REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.86 OF 2018

IAN KIPRONO RUTO.....CLAIMANT

VERSUS

HOTEL WATERBUCK LIMITED.....1ST RESPONDENT

DEBRA CHELAGAT.....2ND RESPONDENT

JUDGMENT

1. The Claimant, Ian Kiprono Ruto, filed a Memorandum of Claim dated 28th March, 2018 against the Respondents, Hotel waterbuck Limited and Debra Chelagat and after the Court allowed him to amend his pleadings on 18th July, 2019, he filed an Amended Memorandum of Claim dated 23rd July, 2019 on 16th August, 2019.

2. He avers that he was employed as a night manager by the 1st respondent on 25th September, 2017 after applying for the said job, attending an interview conducted by Mrs Caroline Kinyanjui, the director of the 1st respondet and passing the said interview was directed to report to work on 25th September, 2017 where he has faithfully served the Respondents until his unfair dismissal on 20th December, 2017.

3. He avers that he was not issued with any employment contract though the respondent gave an indication that the same was to be provided in due course. The claimant was retained at an agreed monthly salary of Kshs. 30,000/-. However, he stated that on 9th November, 2017, the Respondent paid him his salary less Kshs. 2,000/- and failed to house him or alternatively pay the statutory house allowance.

4. On 21st November, 2017, the claimant states that, he received a text message from the 2nd respondent through her telephone number 0723-141-595 that read as follows ***"Good morning Ian, kindly don't report to work from today. The issue of Kalenjin staff imekuwa problem".*** Nevertheless, the claimant ignored the said message and reported to work as usual.

5. On 20th December, 2017, the 2nd Respondent summoned the claimant in her office and explained to him that business was experiencing a low season and directed him to go back home with a promise that he will be called back to resume duty.

6. The claimant avers that he reported the issue to the director Mrs. Kinyanjui who did not take any action and on 3rd January, 2018 he reported the matter to the labour office who invited the claimant and respondents to a meeting on 18th January, 2018 but the issues herein were not resolved culminating to the institution of this suit.

7. He contends that despite several communications between his advocates and the respondents, the respondents have refused to pay his terminal dues. He therefore, prays that judgment be entered against the Respondents jointly and severally for:

1) The claimant prays that his termination be declared unlawful and unfair.

2) It is the claimant's prayers that judgement be entered jointly and severally in favour of the claimant against the 1st and 2nd Respondent for;

a) 20 days worked in December, 2017 Kshs. 26,538/-

b) One month's pay in lieu of Notice Kshs. 34,500/-

c) Pro-rata leave (6) days Kshs. 7,962/-

d) Overtime for 10 days worked Kshs. 13,269/-

e) Compensation for unfair termination Kshs. 414,000/-

f) General damages for discrimination.

g) Kshs. 2,000/- wrongly and unlawfully deducted from the claimants pay.

h) Kshs. 9,000/- being unpaid house allowance.

3) The claimant prays for costs of the suit against the Respondent with interest.

Respondent's Case.

8. The Respondent filed its Amended Memorandum of Reply dated 13th November, 2019 on 14th November, 2019 contending that the Amended Memorandum of Claim does not disclose any reasonable cause of action against them. Further that the claimant's services were lawfully terminated owing to his gross misconduct and general unsuitability of him as a hotel employee.

9. The Respondents confirmed that they employed the claimant on 25th September, 2017 albeit on casual basis, pending his supply of his academic records, diploma, certificate of service from his previous employers and letter of employment from his previous employers. It is stated that the claimant accepted that offer which were given on the following terms;

a) His monthly salary was Kshs. 30,000/- inclusive of all allowances save for those pertaining to meals.

b) He would enjoy the benefits of having his meals in the staff canteen like other managers.

c) He would work under senior managers.

d) He would work as casual employee in the office of the night supervisor until a final decision, on his application for the office of guest relations or front office manager was made.

e) If he failed to supply documents or if he supplied and it emerged that he was not qualified for the said job of guest relations manager, he would work as a casual employee for as long as either he was fit for such a job or until his services were terminated.

