



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**CAUSE NO 42 OF 2018**

**KENNETH ONIALO.....CLAIMANT**

**VERSUS**

**MAJLIS RESORT LAMU T/A MAJLIS LAMU LTD.... RESPONDENT**

**JUDGMENT**

1. This claim was instituted by the Claimant against the Respondent through a Memorandum of Claim filed on 9<sup>th</sup> April 2018. The Claimant, who asserts that he was an employee of the Respondent, alleges that he was unfairly terminated. As a result, he filed these proceedings to seek damages for wrongful termination as particularized in the Memorandum of Claim.
2. The Respondent filed a reply to the Claim in which it denies unlawfully terminating the contract of service between the parties. On the contrary, it is the Respondent's case that the Claimant unilaterally abandoned employment when he resigned without notice. As a result, the Respondent asserts that it suffered loss in its business for which it has counterclaimed compensation.
3. The brief uncontested facts of the case are that the Respondent hired the Claimant on 1<sup>st</sup> July 2013 to provide the Respondent's establishment the services of a Chef. Although the Respondent initially appeared to deny that the monthly salary of the Claimant was Ksh. 80,000/= as asserted by the Claimant, it subsequently conceded this fact at paragraph 20 of the Reply to Memorandum of Claim and Counterclaim.
4. The parties continued in the relationship until 14<sup>th</sup> December 2017 (or shortly before then) when the Claimant resigned. In his Memorandum of Claim, the Claimant asserts that the resignation communication to the Respondent provided for a notice period of one week before it could take effect. However, this is contested by the Respondent which appears to assert that the resignation was without notice.
5. It is this resignation that appears to have precipitated the proceedings before this court. According to the Claimant, the Respondent failed to settle the Claimant's terminal dues upon the aforesaid resignation. Consequently, the Claimant moved to court to claim unfair termination.
6. Conversely, the Respondent's position is that it did not unlawfully terminate the Claimant since the Claimant voluntarily resigned from employment. Further, this resignation was without notice to the Respondent thus occasioning the Respondent's business immense losses.
7. I have reservations about the legal personality of the Respondent as presented in the pleadings and whether it is capable of suing and being sued as such. However, in the affidavit verifying the contents of the Counterclaim, one Stefano Moccla seems to suggest that the Respondent is a corporate person by describing himself as its director. Further, neither of the parties appears to raise concerns on the capacity of the Respondent to be sued as presented. Consequently, I will presume that the Respondent is a legal person capable of suing and being sued as described in the pleadings and say no more on this issue.
8. Both parties filed their respective witness statements and lists of documents. Besides relying on their witness statements, they also gave oral testimony.
9. At the close of the case, the Respondent filed written submissions. The submissions reiterate the Respondent's positions in the suit. Despite being given an opportunity to file his submissions, the Claimant had not done so at the time this Judgment was written. In this decision, I have considered the evidence on record together with the Respondent's Submissions.
10. In my view, the issues for determination in the cause are as framed by the Respondent to wit the following: -

**a. Whether there is a case for unfair and unlawful termination of the Claimant.**

**b. Whether the Claimant is entitled to the reliefs sought in the claim.**

**c. Whether the Respondent is entitled to the reliefs sought in its counterclaim.**

**d. Who is to bear the costs of the suit?**

11. In his evidence, the Claimant stated that he was employed by the Respondent on 1<sup>st</sup> July 2013. That he served in the Respondent's establishment as a Chef. That he resigned from employment on 14<sup>th</sup> December 2017. That at this time, he had served the Respondent for a period of four years and six months.

12. It was the Claimant's further case that after he resigned, he asked to be paid his terminal dues but this was not done by the Respondent. This forced the Claimant to seek the intervention of the local labour office which issued a demand to the Respondent. That following this intervention, the Respondent agreed to pay the Claimant Ksh. 318,989/= but reneged on this agreement. As a result, the Claimant filed this claim to seek the court's intervention in resolving the dispute.

13. The Claimant asserts that the actions by the Respondent constituted unfair termination. He alleges that after he issued his resignation, the Respondent did not call him for a hearing. That further, the Respondent did not pay the Claimant's dues thus occasioning the Claimant financial distress.

