



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2626 OF 2016

GEORGE ORITO KUYA.....CLAIMANT

VERSUS

FAHARIA FATUMA MOHAMED T/A HEROES GRILL.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 22nd December, 2016 seeking the following reliefs; -

- i. A declaration that the termination his employment was unlawful and unfair.**
- ii. The he be paid his terminal benefits amounting to Kshs.1, 089,428.57.**
- iii. The Honourable Court do issue such Orders and give such directions as it may deem fit to meet the ends of justice.**
- iv. The Respondent to issue him with a certificate of service in term as of section 52 of the Employment Act.**
- v. The respondent to pay costs of this claim**
- vi. Interest on the above at Court rates.**

2. The respondent filed a response to the claim on 13th January, 2017 contending that she employed the claimant as Chef though in the year 2014 but denied that she unfairly dismissed him from service. On the contrary she averred that the claimant absconded duty after seeking two days' permission on the 14th July, 2016 to attend to his ailing father but he never reported back to work. Her efforts to have the claimant resume work were futile. Therefore she prayed for the suit to be dismissed with costs.

3. The suit proceeded to hearing on the 18th March, 2021 when both parties gave evidence and thereafter filed written submissions.

Claimant's Case

4. The claimant testified as CW-1 and basically adopted his witness statement dated 22.12.2016. In brief he testified how he worked for the Respondent from 1.1.2012 until 11.7.2016 when he received a call from the Respondent asking him not to report to work. Nevertheless, he reported to work but he was sent away until further notice. Therefore he denied the allegation by the respondent that he absconded duty and maintained that he was dismissed.

5. He further testified that he never went for leave during his entire period of service to the Respondent and he was also not housed or paid house allowance by his employer. Finally he testified that he worked on an aggregate of 12 hours a day without any overtime pay for the 4 extra hours.

6. On cross examination, he admitted that telephone number 0725xxxxxx belongs to him. He contended that he received a call from the Respondent on 11.7.2016 through a strange number which he could not remember. He also could not remember the respondent's personal phone number. However, he admitted that he never pleaded in his claim that he received a call.

7. He further admitted having he received from the respondent, text messages in his phone number 0725xxxxxx on 18.7.2016, 21.7.2016,

8.8.2016, 11.8.2016 and 12.8.2016 (see FMN-2). He further admitted that, the text messages were calling her back to work and later for return of uniform. Again he admitted that he responded to the respondent's text messages promising to visit the Respondent's office and also apologizing for not returning the uniform.

8. He further testified that during the months of Ramadhan, the respondent was closing down the business, but he used to report to work at 11am and leave at 11 pm because muslims were coming to eat at night. He denied that he was being paid daily and maintained that he was being paid on monthly basis.

9. With regard to the letter by the employer to the labour office, the claimant testified that the same was done after he had already been dismissed on 11.7.2016 and the first time it was shown to him was after he filed this suit. Finally he stated that he returned the uniform on 19.10.2016 but he was never paid terminal dues.

10. On re-examination, he admitted that he never reported back to work until 19.10.2016 when he returned the uniform. He maintained that he was dismissed without being subjected to any disciplinary process and without being issued with a notice to show cause.

Respondent's Case.

11. The Respondent testified as RW-1 and confirmed that she is the proprietor of Heroes Grill. She testified that she employed the claimant as a Chef together with another employee by the name Mohamed Kazungu and they worked in shifts of 8 hours each. The claimant's salary was Kshs 600 per day equaling to Kshs. 18,000 per month but the same was paid on daily. She testified that on 15.7.2016 she gave the claimant permission to visit his ailing father for 3 days and he was expected back to work on 18.7.2016 but he did not.

12. The respondent further testified how she called the claimant severally but her call was not answered. She then sends several text message to him inquiring about his whereabouts but again no response was elicited until 15.8.2016 when the Respondent reported the claimant's desertion to the labour office. On 17.10.2016 the claimant responded to the text messages from his employer.

13. The respondent denied the claim for 15 days worked in July, 2016, contending that the claimant was being paid on daily basis upto 15th July 2015 and as such the said claim is without merits.