10. The respondents aver that prior to the employment of the Claimant at the hotel, the claimant father, Mr. Chemirmir had approached Mr. Davies Kinyanjui, the director of the 1st Respondent and requested for a vacancy at the 1st respondent for his son, who is the claimant herein. It is stated that the said Mr. Kinyanjui directed that the claimant appears for interview before the board of the respondent sometimes in September 2017.

11. That, during the interview the claimant sought to be employed as a front office manager or guest relations manager but failed to furnish the board with his academic credentials such as academic transcripts, certificate of service and employment contracts from his previous employers therefore, the board resolved not to take a decision until it is furnished with the said documents.

12. It is stated that the Claimant kept calling Mrs. Kinyanjui requesting to be considered in any other position at the hotel claiming that he was in dire situation and in need of a job. The respondents aver that in the third week of September 2017, they entered into a contract with a client who was bringing 500 guest to stay at the hotel for three (3) weeks. Since their capacity could only accommodate 120 Guest at a time, they sought for accommodation in other hotels but all guest took their three meals at their hotel.

13. It is stated that, the influx of guest informed the respondents decision to hire casual employees to cope with the demands of its' customers. On 25th September, 2017, the respondent hired the claimant herein as a night supervisor on casual basis as they still await to be furnished with his academic documents. The claimant reported to work that night and took instructions as to his duties from food and beverage manager.

14. It is alleged that the claimant had volcanic temper, involved in gross misconduct and generally intimidated employees leading to his suspension on 21st November, 2017 but failed to change as such his employment was terminated on 20th December, 2017

15. Following the termination, the respondents allege that the claimant negotiated his terminal benefits due and the same was agreed at Kshs. 43,000/- and was to be issued with a certificate of service. It further stated that the claimant compromised his claim on 1st March, 2018 pursuant to the offer made on 20th February, 2018 and accepted on 1st March, 2018.

16. It is stated that the Claimant assumed powers not given to him and even referred himself as a night manager requiring other employees to seek his authority for any act done at night. It is alleged that he suspended routine fumigation of the kitchen sometimes in October, 2017 claiming his permission had not been obtained and further reprimanded the manager in charge of food and beverages as such acting insubordination.

17. In addition, the respondent states that the claimant acted grossly when he exercised disciplinary control over hotel resident who returned to the hotel late and required them to give an explanation before returning back to their rooms, further that he would from time to time

engage in embarrassing habit of joining the hotel residents having drinks at the hotel bar and ordering biting reminding the waiters that he is "the night manager", acts that are contrary to the hotel rules and regulations .

18. Further that, the claimant one night broke into the kitchen store and ate some apples. In addition, it is alleged that he would gate crush into the restaurant and serve himself food when he does not have any authority to do that.

19. The 2nd respondent confirmed attending the meeting at the labour office for the purposes of sorting out issue between the respondents and the claimant. At the end of the meeting the parties agreed to pay the Claimant Kshs.61,500/- however, the same was compromised by the claimant who accepted an all-inclusive sum of Kshs. 43,000/- as his terminal benefits.

20. They thus allege that the claimant does not have any other claim against them having accepted the sum of Kshs. 43,000/- and urged this court to dismiss the claim with costs.

Evidence

21. The matter proceeding for hearing on 28th January, 2021 and the claimant, Ian Kiprono Ruto testified as **CW-1**, and adopted his witness statement and sought to rely on the document filed on 29th March, 2018 and further documents filed on 16th August, 2019.

22. On cross examination, he confirmed that the respondents offered him settlement sum of Kshs. 43,000/- together with certificate of service. He confirmed that the letter to the labour office was on basis of redundancy and not discrimination. He further testified and denied all the allegation of gross misconduct levelled against him by the respondents.

23. On the issue of discrimination, he testified that he felt discriminated upon because the 2nd respondent singled him out and send him a text message and terminated his services on the sole grounds of being a Kalenjin when there were other 4 Kalenjin's in managerial position at the respondents' employ.

