



Anyanje v Aturkan Hotel Limited & another (Employment and Labour Relations Cause 64 of 2017) [2022] KEELRC 13420 (KLR) (21 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13420 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 64 OF 2017
NJ ABUODHA, J
NOVEMBER 21, 2022**

BETWEEN

STEPHEN JOMO ANYANJE CLAIMANT

AND

ATURKAN HOTEL LIMITED 1ST RESPONDENT

ANTHONY MUNENE KIBETU 2ND RESPONDENT

JUDGMENT

1. By a memorandum of claim dated April 8, 2016 the claimant pleaded inter alia that:
 - a. The claimant was employed by the respondent at around October 26, 2013 as an Assistant House Keeper.
 - b. The claimant was to earn a basic salary of Kshs 28,000/= and house allowance of Kshs 7,000/= amounting to gross monthly salary of Kshs 35,000/= which later increased to Kshs 50,000/= per month.
 - c. The claimant avers that on September 1, 2014 he was promoted to the rank of Acting General Hotel Manager but then the Respondent reviewed the earlier terms of employment by appointing the claimant as the Acting General Hotel Manager on one year contract and yet he had been earlier employed on permanent basis.
 - d. The claimant avers that he was not paid his December 2015 and January 2016 salaries despite being entitled to the same.
 - e. The claimant served the respondents with dedication and commitment from the date of his employment until he was unlawfully and summarily dismissed from the employment on or about February 8, 2016.



- f. The claimant avers that his termination from the employment by the respondents was unlawful, procedural unfair and / or illegal and in total violation of Section 45 (2) of Employment Act of 2007.
- g. Despite the claimant serving respondents with dedication the respondent mistreated the claimant and more so the respondent jointly and severally unfairly, maliciously terminated the claimant from his employment and failed to pay his terminal dues as itemized hereunder.

Particulars of terminal dues and damages

- a. December 2015 and January 2016 salary
(50,000.00+50,000.00)=100,000.00, 100,000.00
- b. Annual leave dues for the 2 years and
3 months worked 2014 and 2015.
(one month salary x years worked)
50,000.00 x 2= 100,000.00, 100,000.00
- c. Annual Leave dues for 2014
(one month salary in lieu of leave=50,000.00), 50,000.00
- d. Annual Leave Dues for 2015
(one Month salary in lieu of leave=50,000.00), 50,000.00
- e. Service Benefits (15 Days x hrs worked x minimum
basic wage Divided by 30)
(15 x 2 x 50,000/30= 50,000.00
- f. One Month salary in lieu of Notice 50,000.00
- g. Compensation for unfair termination
(Gross pay x 12 months = 50,000 x 12= 600,000.00
- h. Unpaid Public Holidays
(11 days per year x years worked x Basic Salary,
Divided by 30 x 12)
(11 x 2x 40,000/30 x 12= 352,000.00
- i. Unpaid days off
(Basic Salary divide by 30 x 12 months x years worked) (40,000/30x 12
x 2 years)= 32,000.00
- j. Overtime (OT) Dues
45 hrs per week
12 hrs x 6 days =72hrs-45hrs=27hrs OT
27hrs x 4 wks = 108 hrs overtime per month



108hrs x 27months worked = 2,916hrs
Kshs Per hr = 40.00 divide by
(24days divide by 8 hours per day) = 208 per hr
= 208 x 2,916hrs = 607,500.00
Total claim for unfair dismissal 1,999,500.00

- k. Loss of earnings (permanent employment)
for the next 7 years
(50,000 x 2 x 7 = 4,200,000.00