14. On cross examination she maintained that she employed the claimant in May, 2014 but she did not issue him with letter of employment. She maintained that she used to pay the claimant on a daily basis and she never deducted any NSSF or NHIF. She testified that the claimant was also working for other people. She stated further that the claimant used to report to work at 10 am and leave at 5 pm or 6pm. She maintained that there was another chef who exchanged shift with the claimant and denied that the claimant was working overtime.

15. She reiterated that the claimant sought for permission to visit his ailing father but he failed to report back to work again. She stated that the claimant never worked continuously but also admitted that she never kept records for her employees to prove that allegation. She further admitted that the claimant never took his leave and she also never paid him in lieu maintaining that he never worked continuously.

16. She also admitted that she never paid the claimant any service pay for the 2 years worked and further that she never gave a Certificate of Service. She contended that the wages paid to the claimant included Housing allowance. Finally she maintained that the claimant deserted his employment from 18th July 2016 and as such the issue of reason for dismissal does not arise.

Claimant's submissions.

17. The Claimant submitted from that he was unfairly terminated and that the termination was not informed by any valid reason as envisaged under section 43 of the Employment Act. He further submitted that section 10(7) and section 43(1) of the Employment Act places the burden of proving substantive fairness on the employer.

18. To fortify the said submission, he cited the case of **Kenya Union of Commercial Food and Allied Workers Vs Meru North Farmers Sacco Limited [2014] eKLR** and **Anthony Mkala Chitavi V Malindi Water and Sewarage Co. Limited [2013] eKLR** where the Court discussed the doctrine of fair termination of employment.

19. On whether the claimant was subjected to due procedure, it was submitted that the claimant was neither issued with any notice to show cause, nor was he subjected to disciplinary hearing before his services were termination. He argued that the provisions of section 41 are mandatory and any decision made in disregard thereof is unfair. For emphasis he relied on the case of **Elizabeth washeke and other V Airtel (k) Limited and another [2013] eKLR**.

20. Finally, the claimant submitted that he has demonstrated his case on a balance of probability and urged this Court to allow the claim as prayed.

Respondent's Submissions.

21. The Respondent, on the other hand submitted that the claimant absconded duty after seeking leave for three days starting 15.7.2016 but he never reported back to work. It argued that it has demonstrated to this Court, that she made effort to contact the claimant through phone calls and text message and when she failed to receive any response, she wrote a letter the labour office.

22. She argued that the burden of proving unfair termination rests with the employee and the employer is only tasked with justifying the grounds for the termination as per section 47(5) of the Employment Act. To fortify that argument the Respondent cited the case of **Wilson**

Mudogo Mulima Vs AGS worldwide movers (K) Limited [2014] eKLR where the Court held that;-

“Section 47(5) of the Employment Act places the burden of proof in any action where an allegation of wrongful dismissal or unfair termination is made on the employee. The employer on the other hand has the burden to discharge that the dismissal was justifiable.20.Whilst the Claimant claims he was verbally terminated, he did not raise this issue to rebut the accusation by the Respondent that he absconded duty beginning the date he alleges he was verbally terminated to wit 2nd April. Further nothing in his pleadings or evidence at the trial was brought forth to show that he tried to report to work and was turned away by the Respondent. To this extend the Court is not persuaded that the Claimant was verbally terminated on 2nd April, 2012. On standard of proof in a civil case such as this, it is most probable that the Claimant was absent from duty without authority from 2nd April, 2012 as alleged by the Respondent than not. His claim for verbal termination of employment therefore fails and is hereby dismissed.”

23. In brief the Respondent submitted that the claimant had absconded duty and therefore is not entitled to the reliefs sought in the claim.

Issues for analysis and determination.

24. Having carefully considered the pleadings, evidence and submissions, the issues for determination are: -

a) Whether the claimant was unfairly dismissed from employment or he deserted employment.

b) Whether he is entitled to the reliefs sought.

25. The Claimant’s case is that he was dismissed from employment by the Respondent unfairly contrary the provisions of Section 45 of the Employment Act which that provides the employer should not terminate an employee’s employment without a valid and fair reason and without following a fair procedure.

