



**Chege v Cool Rivers Hotel Limited (Cause 304 of 2014)
[2023] KEELRC 1975 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1975 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 304 OF 2014
DN NDERITU, J
JULY 31, 2023**

BETWEEN

JOSEPH MUREGI CHEGE CLAIMANT

AND

COOL RIVERS HOTEL LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. In a memorandum of claim dated 7th July, 2014 and filed in court on 10th July, 2014 through M. Korongo & Co Advocates the Claimant prays for: -
 1. One month salary in lieu of noticeKshs. 9,103.30
 2. Underpayment.....Kshs.103,092.80
 3. Normal overtime.....Kshs.469,818.05
 4. Public holidays.....Kshs. 40,756.45
 5. Leave.....Kshs. 16,566.90
 6. Compensation.....Kshs. 94,990.80
 - Grand totals.....Kshs.734,328.30
2. Together with the statement of claim was filed a verifying affidavit, a statement by the Claimant, and a list and bundle of the listed documents in support of the claim. A further list of documents dated 21st March, 2016 was filed on 22nd March, 2016.



3. On 21st July, 2014 the Respondent entered appearance through Karanja-Mbugua & Co Advocates and filed a memorandum of defence to the claim on 8th May, 2015. In the said defence the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
4. The Claimant filed a response to the defence on 18th September, 2015 reiterating and asserting the contents of the memorandum of claim.
5. On 23rd July, 2021 the Claimant appointed Maragia Ogaro & Co Advocates to act for him in place of his aforementioned law firm.
6. On 31st March, 2017 the Respondent filed a witness statement by Joseph Kamira Wanjau (RW1). No documents were filed by the Respondent.
7. This cause came up for hearing in open court on 26th January, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on 16th June, 2022 when RW1 testified and the Respondent's case was closed as well.
8. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the Claimant, Mr. Maragia, filed his written submissions on 20th June, 2022 while Counsel for the Respondent, Mr. Kariuki, filed on 25th October, 2022.

II. The 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 and the same is summarized as hereunder.
10. In his memorandum of claim, the Claimant pleaded that he was engaged by the Respondent as a butchery attendant on 15th November, 2007 at an agreed gross salary of Kshs.5,000/=. As at the time of termination on 19th November, 2012 the monthly gross salary was Kshs.6,000/=.
11. The Claimant pleads that he was underpaid and that his requests for review of his salary to be commensurate with government guidelines, as issued from time to time vide various Gazette Notices, were ignored and or overlooked during his entire period of employment. He has annexed to his claim a letter dated 15th May, 2009 in which he was seeking such review of salary and payment of overtime, which he produced as an exhibit during the hearing.
12. Further, the Claimant pleads that he worked between 0800hrs and 2300hrs each day without compensation for overtime hours worked. He pleads that he also worked on public holidays without pay. He further pleads that for the entire period of employment he only took annual leave once.
13. He pleads that his dismissal arose from a rather minor issue in that on or about 9th or 10th November, 2012 the director of the Respondent found a roasted chicken in the kitchen area where the Claimant was the attendant. The said director, RW1, became agitated alleging that the Respondent did not deal with chicken and that the chicken in the kitchen was evidence that the Claimant was carrying on private and side business in the premises of the Respondent without authority. On those allegations the Claimant was dismissed on the spot. The Claimant alleges that the subject chicken was an order from a customer and that there was a receipt to that effect but the director could hear none of that. He pleads that he was wrongfully, unfairly, and unlawfully dismissed alongside other two employees, George and Philip.
14. Upon dismissal the Claimant together with the other dismissed employees reported the matter to the County labour office, Nakuru, and the officer thereof wrote a letter dated 22nd November, 2012



inviting the director of the Respondent to discuss how to settle the matter. The director did not heed to the request and hence the three approached their union (KUDHEIHA) which wrote to the Respondent on 5th July, 2013 demanding that the terminal dues for the three be paid and settled. The Respondent ignored this letter as well. The two letters were produced as exhibits by the Claimant.

