



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 616 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

JOHN MALONZA NZEVA.....CLAIMANT

VERSUS

THE DIRECTORS OF IMANI HOTEL.....RESPONDENT

JUDGMENT

Vide his Memorandum of Claim dated 7th April, 2016 and filed in Court on 14th April, 2016 the Claimant seeks compensation for unfair and unlawful termination of his employment by the Respondent herein.

In his Claim the Claimant seeks the following reliefs:

a) That the Respondent be ordered to pay the Claimant his terminal and contractual dues amount to Kshs.673,829.60 comprising of the following:-

i. Salary for February 2016 Kshs.10,000.00

ii. One month salary in lieu of notice Kshs.10,000.00

iii. Unpaid leave for 10 years

21 days x 384.62 x 10 years Kshs.80,770.20

iv. Service Pay for 8 years

384.62 x 15 days x 10 years Kshs.57,693.00

v. Overtime

11 hours x 384.6 = 422.4 per day

422.4 x 26 days x 12 months Kshs.395,366.40

vi. Compensation for unfair termination

10,000 x 12 months Kshs.120,000.00

TOTAL CLAIM Kshs.673,366.40

b) Costs of this Claim and interest thereon at Court rates.

c) A declaration that termination of the Claimant's employment was unfair and unjust.

d) Any other relief that this Court may deem just and fit to grant.

His case is that he was employed by the respondent on or about 1st June, 2006 in the position of a cook and was earning an initial monthly salary of Kshs.4,000/-.

The Claimant contends that he worked diligently, faithfully and to the Respondent's satisfaction until 22nd February, 2016 when his employment was unfairly, unlawfully and un-procedurally terminated by the Respondent herein. That at the time of his separation with the Respondent he was earning a monthly salary of Kshs.10,000/-.

It is the Claimant's case that the termination was unlawful, wrongful and unfair as the Respondent failed to adhere to the provisions of the law on fair termination.

The Respondent despite being served with the Summons and the Memorandum of Claim failed to enter appearance or to file its defence in this matter. The matter therefore proceeded as an undefended Claim on **24th November 2020** after the Court certified that the Respondent was properly served with summons. The Claimant testified on his own behalf as CW1.

The Claimants' Case

The Claimant adopted his witness statement dated 7th April, 2016 and filed in Court on 14th April, 2016 as his evidence in chief. In his statement, the Claimant reiterated the averments in his Memorandum of Claim.

He testified that he was employed by the Respondent herein in the position of cook/chef from January 2006 until the year 2016 when he left work after the Respondent sold the premises and thus his position ceased to exist with the sale of the Respondent's premises.

The Claimant averred that no notice was issued prior to his position being declared redundant. He told the Court that the sale of the Respondent's premises was finalized on 22nd February, 2016.

The Claimant urged that he has made out his case to justify the grant of the Orders he sought and therefore prayed to this Court to allow the claim as prayed.

Claimant's Submissions

The Claimant submitted that he was indeed employed by the Respondent herein until 21st February, 2016 despite the fact that he was not issued with any documentation to prove employment. He further maintained that his employment is supported by the signed witness statements of **David Mutua Muteti** and **Julius Mutua Ngewa** that confirm the position.

The Claimant contended that his termination was unlawful, unfair and un-procedural as the Respondent failed to follow the mandatory provisions of Section 40 and 45 of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the findings in the case of **Mary Nyawira Karimi v Pure Circle (K) Ltd (2018) eKLR** where the Court held that in cases of redundancy an employer must ensure that a termination on that account met both substantive justification and procedural fairness and that the employer must further justify the redundancy.

It is on this basis that the Claimant maintained that he is entitled to the reliefs he seeks from this Court. He urged this Court to allow the same as prayed.

Analysis and Determination

I have considered the pleadings, evidence, submissions and authorities cited by the Claimant. The following are the issues for determination:

1. Whether there existed an employer-employee relationship between the Claimant and the Respondent herein.
2. Whether the termination of the Claimant's employment by the Respondents was wrongful, unfair and unlawful.
3. Whether the Claimant is entitled to the reliefs sought.

Employer-employee relationship

The determination of the other heads of claims advanced by the Claimant will depend on whether the Court finds that there was an employment relationship between the Claimant and the Respondent, as this is an undefended claim.

Although the Claimant did not have any proof of the employment relationship, he produced the Respondent's Counsel's response to the letter of demand in which Counsel for the Respondent admits that the Claimant was employed by the Respondent as averred in the letter of demand. The letter from Chahenza & Associates representing the Respondent is reproduced below: -

"10th March 2016

Mwaure & Mwaure Waihiga, Advocates,

Morningside Office Park, 1st Floor, Wing A

Ngong Avenue,

P.O. Box 75642 – 00200, Nairobi

Dear Sir/Madam,

We act for the former proprietor of Imani Hostels, who has placed in our hands your demand letter of 25th February, 2016 with instructions to respond thereto as hereunder:-