26. However, the Respondent on the other hand denies the alleged dismissal and maintains that the Claimant absconded duties without after the lapse of the three off days he had sought to attend to his ailing father. She contended that she tried to reach him, via phone calls and text messages, to resume work but all was in in vain. Consequently, she submitted that the issue of valid reason for dismissal does not arise in this case since it is the claimant who deserted his employment.

27. Absconding duty is a ground for summary dismissal under Section 44(4)(1) of the Employment Act. For a defence of absconding duty to succeed, the employer must show efforts it took to contact the employee, before summarily dismissing him. In the case of **Simon Mbithi Mbane v Inter Security Services Limited [2018] eKLR** where **Abuodha J.** stated that ;-

“an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”

28. Similarly, Nduma J. in the case of **Joseph Nzioka v Smart Coatings Limited [2017] eKLR** stated that;

“dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties”

29. In this case the respondent has proved on a balance of probability that the claimant was given three days off to attend to his ailing father but he failed to report back. She has also proved that she contacted the claimant through his mobile number on 18th July, 2016 asking him to report back to work. She also sent other text messages on the 21.7.2016 and 8.8.2016 to the claimant but she received no response forcing her to write to the labour office on 15th August to report his desertion from duty.

30. The claimant admitted that he is the owner of the telephone line number 0725157819 and that he received the text messages from the employer. He further admitted that he responded to his employer also via a text message on 17th October 2016 admitting that he did wrong to his employer and apologized. Consequently, I find and hold that the claimant was not dismissed by the respondent but he voluntarily deserted his job from 18.7.2016 without notice to the employer.

Remedies.

31. In view of the foregoing finding, I decline to declare that the claimant was unfairly dismissed. Accordingly the claims for salary in lieu of notice and compensation for unfair termination are not merited.

32. Similarly the claim for 95 days of leave earned must fail because the claimant did not plead any particulars of how he arrived at the said days. Parties are bound by their pleadings and it is not upon the court to improve on the pleadings so as to justify an award.

33. Service gratuity is also claimed but again there is no legal or contractual basis upon which the said gratuity is sought. I seek support from the case of **H. Young & Company EA Limited vs. Javan Were Mbango [2016] eKLR** where the Court stated thus;

“This Court in Central Bank of Kenya vs. Davies Kivieko Muteti [2009] eKLR emphasized that there is a difference between severance pay and gratuity. Gratuity as correctly enunciated by this Court in Bamburi Cement Ltd vs Farid About Mohammed

[2016] eKLR denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the Employment Act. It is usually payable under terms set out in a contract of service or collective bargaining agreement. Severance pay on the other hand, is only payable under Section 40(g) of the Employment Act where an employee is terminated on account of redundancy. See Hema Hospital vs Wilson Makongo Marwa [2015] eKLR. In the current appeal before us the respondent was entitled to severance pay at the rate of not less than fifteen days' pay for each completed year of service."

34. Similarly, in *Bamburi Cement Limited V William Kilonzi [2016] eKLR*, this Court observed thus:-

"Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer".

35. With regard to the House allowance prayed for, the Respondent has indicated that the salary given to the claimant was an all-inclusive sum of Kshs 18,000 per month, this pay factored in the house allowance and the claim of house allowance is therefore declined. The claimant did not tender any evidence to prove that the wages underpaid.

36. The claimant also prayed for overtime worked. He claimed that he reported to work at 6:30am and left at 6:30 pm. The Respondent on the other hand averred that the claimant report at 10 am and left at 5 pm or 6pm at times. It was further argued that the claimant worked in shift with another chef each covering an aggregate of 8 hours per day. The fact that the claimant worked in shift was not challenged in his reply to defence filed on 7.6.2018, neither was there evidence adduce to back up this claim. Therefore the claim for overtime is declined.

37. The claimant will however be issued with a certificate of service as provided for under section 51 of the Employment Act because he worked for more than 4 consecutive weeks.

38. In conclusion, I find the suit to be without merits and it is dismissed save for the prayer for Certificate of Service. Each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF JANUARY 2022.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE