She stated that any public day worked was treated as overtime and paid as such. She delineated the overtime worked by the Claimant and corresponding payments made and maintained that no overtime pay is owed to the Claimant.
21. She stated that she was always in possession of the keys to the hotel premises and opened the premises each morning. She testified that the Claimant worked between 0700hrs and 0600hrs with two tea breaks of 30minutes each and a one-hour lunch break in-between. She stated that when the Claimant left work she took over the supervisory duties. She stated that the biometric clock-in is done at the gate and since the Claimant resided within the compound he did not clock-in as such.
22. She stated that on 26<sup>th</sup> December, 2017 the director visited the hotel and found a wedding dinner party going on and inquired whether the same had been paid for. The Claimant allegedly informed the director that a deposit of Kshs.25,000/= had been made and the balance in the sum of Kshs.59,500/= was to be paid before the party concluded.
23. RW1 claimed that the Claimant did not show up at work on 27<sup>th</sup> December, 2017 and all attempts to contact him on phone were fruitless as he had allegedly blocked the Respondent from contacting him. She alleged that the next time she saw the Claimant is when he came to court to testify in this cause.
24. She testified that it is the Claimant who had booked the wedding dinner party and that when the Respondent contacted the guest in January, 2018 they were informed that the balance of Kshs. 59,500/= had been paid and received by the Claimant. It is imperative to note that by this time the Claimant had already been terminated and kicked out of the Respondent's facility. She concluded that the



Claimant had collected the money and taken off without accounting for the same. She stated that the Claimant did not go back to clear with the Claimant and gave no notice for termination of his services.

25. In cross-examination, she alleged that the Claimant absconded duty, switched off and or blocked any contact with the Respondent, and indeed failed to account for the money collected from the guest as stated above. She testified that the theft by the Claimant was not reported to the police and that the Claimant did not report the desertion of duty to the labour office. She stated that the Claimant vacated the premises on 27<sup>th</sup> December, 2017.
26. She stated that the Claimant booked the event on 11<sup>th</sup> November, 2017 and collected the deposit of Kshs.25,000/= and issued the booking note produced as exhibit 2.
27. It is on the basis of the foregoing that the Respondent seeks that this cause be dismissed with costs. The submissions by the Respondent's counsel shall be considered alongside those from Counsel for the Claimant in the succeeding parts of this judgment.

#### **IV. Issues For Determination**

28. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel for both parties and the court identifies the following issues for determination –
  - a. Was the Claimant wrongfully, unfairly, and unlawfully dismissed by the Respondent or did he abscond and desert duty?
  - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
  - c. Who meets the costs in this cause?

#### **V. Dismissal Or Desertion?**

29. The terms and conditions of employment of the Claimant by the Respondent are not really in dispute. As at the time of dismissal or desertion, as the case may be, on or about 27<sup>th</sup> December, 2017, the Claimant was in employment of the Respondent as a restaurant supervisor at a gross monthly salary of Kshs.30,000/=.
30. It is also not in dispute that no notice of termination or dismissal was issued to or by the Claimant. However, the parties agree that the Claimant did not work for the Respondent as from 27<sup>th</sup> December, 2017.
31. My intelligence feels insulted by the fact that either one or both of the parties in this cause have refused to be forthright even in court. The Claimant testified that he was given an ultimatum by the director of the Respondent, Eliud Waititu Kimeria, to vacate the premises on 26<sup>th</sup> December, 2017 as the said director did not wish “to see him again”. To ensure that the Claimant indeed left the premises of the Respondent the Claimant alleged that he was given a sum of Kshs.3,000/= by the manager as fare home on the instructions of the said director.
32. The Claimant states that he has no idea as to why the director did not wish to see him again. He stated that while he attended to the client, Robert & Terry, in regard to the dinner party held on 11<sup>th</sup> November, 2017 he neither negotiated the amount payable by that client nor did he receive any payments from the said client for and on behalf of the Respondent.
33. On the other hand, the Respondent through RW1 alleges that the dinner party took place on 26<sup>th</sup> December, 2017 and that the Claimant was paid the balance of Kshs.59,500/= and then he took



off with the money in the morning of 27<sup>th</sup> December, 2017 without accounting for the same. The Respondent did not report the said theft by the Claimant to the police and it is not denied that the Claimant was given as sum of Kshs.3,000/= as fare on 26<sup>th</sup> December, 2017 as he vacated from the place of work.

