



**Mutii v Joshua Karunge t/a Mwambao Cafe (Cause 166 of 2015)
[2022] KEELRC 12969 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12969 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 166 OF 2015
B ONGAYA, J
OCTOBER 28, 2022**

BETWEEN

MWENGA MUTII CLAIMANT

AND

JOSHUA KARUNGE T/A MWAMBAO CAFE RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on March 27, 2015 in person. Later he appointed Nyange Sharia Advocate of Kituo Cha Sheria to act for him. The claimant prayed for judgment against the respondent for:
 1. A declaratory order that the termination was unlawful and unfair
 2. Payment of terminal benefits amounting to Kshs 82,148.15 to the claimant by the respondent as per the agreement that existed between the parties at the time
 3. An order for twelve (12) months salary in compensation for unlawful termination
 4. Costs of the suit
 5. Interest on (i) and (ii) above until payment in full
 6. Any other or further relief as this honourable court may deem fit
2. The claimant filed an amended memorandum of claim on May 9, 2022 through Sharia Nyange Njuguna & company advocates. The claimant prayed for judgement against the respondent for-
 1. A declaratory order that the termination was unlawful and unfair
 2. Payment of terminal benefits of Kshs 234,813 to the claimant by the respondent
 3. An order for twelve (12) month's salary in compensation for unlawful termination



4. Costs of the suit
 5. Interest on (i) and (ii) above until payment in full
 6. Any other or further relief as this honourable court may deem just
3. The claimant was granted leave to amend the memorandum of claim but the filed amended memorandum of claim was expunged from the record on account that it failed to accord to the terms of the order of leave to amend.
 4. The claimant's case is that he was employed by the respondent under an oral contract of service which relationship was governed by the provisions of the Employment Act of 2007. The claimant pleaded that he was hired as a chef on contract basis and that he was employed from July 7, 2010 until October 20, 2014. Further, he pleaded that his contract was terminated without notice and payment of salary in lieu of notice contrary to the provisions of law. The claimant pleads that on or about October 20, 2014, the wife to the respondent suddenly instructed the claimant to remove the meat from the fire and hand over the uniform and, leave employment. Further, he pleads that he sought the intervention of the respondent who insisted that he should leave employment. The claimant pleaded that he reported the issue to the labour officer who wrote a demand letter to the respondent on October 24, 2014 calling for immediate payments of his terminal benefits and that the reminder letters were written on November 17, 2014, December 23, 2014 and a meeting set for the December 15, 2014. The meeting at the labour office took place on December 15, 2014 at 2.30pm. The respondent was represented by Jane Wanjiru and Francis Muriuki and the employment records were produced on December 16, 2014. The letter by the labour officer addressed to the respondent found that the respondent unlawfully suspended the claimant without a fair hearing and the claimant was entitled to terminal dues computed as follows:
 1. One-month salary in lieu of notice Kshs. 12, 148.10.
 2. 20-days wages Kshs.8, 098.75.
 3. 18-months accrued leave Kshs.12, 755.40.
 4. Underpayment arrears $Kshs.1, 648.10/10 (Kshs. 12, 148.10 - Kshs.10, 500.00) \times 17 \text{ months} = Kshs. 28, 017.70.$
 5. 4-years' service pay at 15 days per each complete year Kshs. 21, 127.20.
 6. Total Kshs. 82, 148.15.
 5. The letter required the respondent to deposit the money with the labour officer for onward payment to the claimant.
 6. The claimant pleaded that he reported the matter to Kituo Cha Sheria who wrote a demand letter dated February 2, 2015 to which the respondents responded to by a letter dated February 10, 2015 (by B.W.Kenzi & Company Advocates) stating that the claimant was a casual worker who provided services to the respondent intermittently and for an aggregate period that could not qualify him as a permanent employee.
 7. The respondent filed a statement of response on November 20, 2018 through B.W.Kenzi & Company Advocates .The respondent prayed that the claimant's claim be dismissed with costs. The respondent pleaded that he runs 2 food outlets by the business name Mwambao café. He had employed managers in each café who hired employees, some on permanent basis and others as casual on need be basis. The respondent pleaded that the claimant never worked continuously from the year 2010 to 2014 or at all. Further, the respondent pleaded that claimant was never terminated because he was not



his employee in the first place. The respondent denied the claimant's claim and pleaded that all his permanent employees were registered with N.S.S.F and the claimant herein had no prove of the same. The respondent admitted having been served with a demand letter from Kituo Cha Sheria and it was replied to by his advocate denying the claim. The respondent stated that the claimant was not entitled to Kshs 82,148.15.

