



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 72 OF 2019

SHADRACK KIEMA WAMBUA.....CLAIMANT

VS

SUHUFU PALACE HOTEL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between the Claimant, Shadrack Kiema Wambua and the Respondent, Suhufi Palace Hotel Limited.
2. Wambua’s claim before the Court, which is contained in a Memorandum of Claim dated 28th October 2019 and filed in court on 29th October 2019 is for compensation for unlawful and unfair termination of employment plus payment of terminal dues. The Respondent’s Defence to the claim is dated 28th November 2019.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Director, Siyad Issak Hassan. The parties also filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent on 8th January 2017. He claims to have earned a monthly salary of Kshs. 80,000.
5. The Claimant further states that on 1st August 2018, he sought leave to attend to a personal matter, which was granted. He resumed duty on 8th August 2018, upon being recalled from leave.
6. The Claimant adds that on 4th September 2018, he was informed that there were a lot of complaints and was therefore asked to restrict himself to the Hotel. Another employee was deployed to manage the Restaurant. On 11th September 2018, the Respondent informed the Claimant that it could not pay two managers.
7. The Claimant’s complaint is that he was not given any reason for the termination of his employment and was not offered an opportunity to defend himself. He therefore lays a claim for unlawful and unfair termination of employment.
8. The Claimant claims that save for 6 days’ leave taken in August 2018, he was not allowed to go on leave.
9. The Claimant now seeks the following from the Respondent:

- a) 12 months’ salary in compensation.....Kshs. 960,000
- b) 1 month’s salary in lieu of notice.....80,000
- c) Leave allowance.....112,000
- d) Service pay.....80,000

- e) Overtime allowances
- f) Certificate of service
- g) Costs plus interest

The Respondent's Case

10. In its Defence dated 28th November 2019 and filed in court on 2nd December 2019, the Respondent makes a general denial of the Claimant's claim and puts him to strict proof.

Findings and Determination

11. There are three (3) issues for determination in this case:

- a) Whether there was an employment relationship between the Claimant and the Respondent capable of enforcement by this Court;
- b) Whether the Claimant has proved a case of unlawful termination of employment;
- c) Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

12. Among the general denials contained in the Respondent's Defence is the existence of an employment relationship between the Claimant and the Respondent.

13. In his witness statement filed in court on 31st January 2020, the Respondent's Director, Siyad Issak Hassan states that the Claimant was not employed by the Respondent.

14. Hassan denies the existence of any employment contract between the parties and states that the Claimant was a casual worker and that the dues payable to him were made as agreed.

15. In support of his case, the Claimant produced National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) statements showing the Respondent as his employer.

16. Sections 10 and 74 of the Employment Act place the responsibility of custody of records on the employer. As regards the burden of proof of employment terms and conditions Section 10(7) states the following:

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

17. The Respondent's Director, Siyad Issak Hassan testified that the Respondent had records to show that the Claimant was engaged on casual basis. These records were however not availed to the Court.

18. Having stated that the Claimant was a casual employee, it was incumbent upon the Respondent to produce documentary evidence to prove this averment.

19. In the absence of records, the Court rejects the Respondent's assertion that the Claimant was a casual employee and consequently concludes that he was a regular employee of the Respondent working on term contract.

Unlawful Termination?

20. In his witness statement, Hassan denies the Claimant's averment that his employment was unlawfully terminated on 11th September 2018. The Respondent did not however disclose to the Court the circumstances under which the Claimant left its employment.

21. The Respondent therefore failed to dislodge the Claimant's claim that his employment was terminated without justifiable cause as required under Section 43 of the Employment Act and in contravention of the procedural fairness edicts of Section 41 of the Act.

Remedies

22. In light of the foregoing, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service and the Respondent's unlawful conduct in terminating the employment.

23. I further award the Claimant one (1) month's salary in lieu of notice as provided in Section 35 of the Employment Act.

24. In the absence of leave records to the contrary, I allow the claim for leave pay.

25. According to the Claimant's own documents, he was a contributing member of NSSF and any shortfall in remittance should be addressed through the statutory body. The claim for service pay is therefore disallowed.

26. The claim for overtime allowances was not proved and is dismissed.

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

a) 3 months' salary in compensation.....	Kshs. 240,000
b) 1 month's salary in lieu of notice.....	80,000
c) Leave pay for 1 year (80,000/30*21).....	56,000
d) Prorata leave for 10 months (80,000/30*1.75*10).....	<u>46,667</u>
Total.....	422,667

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

29. The Claimant will have the costs of the case.

30. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY JULY 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. Otieno for the Claimant

Mr. Asige for the Respondent