



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2265 OF 2015

JOSEPHAT CHEGE WANGORU.....CLAIMANT

VERSUS

GATHARE BAR HOTEL AND BOARDING HOUSE..... RESPONDENT

JUDGMENT

1. The suit was filed by the claimant on 17th December, 2015. The claimant prays for grant of compensation for unlawful and unfair termination of employment and payment of terminal benefits including one month salary in lieu of notice Kshs 12,221.10; payment in lieu of leave days not taken for 21 years Kshs 179,650.17; severance pay calculated at 15 days salary for each completed year of service Kshs 128,321.35; underpayment arrears for the period 1st May, 2009 to 31st July, 2015, Kshs 373,303.9, provision of Certificate of Service and costs of the suit.
2. The respondent filed a memorandum of reply to the memorandum of claim on 9th February, 2016 in which is pleaded that the claimant was employed as a casual as was the policy of the respondent since inception.
3. That the claimant worked as a watchman in that capacity because he was a descendant of a shareholder of the respondent. That the claimant was not given a written contract.
4. That the claimant absconded work but his employment was not terminated. That the claimant was paid Kshs 5,000 a month together with provision of meals and accommodation.
5. That the claimant absconded with Kshs 1,166.55 which the respondent Counterclaims.
6. The claimant (C.W.1) testified that he was employed by the respondent on 4/2/1994 as a watchman. That he worked continuously until the 7th April, 2015 when his employment was terminated without any reason. That he was paid Kshs.5,000 per month but hoped to be paid Kshs 10,000 per month. That he was not given any reason for termination. That the claimant wrote a demand letter to the respondent which letter was not responded to.
7. The claimant produced the list of documents attached to the statement of claim including a staff identity card issued on 4/2/1994 to the claimant for the position of security guard – ID No. [particulars withheld]. The claimant also produced his national identity card with corresponding names to that in the staff identity. The claimant also produced the letter of demand dated 6th November, 2015 written by Mwaniki Kariuki advocate.
8. The claimant produced a witness statement dated 15th December, 2015 as his evidence in Chief. He

testified that he worked without official clothing and protective gear. That he worked without leave days and off days. That he was paid a salary lower than the statutory minimum and was not properly housed. That he had many challenges at work but his communication to the Chairman of the respondent Mr. Joel Maina on these issues did not bear fruit.

9. That the termination was without notice; any reason and without payment of terminal benefits and/or compensation. That the termination was unlawful and unfair. That the claimant be awarded as prayed.

10. The respondent did not attend the hearing of the suit despite service on them of the hearing notice for the 1st March, 2021 when the hearing took place. The Court adjourned the matter for cross-examination and defence hearing to the 3rd March, 2021 and later to 26th May, 2021 but the respondent did not attend the hearing.

11. The testimony by the claimant remain uncontroverted and unchallenged due to the default by the respondent. The statement of defence does not constitute any evidence and so the averments therein do not suffice to contradict the evidence on oath adduced by the claimant.

12. Accordingly, the Court finds that the claimant has proved all the particulars of claim on a balance of probabilities and in particular that he served the respondent for a period of 21 years as a watchman. That during that period he was underpaid; did not get weekly off-days and did not go on leave. That the claimant's employment was terminated by the respondent without notice; any reason and without payment of terminal benefits.

13. That the claimant is entitled to payment of terminal benefits set out in the statement of claim but only limited to a period of three years since the rest of the claims are time barred.

14. The claimant suffered loss and damage and is entitled to compensation in terms of Section 49(1) (c) and (4) of the Employment Act, since the termination was unlawful and unfair and in violation of Section 36, 41, 43 and 45 of the Employment Act, 2007.

15. The claimant served for 21 years under abhorrent conditions and without enjoying the minimum standards of employment provided by the law. The claimant did not contribute to the termination and did not abscond work as alleged in the statement of defence or at all. The claimant was not paid any terminal benefits or compensation upon termination. The claimant did not receive certificate of service to enable him get alternative work. The Court has considered the Court of Appeal decision in **Chemilil Sugar Company –vs- Ebrahim Ochieng Otuon and 2 Others [2015] eKLR** in which the Court of Appeal confirmed the decision of Wasilwa, J. with regard to alleged casual workers who had served for a continuous long period. The Court of Appeal found as we do in this case that the claimant was not a casual even though he had been employed as such in the first instance and notwithstanding that he had no letter of employment for the 21 years he served the respondent.

16. The Court has also considered the decision by Radido J. in **Josephine Akinyi –vs- Farhiyo Mohammed [2013] eKLR** in which the Court found in favour of an alleged casual employee whose employment the Court deemed to have converted to permanent status in terms of Section 37 of the Employment Act, 2007.

17. In the present case, having considered all the factors above, the Court awards the claimant the equivalent of twelve (12) months salary in compensation for the unlawful and unfair termination of employment in the sum of **(Kshs.12,221.10 x 12) 146,653.20**.

18. The Court also enters judgment in favour of the claimant as prayed in the statement of claim as follows:-

a) One month salary in lieu of notice - Kshs 12,221.10

b) Untaken leave days (12,221.10 x 3) = 36,663.30

c) Underpayments for 3 years between 1st May, 2013 to May, 2015 Kshs (82,940.4 + 65,028.7x21,663.3) – Total Ksh 169,632.

Total including compensation – Kshs 316,285.

d) Interest at Court rates from date of judgment till payment in full.

e) Costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Mwaniki Kariuki for claimant

Mr. Wahome Thuku for Respondent

Ekale – Court Assistant.