24. The Claimant testified that the Respondent did not request for any documents after the interview as alleged but that they offered him a different role from what he interview for which he accepted. He indicated that his main role was to supervise the hotel during the night.

25. The respondent called four witnesses, **RW-1, Caroline Gathoni Kinyanjui**, a director of the 1st respondent, who adopted her statement made on 14th May, 2018 and sought to rely on the document filed on even date.

26. On cross examination**, RW-1,** testified that they paid the claimant on monthly basis and in cash. She further testified that the claimant was employed on casual basis for 2 to 3 months when they had a lot of work. She indicated to court that the claimant was terminated verbally and denied sending the claimant any message on his termination. She further indicated to court that there was no message produced by the claimant alleging that he was discriminated on ethnic grounds and if there was any then it was not official communication as such ought to be disregarded.

27. On re-examination, she confirmed employing the claimant on temporary placement as the claimant had failed to supply the respondent with some crucial documents requested.

28. **RW-2**, **Debra Chelagat**, testified and equally adopted her statement made on 14th May, 2018 together with documents filed by the respondents on even date.

29. On cross-examination, she testified that they did not issue the claimant with appointment letter since he was taken up on casual basis pending his furnishing the respondent with the requisite academic credential for the position interviewed of guest relations manager.

30. She testified that she sent the claimant a text message not to report to work again on 21st November, 2017 for the reason that the claimant kept going round and claiming that since he is a Kalenjin he would not be touched. Further that everyone complained about him.

31. She testified that, they offered to pay the claimant Kshs.43,000/- in settlement of the dispute herein as advised by the labour office, which money was accepted by the claimant.

32. **RW-3, John Nyamolo Olango**, the senior manager for the 1st Respondent, adopted his witness statement of 14th May, 2018 and testified that he is the manager in charge of the night shift and that the claimant was to report to him.

33. He testified that he was to get a report from the claimant who refused to give the said report and the matter was reported to the Human Resource manager. Further that the claimant was accorded hearing sometimes in November, 2017 and reprimanded. That sometimes in December 2017 he was suspended and returned back to work and finally dismissed on 20th December, 2017.

34. The fourth Respondents' witness, **RW-4**, **Lucy Wangare Kamau**, the deputy Chef at the 1st Respondent, adopted her witness statement of 14th May, 2018 and testified that she recorded four instances when the claimant had acted contrary to his mandate and served himself food and fruits when he ought not to have done and that such serving are reserved for the top managers only.

Claimant's Submissions

35. The Claimant submits that the issues for determination are; what was the nature of employment between the claimant and the respondent, whether the Claimant was unfairly terminated, whether the claimant was unfairly discriminated by the respondent and whether the claimant is entitled to remedies sought.

36. The claimant submitted that he was not on probation as alleged by the respondents as probationary contract are usually in writing and cannot be implied as envisaged under Section 2 of the employment Act. He cited the case of **Benard Juma Agutu –v- Maya Freight Limited [2012] eklr** where the Court faced with similar circumstances Held: -

> ***" After addressing my mind to the rival contestations of the parties regarding the issue of probation, it is my humble view that a clause regulating the probation period of an employee is a cardinal provision of a contract and should be incorporated in the contract document expressly and not through reference or by implication. It should be in one document.***
>
> ***22. For this view I draw from the provisions of section 11(4) of the Employment Act which provides that particulars concerning the name, age, permanent address, sex of employee, name of employer, job description, date of commencement of employment, form and duration of contract, place of work, hours of work, remuneration, entitlement to annual leave, pensions, incapacity to work and pension schemes need to be in one document. And if this is not possible, a prudent employer should strive to keep a register or other documentation wherein employees can signify or acknowledge that these policies or manuals have been brought to their attention."***

37. He submitted that, it is the duty of the employer to provide a contract of employment as provided for at section 9(2) of the Employment Act and if the said employer fails to discharge that mandate, he cannot be allowed to impute undocumented terms in his favour. Accordingly, the claimant urged this Court to reject the assertions that the claimant was on probation period.