15. The Claimant pleads that he was denied both substantive and procedural fairness before, during, and after the dismissal, and that the dismissal was wrongful, unfair, and unlawful.
16. During the hearing in court, the Claimant testified alongside the foregoing pleadings and stated that the Respondent is a restaurant based at Lanet, Nakuru County, offering food and accommodation among other hospitality services.
17. He testified that business picked on weekends and public holidays and this explains why he always worked on public holidays. He also stated that most evenings were busy and that is how he ended up working until late in the night.
18. He stated that at the labour office he was paid a sum of Kshs.4,000/= which he stated that he did not understand what it was to cover as it could not cover his terminal dues. He stated that he did not desert duty as he was orally sent home by the director and thereafter no contact was made directing him to report back to work. He stated that he used to sign work attendance sheets which indicated that he worked between 0800hrs and 2300hrs each day including public holidays. He stated that he was denied annual leave and off-days without compensation.
19. In cross-examination, the Claimant stated that the contract of employment was oral. He stated that he applied for leave but was denied and that the Respondent is in possession of all those records.
20. It is on the foregoing basis that the Claimant is seeking for orders as per the prayers in the memorandum of claim as set out in the introductory part of this judgment. The submissions by his Counsel shall be considered in a latter part of this judgment alongside those by Counsel for the Respondent.

III. The Respondent's Case

21. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel as summarized hereunder.
22. In the response to the claim the Respondent denied each and every allegation by the Claimant alleging that the Claimant voluntarily resigned and or deserted duty. It stated that the monthly pay to the Claimant was in accordance to Government's wages guidelines as issued from time to time. It alleged that the Claimant worked for only eight hours a day, that he took all his leave and off-days, and that if the Claimant worked on public holidays he was paid at double the normal rate.
23. In paragraph 8 of the defence the Respondent pleaded that it had all the records of employment in regard to the Claimant. However, no such documents and or records of employment were availed, filed, or produced in court.
24. In his testimony in court RW1 stated that he is the managing director and the owner of the Respondent. He stated that the Claimant's main duty was to prepare meat for customers. He stated that the Claimant used to work from 0800hrs to about 1600hrs. He stated that the Claimant was engaged on an oral contract and that his last salary was Kshs.6,000/=.
25. RW1 stated that on or about 19th or 20th November, 2012 he found the Claimant preparing chicken yet the Respondent did not deal with chicken. He allegedly left the matter to the manager to deal with. He stated that on 21st November, 2012 the Claimant asked for payment of his dues because he wanted to terminate his employment.



26. He alleged that to avoid prolonged arguments he let the Claimant to leave employment. He alleged that the Claimant worked for six days a week and that he took all his leave and off-days. However, no records were produced to authenticate this allegation. He admitted that the Claimant worked for the Respondent for about five years. This witness stated that he attended a meeting at the labour office but the parties did not agree on the quantum of the terminal dues.
27. In cross-examination the witness admitted that no records and or documents were filed in court by the Respondent notwithstanding that he insisted that the records are available. He stated that the manager who engaged the Claimant after the Claimant was allegedly found roasting unauthorized chicken was still working with the Respondent but they had opted not to call him as a witness in this cause. He insisted that the Claimant left the employment voluntarily.
28. He stated that the chicken that the Claimant was found roasting was his personal order which was irregular as he was using the resources of the Respondent. He stated that the Claimant had stolen the chicken from the kitchen and to safe face he decided to resign.
29. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The submissions by its Counsel shall be considered alongside those of the Claimant's Counsel in the succeeding parts of this judgment.

IV. Issues for Determination

30. 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 unfairly and unlawfully terminated or wrongfully dismissed by the Respondent? Or
 - b. Did the Claimant resign voluntarily or desert duty?
 - c. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - d. Who meets the costs in this cause?

V. Dismissal/Termination or Resignation?

31. The terms of engagement of the Claimant by the Respondent are not in dispute. By way of an oral agreement the Respondent engaged the Claimant as a butchery attendant on 15th November, 2007 at a monthly gross salary of Kshs.5,000/=. As at the time of termination or resignation on or about 19th or 20th November, 2012 the Claimant's gross monthly pay was Kshs.6,000/=.
32. On issue (a) the Respondent was under legal obligation to afford to the Claimant a fair hearing before termination. To a large extent the law is now settled on what constitutes fair hearing. An employer has to have a good legal reason for initiating disciplinary action and an employee has to be offered and afforded a fair hearing based on sound procedural fairness grounded on rules of natural justice. The above twin tests constitute what is referred to as substantive and procedural fairness respectively – 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.
33. The Respondent's case is that the Claimant voluntarily resigned and or left employment to safe face after he was found making his personal order using resources of the Respondent. On the other hand,



