



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 409 OF 2017

ANTHONY ORIDO.....CLAIMANT

V

MAYFAIR HOLDINGS LTD T/A IMPERIAL HOTEL/

IMPERIAL HOTEL EXPRESSRESPONDENT

JUDGMENT

1. Anthony Orido (the Claimant) was employed by Mayfair Holdings Ltd t/a Imperial Hotel (the Respondent) and was later confirmed as a Front Office Manager through a letter dated 25 September 2012.
2. Due to his performance, the Claimant was confirmed as Operations Manager on or around 24 November 2015.
3. On 27 July 2015, the Respondent notified the Claimant of transfer to Imperial Hotel Express in the same position.
4. The Claimant served in the same position until 12 May 2017 when the Respondent served him with a letter questioning his work performance (failure to improve occupancy).
5. The letter informed the Claimant that he was required to improve on the performance ahead of an evaluation on 30 June 2017.
6. On 28 August 2017, the Respondent gave the Claimant 1-month notice of the termination of his employment.
7. The Claimant moved the Court on 18 October 2017 alleging unfair termination of employment.
8. The Respondent filed a Response on 6 December 2017, and the Cause was heard on 30 October 2018 when the Claimant testified and closed his case.
9. When the Respondent's case came up for hearing on 19 September 2019, it was adjourned because the Respondent was not ready.
10. The Cause next came up for the Respondent's case on 10 December 2020, but again the Respondent was not ready. The Court declined a request for adjournment by the Respondent, and this forced it to close its case without leading any evidence.
11. The Claimant's submissions were not on record by the agreed date of 10 January 2021 (were brought to Courts attention today) while the Respondent filed its submissions on 21 January 2021.
12. The Respondent identified 3 Issues for determination in its submissions:
 - i. Whether the termination of employment of the Claimant was wrongful, unfair and unlawful in the circumstances.
 - ii. Whether the Claimant is entitled to the relief sought.
 - iii. Whether the orders sought ought to issue.
13. The Court has considered the pleadings, evidence and submissions on record.

Unfair termination of employment

Procedural fairness

14. The Respondent issued the Claimant with a 1-month notice of termination, but it opted to pay the Claimant 1-month salary in lieu of notice, thus complying with the dictates of section 35(1)(c) of the Employment Act, 2007.

15. However, the Respondent was still under a statutory obligation to hear representations from the Claimant in the company of a colleague as envisaged by section 41 of the Employment Act, 2007.

16. The Claimant's evidence that he was not afforded an opportunity to be heard after the notice and before the termination was not controverted or rebutted.

17. The Court finds that the action of the Respondent was tainted with procedural infirmities.

18. It is also instructive that the notice of termination did not set out the reasons or disclose whether the meetings held between the parties on 22 August 2017 and 25 August 2017 were disciplinary proceedings or investigatory to establish the facts.

Substantive fairness

19. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent was under a statutory duty to prove the reasons for terminating the employment of the Claimant.

20. The burden was not discharged as the Respondent failed to lead any evidence.

Compensation

21. The Claimant served the Respondent for about 5 years.

22. In consideration of the length of service, the Court is of the view that the equivalent of 5-months gross wages as compensation would be appropriate (gross monthly wage was Kshs 160,000/-).

Breach of contract

Overtime

23. The Claimant sought Kshs 2,913,723/- on account of overtime.

24. Clause (d) of the contract provided that in lieu of overtime, the Claimant would get off days. It was expressly provided that overtime would not be paid.

25. In addition, the Claimant did not lay an evidential foundation to this head of the claim as he did not disclose which specific Regulation of Wages Orders applied in his case.

26. The Court also notes that the Respondent paid the Claimant his accrued off days as part of the terminal dues.

27. Relief is declined.

Severance pay

28. Severance pay is due upon a redundancy, and since the Claimant's case was not founded on redundancy, severance pay is not available to him, as a remedy.

Conclusion and Orders

29. From the foregoing, the Court finds that the termination of the employment of the Claimant was unfair.

30. The Claimant is awarded

(i) Compensation Kshs 800,000/-

31. The Claimant is awarded costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 17th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Mr. Wanyanga instructed by Akolo Wanyanga & Co. Advocates

For Respondent Mr. Orieyo instructed by Otieno, Yogo, Ojuro & Co. Advocates

Court Assistant Chrispo Aura