GRANT TOTAL CLAIMS 6,191,500.00

2. The respondent filed a response on August 18, 2016 in which it averred among others that:
- The respondents admit the contents of paragraph 4,5,6,7, and 8 of the claim.
 - Paragraph 9 of the claim is strictly denied coercion and the particulars contained therein as wholly denied.
 - In response to paragraph 11 to 19 of the statement of claim the respondents avers that the claimant's services were terminated pursuant to the provisions of the *Employment Act* 2007 as the claimant was summarily dismissed due to gross misconduct.
 - It is the respondents case that the claimant was summarily dismissed hence not entitled to the claim herein.
3. At the oral hearing, the claimant testified among others that he was employed by the 1st respondent on November 1, 2014 and issued with an appointment letter. It was however his evidence that he started working in October 2013 at a monthly salary of Kshs 28,000/= and a house allowance of Kshs 7,000/= he was later promoted to Acting General Manage at a monthly salary of Kshs 50,000/= after promotion his contract was reduced from permanent and pensionable to a one-year contract which was to end on September 1, 2015. That contract was never renewed but he continued to work.
4. The claimant further stated that he proceeded on leave for two months and his leave ended on February 7, 2016. When he reported back to work he found someone else in his office who asked him to call the director. When he called the director who was then in Lodwar he was asked to stay home for a week as the director finds out where he could place him after one week he called the director and was asked which positon he could fit in since his previous positon had been taken. He suggested front office manager.
5. It was further the claimant's evidence that he was paid his leave allowance but not the salary for December. According to the claimant, he had professional training in the position he held having worked in several hotels in Mombasa before he was hired by the respondent.
6. According to the claimant he never went for offs during October to December 2013 however in December they went for December holidays. Further from January, 2014 to December, 2015 he worked throughout and thereafter went on leave for two months.
7. In cross-examination he stated that he reported to duty in October, 2013 although he had nothing to show that he reported on that date. He further stated that his letter of appointment stated his salary. His position as Acting General Manager was for one year renewable contract and that he signed the



- contract signifying his acceptance. The contract was from September 1, 2014 but he continued to work after the expiry of his contract. He was not issued with a renewal contract. The director was meant to give him one.
8. Section 43 of the Employment Act places the burden of proving that the reasons for termination on the Employer. Further Section 45(2) considers a termination unfair if the employer fails to prove that the reason for the termination is valid and that the employment was terminated in accordance with a fair procedure.
 9. The respondent though never called any witness however through a witness statement filed on August 26, 2019 by the 2nd respondent acknowledges that the claimant was employed by the respondent as an assistant house keeper on permanent basis. The terms were later reviewed in a subsequent contract dated September 1, 2014. The 2nd respondent further stated that on or about the February 8, 2016 the claimant went for leave and never reported back on duty.
 10. From the foregoing, the respondent still considered the claimant its employee although his one year contract expired on or about August 30, 2015. The termination of his service on any disciplinary grounds ought therefore to have been in conformity with the provisions of the Employment Act especially as pertains to substantive and procedural fairness. The respondent alleged that the claimant went on leave and never returned when his leave ended however the respondent never tendered any evidence showing any attempt was made to contact the claimant and call upon him to show cause why his employment ought not to be terminated on account of unauthorized absenteeism. To this extent the Court finds and holds that the respondent unfairly terminated the claimant's service contrary to provisions of Section 45(2) of the Employment Act.
 11. Regarding heads of compensation, the claimant laid claim for annual leave for two years' service benefits for two years worked and overtime. The claimant though made these claims did not furnish sufficient evidence to support them. For example, the claimant in his own admission stated he went on leave for two months. It is therefore not equitable to make a claim for payment in lieu of leave. The claimant further claimed overtime yet never led any evidence to show the nature of his job required him to work overtime besides the claimant by nature of his position was in management hence could not claim overtime unless it was expressly provided for in his contract. This heads of claim are therefore disallowed.
 12. The claimant had worked for the respondent for approximately two years. He was in a fixed term contract which if was not renewed, he would have ceased to be the respondents' employee. Taking these into consideration an award of four month's salary would be adequate compensation for unfair termination.
 13. In conclusion, the Court awards the claimants as follows:
Kshs
 - a. One month's salary in lieu of notice of termination 50,000
 - b. Four months' salary as compensation for unfair termination 200,000
 - c. Unpaid salary for December and January 100,000 350,000
 - d. Costs of the suit
 - e. Items (a) (b) and (c) shall attract interest at Court rates but subject to taxes and statutory deductions.



14. It is so ordered

Dated and delivered at Eldoret this 21st day of November, 2022

Abuodha Nelson Jorum

Judge ELRC