38. It was submitted that the claimant was employed on permanent terms as he worked continuously for about three months before his termination, therefore was not a casual employee as alleged by the respondent and as defined under the employment. He reinforced this position by citing the Court of Appeal Case of **Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others [2018] eKLR** which court held:

> **"As clarified by this Court in the case of Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others [2017] eKLR:**
>
> **"The Employment Act recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment. The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer."**
>
> **As long as such contracts are compliant with the law, the courts have no reason to interfere. The case pleaded by the respondents in this case is 'casual employment'.**
>
> **A "Casual employee" is defined in section 2 of the Act as: ".. an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time".**
>
> **Casual employment thus entails engagement for a period not exceeding 24 hours at a time and payment made at the end of the day.**

39. The claimant submitted that the burden of proving whether certain terms of employment existed in any contract lays with the employer as provided for at section 10(7) of the employment Act. He argued that this burden was not satisfied and thus urged court to find that the contract by the parties was on permanent and pensionable and cited **Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others [2018] Eklr (Supra)** Where the court held that;

> **"The maneuver adopted by the appellant in declining to testify served only to give credence to the respondents' version of events, and we do not blame the trial court for its summary conclusion that the respondents were engaged as casual employees and that they had worked for a period of continuous days equivalent in aggregate to not less than a month and the job they performed could not reasonably be completed in less than three months or more. Consequently, we find and hold, as the trial court did, that the contracts of service of the respondents assumed permanency and were *"deemed to be ones where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service"* in terms of *section 37."***

40. On whether the claimant was unfairly terminated, it was submitted that the respondent terminated the service of the claimant abruptly, without notice as required under section 35 of the employment Act, neither was he paid salary in lieu of notice as envisioned under section 36 of the employment Act.

41. He further submitted that, the respondent failed to give sufficient reasons for his termination. Further that the reason given that business was not doing well at the time is unfounded, he thus argued that the respondents violated section 41, 43 and 45 of the employment Act. He buttressed this argument by citing the case of **Henry Abuga Bosire Ongwae –v- Ming Tribe International group [2019]** eklr where court held that;

> **"In terms of section 41(1) & (2) of the Employment Act, 2007, the Respondent was under an obligation to inform the Claimant of the reasons for the contemplated termination of employment, and afford him an opportunity to make representations preferably in the company of an employee of his choice, before taking the decision to terminate.'**

42. The claimant submitted that, due process was not followed in terminating the claimant's services. Further that the claimant was not issued with a warning letter or subjected to disciplinary proceeding as mandated by law and reinforced in the court of appeal case of **Kenfreight (E.A) Limited –v- Benson N.Nguti [20116] eklr.**

43. On the issue of discrimination based on ethnicity, the claimant holds that he was deliberately discriminated against when the 2nd respondent singled him out solely because of being from the Kalenjin ethnic group. In addition, the claimant submitted that the message sent to him by the 2nd Respondent clearly indicated that his termination was discriminatory contrary to express provisions of Article 27(4) of the constitution of Kenya and sections 5 of the employment Act. He buttressed his arguments by relying on the case of **Christine Munguti & 21 others –v- national bank of kunya limited [2017]eklr** where the court held that;

> **"On the question of discrimination against the Claimants, Section 5 of the Employment Act 2007 which contains antidiscrimination law requires Employers to promote equality of opportunity and strive to eliminate direct and indirect discrimination.** ***Once the employee has established a prima facie case, the burden shifts to the employer, to show a legitimate explanation for termination. Where the employee has demonstrated a prima facie case, a presumption that the employer discriminated against the employee is raised. The employer must then articulate clear, specific, and non-discriminatory reason for termination. The employee's duty is to provide evidence, which would permit the Court to conclude the explanation proffered by the employer, is pretexual. Pretext can be established by showing that the asserted neutral basis for termination was so ridden with error, that the employer would not honestly have relied on it. The obligation of the employee is not to establish that she has been discriminated against, on strict proof, as demanded by the Respondent in this case; the employee needs only to show that she has a prima facie case, and that the reasons advanced by the Respondent, are unworthy of credence. Under our law, specifically Section 5(6) of the Employment Act 2007, the burden rests on the shoulders of the Respondent, to show that discrimination did not take place."***

44. He thus submitted that the respondent discriminated against him and caused him to be fired when all other employees who were employed in the same period continued with their employment.

45. On the issue of settlement of the dispute herein, the claimant submitted that a meeting took place on 18th January, 2017 but failed to elicit any settlement. On 19th January, 2017, the claimant through his advocates send a demand letter to the respondents and another reminder on 15th February, 2017 and the respondents offered some settlement terms. In accepting the said terms, the claimants wrote;

> "***we have instructions to receive payment of entitlements as outlined in your letter together with the certificate of service."***

46. From the said letter, the claimant argues that the acceptance of settlement terms did not resolve all the issue raised in this claim. Further that section 47(3) of the employment Act gives an employee option to report the matter to the labour office in addition to filing a suit in Court.

47. He argued that the respondents have not produced any evidence to affirm the payment of the alleged settlement sum, neither have they attached the said cheque to affirm the said settlement. He therefore, urged this court to ignore the alleged settlement terms and decide this case on the prayers sought herein.

Respondent's Submissions.

48. The gist of the respondents' submissions is that the claimant suit herein is fraudulent in the sense that the claimant filed this suit 28 days after entering into a settlement agreement of his terminal dues which was agreed between the parties that the respondents would pay the claimant Kshs. 43,000/- and issue him with a certificate of service. Further that the claimant worked as a casual employee throughout his tenure at the respondents' employ and that the contract never converted to permanent basis as contemplated under section 37 of the employment Act as such the respondent argues that it is justified to have terminated the claimant's employment as it did.

49. The respondents argued that the claimant in his pleadings and during hearing failed to disclose to this Honourable Court the settlement agreement between the parties herein as such acted fraudulently.

50. The respondents argued that the claimant does not have a cause of action against them because he had compromised the issues herein when he accepted and received Kshs. 43,000/- on 1st March, 2021 together with his certificate of service. It is indicated that the position the claimant held for the said Three months was created temporarily to cater for the influx of the 500 guest received during that time and later the said position was scrapped off after the guests left the hotel.

51. They argued that, the terms of the letter of 20th February, 2018 were formulated by the labour officer whom the claimant had filed a complaint at. Therefore, the settlement terms arrived at by the parties was informed by the direction of the labour officer and not a formulation of the parties herein. They thus urged this court to estop the claimant from enjoying the settlement claim terms in addition to seeking further redress before this court. He argues that the Defence of accord and satisfaction as illustrated at para. 22-012 to 22-014 of **Chitty on Contracts, 29th Edition** applies in this case and thus the claimant case should be dismissed.

52. The respondent argues that the parties herein were free to enter into a contract of employment whether casual or permanent as envisioned under Article 19(2)(b) of the Constitution. Further that, casual employment is distinguishable from permanent employment by lack of mutuality of obligation as seen in **John Bower book; a practical approach to Employment Law, 7th Edition** at page 26 and 27 and reinforced in the case of **O'kelly Versus- Trust House Forte PLC [1983] 3wlr 605** where the appellant worked as a wine butler at the Grosvenor house hotel, they were known as 'regular casuals' and they had no other employment. The employment tribunal found that many factors were consistent with a contract of service but one thing missing was mutuality of obligations as the respondent had no obligation to

provide work and the employee was free to obtain work elsewhere.

