



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUE NO.615 OF 2016**

**JAMES ALUVISIA LUVAYI ..... CLAIMANT**

**VERSUS**

**THE DIRECTOR, THE OPTION LOUNGE .....RESPONDENT**

**JUDGEMENT**

On 1<sup>st</sup> March, 2014 the respondent employed the claimant as a Lounge/Club manager earning Ksh.15, 000 per month and based in Rongai. The claimant worked until 7<sup>th</sup> February, 2016 when the respondent terminated his employment.

The claim is that termination of employment was unfair and without due process. The claimant is seeking the flown terminal dues;

- a) Pay for 7 days worked in February, 2017 Ksh.4,036.34;
- b) One month notice pay Ksh.15,000;
- c) Unpaid leave for 1 year and 11 months Ksh.24,218.04;
- d) House alliance for 19 months Ksh.42,740;
- e) Public holidays Ksh.23,064;
- f) Service pay for a year and 11 months Ksh.16,577.83
- g) Compensation for unfair termination.

The claimant testified in support of his case that upon employment by the respondent he worked diligently from 7<sup>th</sup> April, 2014 but on 7<sup>th</sup> February, 2016 he was dismissed when he was called in the office and told that there was no work. There was no notice of payment of his terminal dues and should be awarded as pleaded in the Memorandum of Claim

In response, the respondent's case is that the party sued is unclear and it is not clear whether the respondent is a registered company named as *Option Lounge* and the respondent denies that such entity does not exist in law.

The allegations made are denied and are without evidence and should be dismissed with costs.

On a without prejudice basis, the response is that the claimant was a casual labourer and not an employee and was paid all his dues at the close of business every working day.

No evidence was called.

The respondent filled Notice of Preliminary Objections dated 29<sup>th</sup> June, 2016 but was never prosecuted.

The claimant filed his written submissions.

Determination

The claimant's case is that he was an employee of the respondent and his employment was terminated on 7<sup>th</sup> February, 2016 after being called and informed that there was no work.

The respondent on the other hand has denied employing the claimant save that he was taken as a casual labourer and paid at the end of each day.

The respondent as the employer is required to file work records pursuant to section 10(7) of the Employment Act, 2007 (the Act). Where indeed the claimant was a casual labourer, the employer is required to keep work records and submit such records with the court once suit is filed;

***(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.***

Without work records, the evidence of the claimant is not challenged. He was in the full time employment of the respondent and pursuant to section 37 of the Employment Act, 2007 where he remained on casual terms; he became protected under such provisions. He is entitled to rights and benefits under the law.

Where an employer has no work, the law allows termination of employment under the provisions of section 40 of the Employment Act, 2007 subject to payment of severance pay and terminal benefits. Where there is no such compliance, the resulting termination of employment is unlawful and unfair in terms of section 40 read together with section 45 of the Employment Act, 2007.

Notice pay is due to the claimant under the provisions of section 35 of the Act all at Ksh.15,000.

Under section 28 of the Act, every employee is entitled to take annual leave and for an incomplete year, leave days are prorated. The claimant for Ksh.24,218 is found appropriate.

House allowance is due to every protected employee earning a basic wage at 15% of the wage paid. The claim of Ksh.42,750 is a fair tabulation of such allowance and is due.

During public holidays an employee who is at work should be compensated. The Wage Orders allow for tabulation of such days. The claimant has claimed for Ksh.23,064 without indicating or particularising how such amounts arose. Public holidays are official and published in the Kenya Gazette and are not general.

Service pay is due to an employee whose employer fails to register him to the NSSF or register the employee under a medical or pension scheme. Where the employer fails to comply, the employee is entitled to pay of 15 days for every complete year worked. In this case, the claimant worked for one full year and a pay of 15 days is due all at Ksh.7,500.

Compensation is due in a case where employment is terminated unfairly. An award of one month's pay is hereby found appropriate all at Ksh.15,000.

For days worked in February, 2016 the wage is due for whatever reason leading to termination of employment all at Ksh.4,036.

**Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;**

- a) **Compensation ksh.15,000;**
- b) **Notice pay ksh.15,000;**
- c) **Unpaid leave Ksh.24,218.04;**
- d) **House allowance Ksh.42,750;**
- e) **Service pay ksh.7,500;**
- f) **7 days' pay for February, 2017 Ksh.4,036; and**
- g) **Costs of the suit.**

**DELIVERED AT NAIROBI IN OPEN COURT THIS 10TH DAY OF MARCH, 2022.**

**M. MBAR?**

**JUDGE**