14. The Claimant seeks for the following reliefs: -

**a. Payment in lieu of one month's notice.**

**b. Payment of service pay for 4 years.**

**c. Pay in lieu of leave for a period 3 years.**

**d. Pay for the days worked in December 2017 before he resigned.**

**e. Pay in compensation for public holidays the Claimant had worked for 3 years.**

**f. Pay for pending off days.**

**g. Compensation for unfair termination.**

**h. Costs of the case.**

**i. Interest on the sum the court will award at court rates.**

**j. Any other relief the court will deem fit to grant.**

15. In cross examination, the Claimant stated that he understood that there was an obligation on an employee (in much the same way as the employer) to give notice before terminating a contract of service or pay to the employer an amount equivalent to salary for the notice period in lieu of such notice. He insisted that he complied with the requirement of notice by issuing such notice to the Respondent. That he gave notice of 15 days.

16. He indicated that the notice for resignation which was sent out by email on 9<sup>th</sup> December 2017 indicated that the resignation was with effect from 8<sup>th</sup> December 2017 even though it requested for his release by 12<sup>th</sup> December 2017 to enable him report to his new work station on 15<sup>th</sup> December 2017. In his view, this email satisfied the requirement of notice to terminate his services with the Respondent.

17. The Claimant conceded that it was his action that terminated the contract of service between the parties. This was after he issued the letter of resignation. Yet, he still held the view that he could lawfully claim damages for unfair termination against the Respondent. However, the Claimant conceded that the Kilifi Labour office had declined to entertain the head of damages titled "unfair termination" as it lacked merit.

18. In re-examination, the Claimant still appeared to insist that despite the fact that he is the one that issued notice to resign from work, it is the Respondent who terminated the contract of service between the parties. Even though he had failed to explain how he arrived at the heads of damages he pleads in the Memorandum of Claim during cross examination, in re-examination, the Claimant suggested that the workings were done by the Kilifi Labour office. He also suggested that the Respondent had agreed but later declined to pay out the quantum of damages as recommended by the Labour Officer. He denied that his decision to resign caused the Respondent any loss.

19. On its part, the Respondent gave evidence through one Stefano Moccla. The said witness confirmed that the Respondent hired the Claimant in 2013 as a Chef at its hotel establishment. That the parties worked together until December 2017 when the Claimant resigned. That the resignation happened during the peak season in the Respondent's business.

20. RW1 stated that the Claimant asked to leave immediately and that he failed to give the Respondent the requisite notice to terminate the contract of service as required in law. That at the time of resignation, the Claimant had worked for only eight (8) days in the month of

December 2017.