- the Claimant is categorical that he was dismissed on flimsy grounds in that the alleged chicken was an order from a customer and the receipts showed so. The Respondent did not call the manager who handled the matter yet the court was informed that the said manager is still in employment of the Respondent. No explanation was given as to why the said manager did not testify.
34. The testimony by RW1 in this regard does not make sense. The Claimant had worked for the Respondent for over five years before dismissal. No negative disciplinary record was availed or any other issues that would have made the Claimant vulnerable to want to leave employment. There is no evidence that he had found other or alternative employment. In his own words RW1 alleged that the Respondent did not deal in chicken while at the same time alleging that the chicken had been stolen from the kitchen. There is no letter of resignation from the Claimant, the manager who handled the matter was not called as a witness, notwithstanding that he is still in employment of the Respondent.
 35. In the considered view of this court RW1 was so unreasonably incensed by the rather minor issue of a roasted chicken that he decided to dismiss the Claimant without following due process as provided for in the law. No hearing was held, no notice was issued, and no letter of dismissal was served upon the Claimant. No terminal dues were paid to the Claimant except for an admitted sum of Kshs.4,000/= which has not been explained as to what it catered for.
 36. This court comes to the logical and reasonable conclusion and holds that the Respondent unlawfully and wrongfully dismissed the Claimant without notice and without affording him both substantive and procedural fairness as envisaged by the law under Sections 41, 43, 45, and 47 of the Employment Act (the Act).
 37. No notice of termination or dismissal was issued to the Claimant and no disciplinary hearing was held. That is what may be described as a classic example of wrongful, unfair, and unlawful termination – See Anthony Makala Chitavi v Malindi Water & Sewerage Company Limited (2013) eKLR, Kenya Commercial Food & Allied Workers Union V Meru North Farmers Sacco Limited (2014) eKLR, and Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR.
 38. Counsel for the Respondent in his submissions argues that the Claimant was dismissed on reasonable suspicion of having committed an offence against the Respondent or its property to the detriment of the Respondent. There is no evidence that the Claimant had stolen or that there were reasonable grounds to found suspicion of theft so as to bring this issue under the purview of Section 44(4) of the Employment Act (the Act).
 39. In regard to issues (b) and (c) for determination, this court returns that the Respondent wrongfully dismissed the Claimant denying him both substantive and procedural fairness. The Claimant neither resigned nor deserted duty. It is so declared.

VI. Reliefs

40. Having held that the Claimant was wrongfully, unfairly, and unlawfully dismissed by the Respondent, this court shall now consider each of the reliefs sought as hereunder.
41. Prayer (1) is for one month's salary in lieu of notice. From the calculations and tabulations in the memorandum of claim, the Claimant indicates that the salary paid to him did not include house allowance. There is no evidence that he was housed by the Respondent. Basing his calculations on the various legal notices that have been availed and exhibited the Claimant has submitted that his gross salary as at the time of dismissal ought to have been Kshs.9,103.30. There are no alternative Gazette Notices that have been availed by the Respondent to counter or dispute those availed by the Claimant. No notice of dismissal was issued to the Claimant and as such he is awarded Kshs.9,103/= as prayed.