8. The claimant testified that he worked on a daily basis from 2009 to 2014 and that there was no break. He testified that he was transferred to Majengo and later on he was dismissed. He further testified that his wage was Kshs 350 per day and further computed and paid at the end of the month. Further, there was a book he signed at the end of the month whenever he was paid. The claimant further testified that he reported the grievance to the labour office and that he was to be paid Kshs 82,148 by the respondent but he was not paid. On cross examination the claimant testified that he had no letter of appointment and that he had a medical fitness certificate as a cook but which was retained by the respondent. Further, he testified that he went for examination at the time he was employed but he did not keep a copy of that letter because he gave it to the respondent. He testified that he was a permanent worker, worked from 7am to 7pm, Monday to Sunday and, had no off or leave - and that if he had complained, he would have been dismissed. He testified that he was dismissed and if that was not the case at the time, then the visit to labour office would not have taken place. He stated that the respondent admitted the computation but he failed to pay. In re-examination, the claimant testified that the letter written by the labour officer dated December 23, 2014 showed that he was unfairly suspended from work and that he had accrued leave of 18 months.
9. The respondent's witness (RW) Peter Muthama testified that the claimant was employed by the respondent to grill meat. He confirmed that the claimant was employed in 2010, he was not a casual worker, he was paid on a monthly basis, and, he was transferred from Mwembe Tayari Cafe to Majengo Café as he is the one that effected the transfer orally. RW testified that the claimant absconded work, that he knew Jane Wanjiru as she was the accountant and Francis Mwiroria was the supervisor but they could not be reached so as to attend Court as witnesses. RW was not aware if the claimant was accorded due notice and a hearing after he had allegedly absconded or deserted work. Further, he testified that he had no correspondence or letter to the labour office stating that the claimant had absconded work. In re-examination, RW testified that he never attended a meeting at the labour office and that the claimant never addressed a letter to him as the manager stating that he had been terminated or that he was seeking reinstatement.
10. The Court has considered the pleadings, the evidence and the final submissions filed for the parties. The Court makes findings as follows.
11. To answer the 1st issue, the evidence is that the parties were in a contract of service. The respondent employed the claimant as a cook and the last monthly payment was Kshs. 10,500. RW confirmed that the claimant was employed in 2010 to do grilling of meats. The Court returns that the claimant worked for the respondent from July 7, 2010 to October 20, 2014. It was a period of 4 complete years of service.
12. To answer the 2nd issue for determination the Court returns that the termination was unfair for want of a notice and a hearing per section 41 of the Employment Act, 2007. There is no reason to doubt the claimant's testimony that he was unfairly dismissed on October 20, 2014. It was upon falsified allegation by the respondent's wife one Njeri that the claimant had refused to comply with the instructions relating to his work. Further, there is no reason to doubt the claimant's testimony that on the same October 20, 2014 he had raised the grievance of the unfair dismissal with the respondent but who opted to ratify the dismissal by telling the claimant to leave the employment. The claimant's pleading that he was terminated by the respondent's wife on falsified reasons that he had been sent by her and he had refused to obey is consistent with his evidence.



13. On the other hand, the respondent and the wife failed to offer evidence to rebut the claimant's case. The respondent's pleading was that it had never terminated the claimant's employment as he was not its employee. In an inconsistent manner, RW testified that the claimant deserted duty when RW transferred him orally from Mwembe Tayari to Majengo Café. The Court finds that such testimony being inconsistent and incoherent with the pleadings cannot be trusted. RW further testified that the alleged transfer was in 2014 in a month he could not recall. By that evidence, the Court finds that the respondent has failed to establish existence of the alleged desertion and thus, a valid reason for the separation per section 43 of the Act. Further, the reason, if any, has not been shown to have been fair per section 45 of the Act. It was unfair.
14. The Court has considered the factors in section 49 of the Act. The claimant has established he worked without offs and annual leave. He was not registered with NHIF and NSSF. As established by the labour officer, he had served with underpayment. The Court finds that such were unfair labour practices that aggravated the case against the respondent. It has not been shown that the claimant had a dirty record of service. He is therefore awarded 12 months' salaries in compensation making Kshs. 12, 148.00 x 12 thus Kshs.145, 776.00.
15. The Court further finds that the claimant has by his evidence and as per the findings of the labour officer established the award of the contractual claims in the sum of Kshs. 82, 148.15. He is awarded accordingly. The Court has considered the margins of success and all circumstances of the case and returns that the respondent will pay costs of the suit.
16. In conclusion, judgment is hereby entered for the claimant against the respondent for:
 1. The declaration the termination of the contract of service was unfair, unlawful and unjust.
 2. The respondent to pay the claimant Kshs. 227,924.15 by January 1, 2023 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
 3. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 28TH OCTOBER, 2022.

BYRAM ONGAYA

JUDGE