21. It was RW1's evidence that the Claimant's resignation disrupted the Respondent's business. The Respondent's clients could not get meals prepared to their taste due to the hasty departure of the Claimant who had been trained to discharge this function as the head Chef.
22. The witness stated that as a result of the Claimant's sudden resignation, the Respondent was forced to incur additional expenses in paying additional emoluments to the remaining Chefs due to the increased workload. Despite this, dissatisfied clients began posting negative reviews of the Respondent's business thus causing the said business to plummet. The witness introduced as exhibits some of the adverse comments by the Respondent's clients.
23. The witness stated that the Respondent had invested heavily in training the Claimant as Chef. He provided recommendations from the trainers as exhibits.
24. Besides, RW1 asserted that the Respondent ensured that the Claimant was well catered for while in employment. That he was housed, provided with meals, granted off duty and leave days.
25. In effect, the Respondent gave the impression that the Claimant's behavior was a betrayal of the trust the Respondent had bestowed on him. That this conduct had occasioned the Respondent extreme inconvenience and losses.
26. In cross examination, RW1 confirmed that the Claimant was engaged orally and there was never a written contract of service between the parties. That the Claimant's monthly salary was about Ksh 80,000/=. That the Claimant had worked extremely well until he suddenly resigned. That the resignation was with immediate effect. It was without notice.
27. RW1 confirmed that in an apparent fit of rage following the resignation, the Respondent's directors threatened to sue the Claimant if he did not resume duty and that they vowed not to pay the Claimant any terminal dues if he elected not to report back to work. Despite these threats, the Claimant did not report back.
28. Although the Respondent pleaded loss of business as a result of the Claimant's sudden departure, RW1 stated that they had no documents to demonstrate that the loss the Respondent suffered around the time in question was directly attributable to the resignation in question. He nevertheless attributed the decline in the Respondent's business between 2017 and 2019 to the Claimant's decision to resign which he said resulted in poor client review of the establishment. The witness produced as exhibits the Respondent's financial reports from 2016 to 2018 to demonstrate the institutions financial trends.
29. The witness stated that he was aware of attempts by the Kilifi Labour office to resolve the dispute between the parties arising from the impugned resignation. However, there was never an agreement that the Respondent pays the Claimant Ksh. 318,989/= in settlement of the matter.
30. RW1 confirmed that the Respondent later paid out to the Claimant some Ksh. 68,000/=. However, this payment was not in acknowledgement of any wrongdoing by the Respondent. It was only made pending the parties' agreement on the final dues to the Claimant less any setoff that the Respondent would be entitled to set up against the Claimant.
31. Having considered the evidence as presented, it is clear to me that this is not a case for unlawful dismissal as pleaded by the Claimant. The Respondent did not terminate the contract of service between the parties. Rather, the Claimant voluntarily resigned from duty to seek greener pastures. Consequently, sections 41, 43 and 45 of the Employment Act have no application to this dispute. I will therefore answer issue number one (1) as framed by the Respondent in the negative.
32. The Claimant having voluntarily resigned from duty, this case falls for consideration under the provisions of sections 35, 36 and 38 of the Employment Act. Suffices to mention that under the current regime of employment law in Kenya, whilst the employer must justify a termination of a contract of service by providing reasons for the decision, no such obligation exists as against an employee. All the law requires of an employee terminating the contract is to issue the employer with the requisite notice to terminate or pay to the employer an amount equivalent to the notice period should he/she opt not to give notice. I have read the decision by my sister Mbaru J in ***Jaswinder Kaur Ghataanura v Naredrasing R. Mahinda & Another (2013) eKLR*** suggesting that the employee has a duty to justify his/her resignation in much the same way as the employer. With respect, I hold a contrary view as expressed above. Having carefully considered Part VI of the Employment Act which deals with termination and dismissals, I am unable to find the provision of law that justifies the conclusion that an employee must furnish the employer with reasons for the decision to resign from employment.
33. Under section 38 of the Employment Act, the employer can elect to waive the obligation on the employee to continue working during the duration of the resignation notice period. Where such waiver is granted, the employee will be required to cease employment immediately. And the employer waiving the notice will be required to pay the employee the full salary for the duration covering the notice period.
34. In the current case, there is no evidence that the Respondent waived the need for the Claimant to continue serving during the notice period contemplated in law. Consequently, section 38 of the Employment Act does not apply to the dispute.
35. The net effect of the foregoing is that the Claimant was in law required to issue the Respondent with the requisite notice to terminate the contract of service. Under section 35 of the Employment Act, the duration of the notice to terminate is directly proportionate to the duration one has to work in order to earn a wage. In this case, the oral contract of service appears to have been one in respect of which the Respondent was to pay the Claimant salary periodically at intervals of one month. Such arrangement would only regularly terminate if either party issues the other a termination notice of not less than twenty eight (28) days unless the parties have agreed on an extended period of notice.