42. Prayer (2) is for underpayments in the sum of Kshs.103,092.80. The underpayments claim relate to the period from 1st May, 2009 to October, 2012.
43. This cause was filed in court on 10th July, 2014 and under Section 90 of the Act any amount awardable can only relate to a period of three years immediately preceding the date of filing of the cause in court. That goes back to about June, 2011. In the circumstances, the only amounts payable under this head are those in items (c), (d), and (e), that is Kshs.36,586.20, Kshs.16,413.20, and Kshs.6,204.60 making a total of Kshs.59,204/=. This is the amount that the court hereby awards under this head.
44. Prayer (3) is for Kshs.469,818.05 for normal overtime. The Respondent admitted that it had no records to show how many hours the Claimant worked for the entire period that he worked for the Respondent. While lack of those employment records does not automatically authenticate the claim by the Claimant, it is still the duty, obligation, and burden of the Claimant to prove his case on a balance of probability that the allegations made are true.
45. A close scrutiny of Section 10(7) of the Act indicates that failure of the employer to produce records of employment exposes the employer to bear the burden of any term of the contract alleged by the employee. Overtime is a matter of fact that shall be compensated under the Act if proved. It need not be an express term of the contract. It was the duty of the Claimant to prove that he indeed worked overtime.
46. The Claimant testified that he worked from 0800hrs to 2300hrs and that he signed attendance sheets or duty roster. RW1 admitted that there are records of work attendance for all employees including the Claimant, yet no such records were either filed or availed in court. In those circumstances, this court shall make the presumption that if the said documents and records were availed and produced in court they would support the Claimant's case and or that they would be against the position taken by the Respondent.
47. However, as it has been held in an earlier part of this judgment, the Claimant may only be paid for dues that were payable up to three years preceding the filing of the cause in court. As noted above this goes back to June, 2011. In view of the foregoing, only items in (d), (e), and (f) may be considered under this head in the following sums, Kshs.108,538.30, Kshs.61,378.70, and Kshs.4,262.40 respectively making a total of Kshs.174,179.30. This is the amount that is awarded to the Claimant under this head.
48. Prayer (4) is for pay for public holidays worked in the sum of Kshs.40,756.45. The Claimant testified that his work picked during public holidays and weekends as that is the time when patrons frequent restaurants. That is a matter of fact and commonsense that need not be overemphasized. Again, only those items that relate to the period from June, 2011 may be compensated. Those items are (d) and (e) in the sum of Kshs.11,844.50 and Kshs.3,653.50 respectively making a total of Kshs.15,498/= and this is the amount that is awarded to the Claimant under this head.
49. Prayer (5) is for leave pay in the sum of Kshs.16,566.90. Under this head only leave pay for the last year worked is payable as the others claimed in the memorandum of claim go beyond the statutory limitation. The amount claimed for the said valid period is Kshs.4,899.30 and this is the amount that is awarded under this head.
50. Prayer (6) is for compensation for wrongful, unfair, and unlawful termination equivalent to 12 months gross pay at the rate of Kshs.7,915.90/= per month. However, the Claimant pleaded, and this court found in his favour in the foregoing parts of this judgment that his rightful gross monthly salary ought to have been Kshs.9,103/= and hence this is the amount that shall be applied in calculating any awardable amount under this head. Section 49(4) of the Act provides a sample of the factors that this court ought to consider in making an award under this head.



51. This court has already found that the dismissal was wrongful, unfair, and unlawful both in substance and procedure. The parties have not expressed willingness to re-engage and this court cannot order reinstatement as time has expired within which such an order may be made. The Claimant had served the Respondent for a period of over five years as at the time of termination. There is no doubt that the service that the Claimant was offering as a butchery attendant is not a specialized service and opportunities for the said service are to a large extent available in the job market. It is however noted that the Respondent did make some payments to the Claimant in terminal dues as stated in the foregoing parts of this judgment in the sum of Kshs.4,000/= as admitted by the Claimant in his testimony in court. This court has not detected any undue conduct on the part of the Claimant that might have contributed to the termination.
52. Considering all the relevant factors as enumerated above and in the interest of fairness and justice, this court is of the considered view that an award of six months gross salary is fair and reasonable compensation to the Claimant. The same is calculated as Kshs. 9,103/= *6 = Kshs.54,618/=.

VII. Costs

53. The Claimant is awarded costs of this cause.

VIII. Disposal

54. In final disposal of this cause, this court issues the following orders: -
- a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was wrongful, unfair, and unlawful.
 - b) The Claimant is awarded a total of Kshs.313,501.30 made up as follows –
 - i. Salary in lieu of noticeKshs. 9,103.00
 - ii. UnderpaymentsKshs. 59,204.00
 - iii. Overtime payKshs.174,179.30
 - iv. Public holidays payKshs. 15,498.00
 - v. Leave payKshs. 4,899.30
 - vi. Compensation for wrongful,unfair, and unlawful dismissal..... Kshs. 54,618.00
 - TotalKshs.317,501.30
 - Less paid as admittedKshs. 4,000.00
 - Balance due and payableKshs.313,501.30
 - c) All the other claims are denied.
 - d) Costs to the Claimant.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 31ST DAY OF JULY, 2023.

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DAVID NDERITU

JUDGE