53. Similarly, he relied on **Clark –versus- Oxfordshire health authority (1998) IRKR 125** where the court held;

> **"...The employee who were offered work as and when work was available were causal employees."**

54. They juxtaposed the said decisions to this current case by submitting that the claimant herein approached the respondent and took an interview for front office manager but none was available but later called the respondent and requested for any job available that the respondents offered him a night supervisor position in the duration when the 500 guest received by the respondents were staying at the hotel to ease the work load of the Night manager. It was thus argued that, it is on these bases that the claimant was offered a temporary position therefore considered as a casual employee.

55. The respondent admitted that this Honourable Court has jurisdiction to adjudicate upon the claimant's claim under Article 162(2)(a) of the constitution but denies that the claimant is entitled to the reliefs sought.

56. According to the Respondents, the import of Accord and satisfaction illustrated in **Chitty on Contracts, 29th Edition**, is to be released from an obligation whether arising out pf contract or tort by any means, any valuable consideration, not being in actual performance of the obligation itself. Once a valid compromise has been reached it is not open to one party against whom the claim is made to avoid the compromise on the ground that the compromise was in fact invalid provided the compromise was made in good faith and was reasonably believed to be valid by the party asserting it.

57. They buttressed their argument by relying on the case **Krystalline salt limited –v- Kwekwe mwakele & 67 others [2017] eklr**. Where the court held regarding liberty to enter into employment contracts that;

> **"Secondly, it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the Employment Act and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs."**

58. They further cited the case of **Josphat Njuguna –versus- High rise self-group [2014] eklr** where the learned Judge construed section 37(1) of the Employment Act and held that;

> **"It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment cannot be made at the end of the day or make the hiring be for more than 24 hours."**

59. They submitted that the right of an employer, Respondents herein and the employee, claimant to take temporary benefit of contract to serve 500 customers is a fundamental one which is preserved by Article 19(2)(b) of the constitution and that section 37 of the employment Act which purports to convert casual employment contracts contrary to the wishes of the parties is unconstitutional, null and void by virtue of section 2(4) of the constitution. Further that an employee employed on casual basis is analogous to position of that of an employee on probation so that when the employee does work satisfactorily, the employer is at liberty to terminate such employee without Notice as provided under Section 41 of the employment Act.

60. They further submitted that the claimant distorted the meaning of the text message allegedly send to him by the 2nd respondent to claim that he has been discriminated against on ethnic grounds contrary to Article 27 of the Constitution. The argued that the claimant has not demonstrated how he was discriminated as compared to other employees and urged this Court to dismiss such claim as unfounded.

61. In conclusion the respondents contend that, this suit is fraudulent and ought to be dismissed with costs.

62. I have examined the averments of the parties herein. From the evidence given by the claimant, he was employed on 25th September 2017 at a salary of kshs.30,000/=. The contract was oral. He was then terminated on 20/12/2017 orally.

63. In essence therefore the claimant's services had not been confirmed by virtue of Section 42 of the Employment Act which states as follows:-

> 42. **Termination of probationary contracts**
>
> **(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.**
>
> **(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.**
>
> **(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).**
>
> **(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.**

64. The claimant having served for about 2 months, the provision of section 41 of the Employment Act 2007 did not apply to him during termination.

65. The claimant averred he was discriminated against for being a Kalenjin but the evidence of RW2 who hereof was a Kalenjin makes this fall by the way side.

66. That notwithstanding, I find no reason to find that the claimant was unfairly terminated as he was a casual or on probation and he didn't qualify to be subjected to a disciplinary hearing under Section 42 of the Employment Act 2007.

67. In terms of remedies, I find for claimant and award him as follows as terminal benefits;-

1. 20 days salary for 20 days worked in December 2017 = 20/30 x 30 = 20,000/=

2. 7 days salary in lieu of notice = 7/30 x 30 = 7,000/=

3. Pro rata leave for 2 months = 2/12 x 30,000 = 5,000/=

Total = 32,000/=

Less statutory deduction

4. The respondent will pay costs of this suit plus interest at court rates.

DATED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF APRIL, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ms. Ekesa holding brief for Mr. Konosi for claimant - present

Dr. Kamau Kuria for respondent - present