34. The payment of the sum of Kshs.3,000/= to the Claimant by the Respondent is admitted by the latter even in the submissions by their Counsel. It is therefore logical to assume that the Claimant left the premises and employment of the Respondent in full knowledge and instructions or orders from the Respondent. RW1 alleged that the Claimant deserted duty after collecting a sum of Kshs.59,500/= from a client without accounting for the same. Yet she admits that this was established in January, 2018 long after the Claimant had been dismissed.
35. If indeed the Claimant failed to account for the said sum of money how come the Respondent voluntarily incurred a further sum of Kshs.3,000/= for fare to enable him get home? The evidence by RW1 does not make sense at all. It cannot be true that after the Claimant left the place of work under the foregoing circumstances that he blocked any communication from the Respondent. In any event RW1 was categorical that the Respondent only confirmed that the Claimant had allegedly received the said sum of money in January, 2018 long after he had been dismissed.
36. The Respondent did not avail any call records from any service provider to demonstrate that indeed there were efforts made by the Respondent to contact the Claimant. There is no evidence that a report was made to the area labour officer to the effect that the Claimant had deserted duty. There is no evidence that the alleged theft by the Claimant was reported to the police and or any other action taken. In any event, there is no evidence that the Claimant indeed received the alleged sum of Kshs.59,500/=.
37. In the foregoing circumstances, this court is inclined to believing the version of events as testified by the Claimant that he was ordered by the director of the Respondent to vacate the place of work and to facilitate the evacuation he was given fare in the sum of Kshs.3,000/=. With that order from the director the Claimant lost his job and no efforts were made to contact him to report back to work or pay his terminal dues. Those circumstances amount to unfair and unlawful dismissal.
38. For dismissal or termination to be fair and lawful it should meet the twin test of substantive and procedural fairness – See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
39. No reason was given for the dismissal or proved and the Claimant was obviously not subjected to procedural fairness. No notices were issued and no letter of dismissal or termination was availed in court by the Respondent. This court concludes that the Respondent wrongfully, unfairly, and unlawfully dismissed the Claimant.

## VI. Reliefs

40. Having held that the Respondent wrongfully, unfairly, and unlawfully dismissed the Claimant, this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
41. Prayer (1) is for one month's salary in lieu of notice. There is no contest on this prayer and this court has no difficulties in granting the same in the sum of Kshs.30,000/=.
42. Prayer (2) is for the salary of December, 2017. It is not in dispute that the Claimant did not work for the Respondent after 26<sup>th</sup> December, 2017 and hence he worked for 26 days only in that last month of his employment. He is therefore entitled to Kshs.26,000/= for the days worked.



43. Prayer (3) is for leave pay on pro rata basis in the sum of Kshs. 12,250/=. This claim is conceded by the Respondent and the same is awarded as prayed in the sum of Kshs.12,250/=.
44. Prayer (4) is for salary deductions in the sum of Kshs.2,520/= which was allegedly made by the Respondent but not remitted to the authorities or institutions concerned. This court takes the view that once statutory deductions are made from an employee they are no longer payable to the employee but lawfully belong to the body or institution on whose behalf the same was made. It is the NHIF, NSSF, KRA, HELB, or such other public body that should pursue the employer upon a report made by an employee. For this reason, this prayer is denied.
45. Prayer (5) is for overtime in the sum of Kshs.348,923.10. This claim is denied as the records produced by the Respondent in the form of a muster roll indicates that the Claimant was paid all his overtime worked. There is no evidence to dislodge the records produced by the Respondent. RW1 testified at length on the time schedule on which the Claimant served and supported the same with the muster roll. The Claimant was paid accordingly for overtime worked. It was explained that the Claimant resided within the hotel premises and as such he did not clock-in at the gate like most of the other employees. This is a reasonable explanation as to why there are no records on the time that the Claimant reported to and left work.
46. For the foregoing reasons prayers (5) and (6) for overtime and public holidays respectfully are denied.
47. Prayer (7) is for compensation for unfair and unlawful dismissal. Counsel for the Claimant has submitted that the court should make the maximum award of 12 months gross pay. There is no support or justification given for such an award. On the other hand, Counsel for the Respondent has proposed an award of one month's gross salary in the sum of Kshs.30,000/=. Counsel for the Respondent has argued that the Claimant worked for the Respondent for a short period of about seven months. He has cited *Evans Zimbaso Indege & 8 Others v Africa Apparels (EPZ) Limited* (2022) eKLR and *Michael Mwangi Wamwea v Brinks Security Limited* (2019) eKLR.
48. This court has taken into account the factors that should be considered in making an award for compensation under Section 49 of the *Employment Act*. The Respondent failed to offer the Claimant both substantive and procedural fairness. The evidence by RW1 in court was not forthright and the Respondent tried to conceal the truth regarding the circumstances that led to the dismissal of the Claimant. No compensation was offered to the Claimant upon dismissal and no efforts were made to either report the matter to the police, if the Respondent was of the view that the Claimant had stolen or misappropriated funds, or to call him back to work if no evidence was available for misconduct on his part. The Respondent dismissed the Claimant unfairly and unlawfully and wished the matter away. The dismissal was wrongful, unfair, and unlawful. On the other hand, the Claimant worked for the Respondent for a relatively short period of seven months.
49. In the foregoing circumstances and considering all the factors that this court should consider, I find that an award of three months gross salary would be fair and reasonable compensation. The award under this head is thus made in the sum of Kshs.90,000/=.
50. The sum of Kshs.3,000/= given by the Respondent to the Claimant as fare home was simply that and should not interfere with the award made herein.

#### IV. Costs

51. The Claimant is awarded costs of this cause.



## V. Disposal

52. In final disposal of this cause, this court issues the following orders: -

- a) A declaration be and is hereby issued that dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful.
- b) The Claimant is awarded a total of Kshs.158,250/= made as follows –
  - i. One month's pay in lieu of notice.....Kshs. 30,000/=
  - ii. Salary for December, 2017.....Kshs. 26,000/=
  - iii. Pro rata leave pay.....Kshs. 12,250/=
  - iv. Compensation.....Kshs. 90,000/=Total.....Kshs.158,250/=
- c) All the other claims are denied.
- d) Costs to the Claimant.

**DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 4<sup>TH</sup> DAY OF MAY, 2023**

.....

**DAVID NDERITU**

**JUDGE**

