



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO 590 OF 2017

JOHN CHARO NGUMBAO.....CLAIMANT

VS

LEISURE LODGE LIMITED T/A LEISURE LODGE RESORT.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between John Charo Ngumbao and his former employer, Leisure Lodge Limited trading in the name of Leisure Lodge Resort.
2. The claim is contained in a Memorandum of Claim dated 19th July 2017 and amended on 23rd January 2020. The Respondent filed a Response on 29th August 2017. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Human Resource and Administration Manager, Jackson N. Mutiso. The parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 6th October 2013, in the position of Executive Sous Chef. He earned a monthly salary of Kshs. 75,000. By the time of leaving employment, the Claimant held the position of Executive Chef.
4. The Claimant claims that on 22nd November 2016, the Respondent terminated his employment, without any lawful cause, and in violation of due procedure. The Claimant therefore seeks the following remedies:

- a) Salary arrears for 6 months.....Kshs. 197,775
- b) Unpaid leave for 119 days.....496,230
- c) 12 months’ salary in compensation.....1,455,000
- d) 1 month’s salary in lieu of notice.....121,250
- e) Costs plus interest

The Respondent’s Case

5. In its Response dated 24th August 2017 and filed in court on 29th August 2017, the Respondent denies that the Claimant’s employment was unlawfully terminated. The Respondent states that the termination was based on letters dated 15th and 22nd November 2016, giving reasons leading to the termination.
6. The Respondent further states that the Claimant refused to receive a letter inviting him for disciplinary proceedings, after failing to show cause why disciplinary action should not be taken against him.
7. The Respondent accuses the Claimant of below average performance and general rudeness.

8. The Respondent states that prior to his suspension, the Claimant had been issued with a show cause letter, to which he responded but his response was found unsatisfactory.

9. The Respondent avers that the Claimant was paid one month's salary in lieu of notice but was not entitled to compensation, having refused to participate in disciplinary proceedings.

10. Regarding the claim for salary arrears, the Respondent states that the amounts claimed relate to unpaid leave taken by the Claimant during low business season.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

12. On 22nd November 2016, the Respondent wrote to the Claimant as follows:

"Dear Mr. Ngumbao,

RE: TERMINATION OF EMPLOYMENT AS EXECUTIVE CHEF

Further to our suspension letter dated 15th November 2016 and as per clause 2 of your employment letter dated 6th October 2013, this is to formally terminate your employment with Leisure Lodge Beach & Golf Resort as the Executive Chef with effect from 22nd November 2016 for the following reasons;

- 1. Gross negligence – On Tuesday 15th November 2016 you failed to serve the required breakfast items to the Hotel Guests, contrary to your terms of employment.*
- 2. Insubordination – On the same day, Tuesday 15th November 2016, you refused to heed instructions given by your Supervisor, the Resident Manager and wilfully disobeyed the same.*
- 3. On the same day, Tuesday 15th November 2016 you refused to accept correspondence from the Company.*

Your final dues will be computed upto and including 22nd November 2016 as follows

- 1. Salary upto and including 22nd November 2016*
- 2. House Allowance upto and including 22nd November 2016*
- 3. Phone Allowance*
- 4. Entertainment Allowance*
- 5. Travel Allowance*
- 6. Others.*
 - a. 2.5 Leave days upto and including 22nd November 2016*
 - b. 12 days Pending off upto and including 22nd November 2016*
 - c. Less any monies owed to the company.*

Please arrange to obtain a clearance certificate before collecting your above dues.

We take this opportunity to thank you for your services and wish you the best of luck in your future endeavours.

Yours sincerely

(signed)

MONICA W. KAMAU

ASSISTANT HUMAN RESOURCE MANAGER

13. According to this letter, the Claimant's employment was terminated on account of gross negligence and insubordination. The particulars of the charge of gross negligence are that on 15th November 2016, the Claimant served substandard breakfast to the Respondent's guests. As a result, the Claimant was issued with a show cause letter, which he is said to have declined.

14. In the Respondent's Response however, it is pleaded that the Claimant's response to the show cause letter was unsatisfactory. If the Claimant declined to receive the show cause letter, how then did he respond to it? The Respondent's witness, who was not present when the events leading to the termination of the Claimant's employment took place, was unable to unravel this mystery.

15. What is clear is that the allegations of insubordination made against the Claimant were not proved. Regarding the charge of gross negligence, the Claimant, both in his response to the show cause letter as well as in his testimony before the Court, stated that he had not received the necessary budget allocation for the kitchen, an issue he had raised with the Respondent's management on several occasions.

16. The Claimant filed several letters of appreciation issued to him between 2013 and 2015, together with a certificate of excellence issued in April 2015. Looking at these commendations, it is evident that the Claimant was a star performer and the Court has no difficulty in concluding that the incident of 15th November 2016 was an isolated one.

17. The law is now well settled that for termination of employment on account of negligence of duty or misconduct to be justifiable and fair, the employer must allow the employee an opportunity to respond to the specific charges at the shop floor. These are the procedural fairness requirements of Section 41 of the Employment and were affirmed by the Court of Appeal in its decision in *Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR* in the following terms:

“Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations leveled against him by the employer.”

18. In the case now before me, the Claimant was suspended on 15th November 2016, the same day he was issued with a show cause letter. There was no evidence that his response to the show cause letter was taken into account and he was certainly not invited to a disciplinary hearing as required by Section 41 of the Employment Act.

19. I have already stated that from the record, the Claimant appears to have been a star performer and that the incident of 15th November 2016 was an isolated one. Had the Respondent taken the Claimant through due process, the reason for lack of some food items at breakfast would have been established. Instead, the Respondent's management appeared to be in a rush to get rid of the Claimant. In their haste, they violated the law on procedural fairness and failed to establish a valid reason for terminating the Claimant's employment. The Claimant is therefore entitled to compensation for unlawful and unfair termination of employment.

Remedies

20. Flowing from the foregoing, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful conduct in terminating the employment.

21. By a second letter dated 22nd November 2016, the Respondent states that the Claimant is entitled to one month's salary in lieu of notice. The claim thereon is therefore admitted and is payable.

22. The Claimant further claims salary arrears for the year 2015 and unpaid leave for a total of 11 days. In my view, the claim for salary arrears falls within what is referred to as 'continuing injury' within the meaning of Section 90 of the Employment Act and should have been brought within 12 months. Because the Claimant filed his Memorandum of Claim in 2017, the limb on salary arrears is statute barred.

23. With respect to the claim for unpaid leave, I have looked at the letters filed by the Claimant and it is evident that any unpaid leave taken by the Claimant was preceded by discussion and agreement with the Respondent. The Claimant did not raise any objection at any time he was proceeding on unpaid leave and he cannot raise it now. This claim is therefore disallowed.

24. In the end, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 727,500
b) 1 month's salary in lieu of notice.....	<u>121,250</u>
Total.....	848,750

25. This amount will attract interest at court rates from the date of judgment until payment in full.

26. The Claimant is also entitled to a certificate of service plus costs of the case.

27. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Kenga for the Claimant

Miss Nanjali h/b for Mr. Kibe for the Respondent