1. It is not denied that your client was in our client's employment as a cook for the period outlined in your letter under reference but ours is a stranger, and denies the allegations that he unlawfully, and or unfairly terminated his employment.
2. To the contrary, the termination was on the footing of a redundancy that was declared prior to our client's closure of business and demolition of the then Imani Hostel. This fact was notified to among others the labour office, employees of Imani Hostel and the occupiers of the said hostel two (2) months well in advance.
3. Furthermore, prior to securing employment with our client your client was a vagabond, with no place of aboard in the city, and were it not for our client's mercy and goodwill yours would not have secured shelter and thereafter employment. Full and better particulars are well within your client's knowledge.
4. Our client is therefore a stranger to the claims and or quantum of damages outlined in paragraphs (i) to (vi) of your letter under reference and therefore unable to comply with your demand in respect thereto. In particular ours responds to individual claims raised by yours as follows:
 - i. With respect to compensation of February, 2016 salary our client denies owing yours unpaid salary in the sum of Kshs.10,000/= for the same was paid timely.
 - ii. As regards the issue of one month in lieu of notice it is our client's contention that a proper notice was issued to all affected by the redundancy.
 - iii. Thirdly, the claim for unpaid leave is denied as ours always granted his employees fully paid leave for 21 days.
 - iv. With respect to service pay our client paid yours terminal benefits of Kshs.50,000/= via Mpesa. Kindly ask your client not to conceal material facts.
 - v. Do further take note that, as a breakfast and dinner cook, your client worked for less than four (4) hours per day and therefore the issue of working overtime does not arise.
 - vi. Lastly, your client is not entitled to compensation for unfair termination for as aforesaid the termination was based on a redundancy and all procedural requirements were followed.
5. We have in that respect advised our client to disregard your demand of Kshs.673,829.60 for lack of any or any discernible supporting particulars of the claim.
6. We trust that with the benefit of the matters set out herein you shall reconsider your advice to your client. Should your client be minded to file suit, however, we confirm that we have instructions to defend the same at your client's risks as to costs and other consequences attendant thereto.

Yours Faithfully,

FOR: CHAHENZA & ASSOCIATES

SIGNED

COSMAS CHAHENZA”

The letter from Chahenza & Associates is an admission of the employment relationship between the Claimant and the Respondent. I thus find that there was an employment relationship between the Claimant and Respondent.

Whether the termination of the Claimant’s employment by the Respondent was wrongful, unfair and unlawful

The Claimant submitted that the Respondent did not adhere to due process while dismissing him from its employment. He insists that the Respondent proceeded to sell the business thus rendering his position redundant without prior notice or following the mandatory provisions of Section 40 of the Employment Act, 2007.

This Court however noted that the issue of redundancy was not pleaded in the Claimant's Memorandum of Claim and was only raised at the hearing and submissions. Parties are bound by their pleadings as was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the **Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC** expressed himself thus on the importance and place of pleadings: -

"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded....."

"...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

As to whether or not the Claimant's termination was fair procedurally and substantially based on the evidence, this Court is of the view that the Respondent did not comply with the provisions of Sections 40, 41 or 43 of the Employment Act, 2007 therefore his termination is unlawful and unfair within the meaning of Section 45 of the Employment Act, 2007.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

Whether the Claimant is entitled to the reliefs sought

Having found the termination of his employment unfair, the Claimant is entitled to the following:

(i) Salary for February 2016

The Claimant maintained that his employment was terminated on 22nd February, 2016 and that he was not paid his February salary. In the absence of any evidence from the Respondent to rebut this assertion I find that the Claimant is entitled to payment under this head.

(ii) One month salary in lieu of notice

The Claimant is entitled to compensation under this head by dint of the provisions of Section 35 of the Employment Act, 2007.

(iii) Unpaid leave for 10 years

The Claimant in his pleadings, evidence and submission maintained that he worked for the Respondent without taking any leave. No evidence was produced to prove this head of claim. The only mention of leave is in the tabulation at paragraph 6 of the claim. No mention is made of the annual leave in the Claimant's testimony and witness statement.

Since the Respondent denied this head of claim in the reply to the demand letter, it was incumbent upon the Claimant to prove the same which he has not. The prayer is accordingly dismissed.

(iv) Service Pay for 8 years

The Claimant did not prove that he qualifies for service pay under Section 35(6) of the Act. The prayer is accordingly dismissed.

(v) Compensation for unfair termination

Having found that the Claimant's termination was unfair, he is entitled to compensation. Given the length of service and the fact that he did not contribute to his termination, I award him maximum compensation in the sum of Kshs.10,000 x 12 months = **Kshs.120,000.00/-**

(vi) Overtime

The Claim for overtime fails for lack of particulars.

Conclusion

In conclusion, Judgment is entered in favour of the Claimant as against the Respondent in the following terms:

- a) A declaration be and is hereby issued that the Claimant's termination was unlawful, unfair and contrary to the provisions Section 45 of the Employment Act, 2007.
 - b) Payment of 22 days worked in February 2016 Kshs.8,462.00
 - c) One month salary in lieu of notice Kshs.10,000.00
 - d) Compensation for unlawful termination Kshs.120,000.00
- Total Kshs.138,462.00**
- e) The Claimant is awarded costs and interest at Court rates from the date of Judgment until settlement in full.
 - f) The Respondent to issue to the Claimant a Certificate of Service.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF APRIL 2021

MAUREEN ONYANGO

JUDGE

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE