



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO.12 OF 2020

(Before D.K.N.Marete)

TOM ONDARI ANGUSAI.....CLAIMANT

VERSUS

MERU SLOPES HOTEL.....RESPONDENT

JUDGMENT

This matter was originated by way of a Claimant's Amended Memorandum of Claim amended on 7th June, 2018. The issues in dispute are therein cited as;

- a) *Unfair termination.*
- b) *Off days.*
- c) *House allowance.*
- d) *Normal overtime.*
- e) *One month's pay in lieu of notice.*
- f) *Compensation under section 49 (c) of the Employment Act.*
- g) *Certificate of Service.*
- h) *Unpaid salary for March, 2017 at kshs.21.000.00*
- i) *The Respondent herein to pay the claimant one month's pay in lieu of notice as provided in the Employment Act, 2007, totalling to Kshs.51,750.00.*

The Respondent in a Response to the Claimant's Memorandum of Claim dated 29th January, 2018 denies the claim and prays that the same be dismissed with costs.

The Claimant's case is that he was employed as a chef by the Respondent on 6th October, 2015 at Kshs.18,000.00 and House Allowance of Kshs.3,000.00 per month. This continued to 31st March, 2017 when his employment was constructively terminated.

The Claimant's further case is that whilst working for the Respondent herein would start his working day at 5:00 A.M in the morning up to 3:00 P.M in the afternoon during the day shift and 3:00pm up to 10:00 A.M in the evening constituting a twelve (12) hours working day.

His other case is that the circumstances of the unlawful and unfair termination are that on or around the 28th February, 2017 the claimant herein gave the respondent a one month notice of resignation via a written letter. It is upon this that the Respondent transferred the claimant from the kitchen department where he worked as a chef to the public area department as cleaner.

The Claimant's further case is that he raised an objection on grounds that he was chef and would not work in the cleaning department which was not part of his service contract. He was thereafter ordered to proceed on a compulsory leave for the rest of the month and on return from

such leave the respondent informed him that he is no longer an employee and was not entitled to salary for March or even terminal dues as had indeed resigned. He was entitled to his leave dues and salary for March, 2017.

The Claimant's other case is that his termination of employment was unfair and unlawful and a contravention with provisions of Labour Laws and the Constitution. He was not invited for a disciplinary hearing as compelled by Section 41 of the Employment Act, 2007 and neither did they inform him of the reasons for dismissal.

It is his other case that the termination process adopted by the Respondent was fundamentally flawed as it violated Employment Act, 2007 on the rules of justice. It did not meet the threshold for procedural as well as substantive fairness as envisioned by sections 41, 43 and 45 of the Employment Act, 2007 as he was not granted an opportunity to be heard.

The Claimant further avers that during his employment, which he served dedicatedly, he was required to work beyond eight (8) hour set up and would be there for 12 hours for which he was never compensated in terms of overtime. This included working during public holidays, again, for no reward.

Other anomalies in the employment include;

- He was not issued with a service contract as initially agreed and also pay advice slips.
- He is owed one month salary in lieu of notice.
- His efforts to meet the respondent to thrash out the issue of termination have been rebuffed.
- He has suffered and continue to suffer due to the respondent's failure to meet his rightful dues.
- He played safe and in accordance with the Employment Act, 2007 and other relevant laws and therefore he deserves fairness from the respondent, and therefore he has so approached the sit of justice.

He prays as follows;

a) *Compensation under Section 49(c) at Kshs.252,000.00*

b) *House allowance Kshs.16,200.00*

c) *Notice pay at Kshs.21,000.00*

d) *Overtime pay at Kshs.131,815.38*

e) *Public holidays pay at Kshs.32,307.70*

f) *Annual leave pay Kshs.25,442.30*

g) *Certificate of service.*

GRAND TOTAL: Kshs.478,765.38

The Respondent's case is that prior to the resignation letter, the claimant had been caught up in an instance in the respondents' kitchen whereby he had been issuing out unreceipted food. Upon the occurrence of this instance the claimant accepted his mistake and gave the respondent an apology letter dated 5th February, 2017. The respondent further noted that these actions were contrary to clause 8 of the appointment letter of 15th October 2015.

The Respondent's further case is that thereafter the above two incidences, the respondent pursuant to clause 7 of the claimants appointment letter, gave a transfer of the claimant from the kitchen to the public area department. This was well within the said appointment letter. He did not raise any objection but thereafter he absconded duty and did not report to work any longer.

Her further case is that after the claimant absconded duty, the general manager was called by the labor union at Nairobi and they explained their position, they further informed the office that the issue was being handled by the labor office, Meru.

Overall, the respondent avers that after the claimant left he has not returned for clearance and therefore his remainder of salary cannot be issued before clearance is done.

The Respondent's penultimate case is a denial of the claim and all it antecedents *in toto*.

The matter came to court variously until the 3rd February, 2021 when the parties agreed on a disposal by way of written submissions.

The issues arising for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the Respondent?
2. Whether the termination, if at all, was wrongful, unfair and unlawful?
3. Is the claimant entitled to compensation for unlawful termination?
4. Who bears the costs of this claim?

The 1st issue for determination is whether there was a termination of the employment of the claimant by the Respondent. The Claimant in his written submissions dated 23rd April, 2021 posits and submits a case of termination of employment. The Respondent denies this and submits a case of desertion on the part of the Claimant after a transfer of duties to the grounds- public area department.

It is the Respondent's case that the transfer was in accordance with the service contract which this court agrees with. However, it is noted that there is no documentation or evidence of events leading to or even after the resignation of the claimant. The Respondent merely makes averments of interventions by the labour offices at Nairobi and even Meru but does not establish this in evidence. In the absence of this, a case of termination ensues in the circumstances.

The 2nd issue for determination is whether the termination, if at all, was wrongful, unfair and unlawful. Having established a case of termination of employment, the next issue becomes its legality. The claimant in his written submissions submits lack of procedural and substantive fairness in the termination of his employment in that he was never afforded an opportunity to be heard at disciplinary level. It is his case and submission that the defence by the respondent is a mere denial of the situation as it occurred.

I agree.

The Claimant's case over bears that of the respondent. He has on a higher balance of probabilities established a case of termination of employment which the Respondent has failed to rebut. I therefore find a case of wrongful, unfair and unlawful termination of employment and hold as such. This answers the 2nd issue for determination.

The 3rd issue for determination is whether the claimant is entitled to compensation for unlawful termination. He is. Having won on a case of wrongful, unfair and unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

- i) One (1) months salary in lieu of notice.....Kshs.20,700.00
- ii) Salary for March, 2017.....Kshs.20,700.00
- iii) One (1) months as compensation for unlawful

termination of employment.....Kshs.20,700.00

Total of Claim Kshs.62,100.00

- iv) The Respondent is be and is hereby ordered to issue a certificate of service to the claimant in thirty (30) days.
- v) Each party shall bear their costs of the claim.

Dated and delivered at Nyeri this 19th day of July, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.S.K.Mburu instructed by S.K.Mburu & Company Advocates for the Claimant.
2. Mr. Githaiga instructed by Wangari Githaiga & Company Advocates for the Respondent.