36. The Claimant concedes that he gave less notice than that provided for under section 35 of the Employment Act. In his evidence, he suggested that he gave notice of fifteen (15) days. Yet, in his Memorandum of Claim, he pleaded that he gave the Respondent a one week notice to terminate.
37. In the email communicating the decision to resign, the Respondent mentions that his resignation was with effect from 8<sup>th</sup> December 2017, a day before he sent the email. Further on in the said email, he pleads to be released by 12<sup>th</sup> December 2017. The totality of the notice as communicated in the Claimant's email of 9<sup>th</sup> December 2017 cannot by any stretch of imagination be said to have been notice in compliance with the provisions of section 35 of the Employment Act. I therefore find that the Claimant resigned without notice to the Respondent as required under section 35 of the Employment Act.
38. Having so resigned without notice, section 36 of the Employment Act obligated the Claimant to pay the Respondent salary equivalent to the notice period. Although the Respondent claims that the notice period was to have been for three (3) months, section 35 of the Employment Act provides for a minimum notice of twenty (28) days unless the parties had by agreement improved on this period. There was no evidence that the parties to this dispute agreed on an extended notice period. The Claimant was therefore required to have either issued the Respondent with a twenty eight (28) days' notice to terminate or paid an amount equivalent to salary for that period in order to regularly terminate the contract of service.
39. There is no evidence that the Claimant paid the Respondent this amount. On the contrary, it is the Respondent which appears to have paid the Claimant some Ksh. 68,000/=. In view of the fact that the Claimant neither issued the requisite notice to the Respondent nor paid the Respondent an amount equivalent to the Claimant's twenty eight (28) days' salary in lieu of notice, he contravened the legal stipulations on resignation from employment. However, this in my view does not invalidate or render unlawful the resultant resignation. Rather, it vests in the employer the right to pursue the Claimant for payment of the sum required to be paid in lieu of notice.
40. Section 35 (5) of the Employment Act introduces service pay for departing employees under the category of the Claimant if they are not registered under any provident scheme. There is no evidence that the Claimant was registered under any such scheme.
41. Although the section implies that the claim arises only in instances where the termination is by the employer, I think that it covers situations where the termination is by either party. Therefore in my view, the Claimant is entitled to this claim.
42. The law does not provide a methodology for fixing the quantum of service charge under section 35 of the Employment Act. To overcome this lacuna, courts have often employed the methodology used under section 40 of the Employment Act to work out the quantum of severance pay to determine service pay under section 35(5) of the Act. Thus, service pay has been understood to mean an amount equivalent to salary for fifteen (15) days for every year worked.
43. As the Claimant was engaged on 1<sup>st</sup> of July 2013 and ceased employment around 12<sup>th</sup> December 2017, he had worked for the Respondent for a period of slightly above four (4) years. All factors remaining constant, he would be entitled to Ksh. 160,000/= (worked out at Ksh. 40,000/= x 4 = Ksh. 160,000/=). I therefore award him this sum less any set-off by the Respondent.
44. The parties agree that prior to issuing his resignation the Claimant had worked for a total of eight (8) days in the month of December 2017. Therefore, absent any other bar, he would be entitled to be paid salary for the eight days which works out to Ksh. 21,333/=. I therefore award him this sum less any set-off by the Respondent.
45. The Claimant has pleaded compensation for unfair termination. However, as has been demonstrated earlier on in the judgment, this is not a case for unfair termination by the employer. Consequently, this prayer is declined. Similarly, the several other heads of damages as set out in paragraph 14 of this judgment and which have not been specifically addressed above are declined for want of cogent evidence.
46. As observed in the judgment, the Claimant resigned without notice to the Respondent in terms of section 35 of the Employment Act. Accordingly, the Claimant is obligated to pay the Respondent an amount equivalent to the Claimant's twenty eight (28) days' salary in lieu of notice. This represents Ksh. 74,666/=.
47. As observed in paragraphs 43 and 44 above, the Claimant is entitled to claim from the Respondent service pay of Ksh. 160,000/= and Ksh. 21,333/= being salary for the eight (8) days worked in December 2017 all totaling Ksh. 181,333/=. However, I note from the evidence tendered that the Respondent had paid the Claimant some Ksh. 68,000/= before the matter came to court. Further and as observed in paragraph 46 above, the Claimant is required to pay the Respondent Ksh. 74,666/= in lieu of notice. This totals Ksh 148,666/=. Applying the set off principle, the amount due from the Respondent to the Claimant after deducting Ksh. 148,666/= from Ksh. 181,333/= works out to Ksh. 32,667/=. I therefore enter judgment for the Claimant for the sum of Ksh. 32,667/= and order that the Respondent pays the Claimant this sum as the balance due to him under the head of damages of service charge as contemplated under section 35 (5) of the Employment Act. This amount is to be paid with interest at court rates from the date of institution of this suit till payment in full.
48. Regarding the Counterclaim, although it is clear that the Claimant's conduct caused the Respondent considerable stress, there is nevertheless no direct evidence to attribute the Respondent's loss in business to the fact of the Claimant's departure. This may only have been one of the many factors that may have occasioned the loss captured in the Finance records filed by the Respondent. The court does not wish to speculate on the issue in the absence of cogent evidence in this respect.
49. In any event, the Claimant's only obligation to the Respondent was to issue a resignation notice for a period of twenty eight (28) days. Outside this period, the Respondent had to make arrangements to ensure continuity of its operations without the Claimant. Therefore, the particulars of loss as set out in paragraph 28 of the Reply to Claim and Counterclaim are unsustainable. But more importantly, there was no evidence to prove the particularized loss in the paragraph. I will therefore decline to award the Respondent damages for loss of business.
50. I therefore dismiss the Counter-claim save as has been allowed in relation to pay in lieu of notice. As either party has partially succeeded

in their cause, I will make no order as to costs. For the avoidance of doubt, this order on costs does not affect the orders for costs awarded to the either party when this matter was adjourned should the same be outstanding.

**DATED, SIGNED AND DELIVERED ON THE 17<sup>TH</sup> DAY OF FEBRUARY, 2022**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

No appearance for the Claimant

Ritajoyo for the Respondent

**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 15<sup>th</sup> 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.**

**B. O. M. MANANI**

**JUDGE**