



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 1487 OF 2013

PATRICK KASYOKA NZOMO.....1ST CLAIMANT

JOSPHAT MWANZIA MUTINDA.....2ND CLAIMANT

VERSUS

PAUL MOPEL T/A CALIFORNIA BAR AND BUTCHERY.....RESPONDENT

JUDGMENT

1. The Claimants brought this suit on 21.8.2015 alleging that their contracts of employment was unfairly and unlawfully terminated by the Respondent on 16.2.2015. The suit seeks the following reliefs:

- (a) A declaration that the Claimant's termination from their employment was unfair and unlawful.
- (b) The Claimants be paid their terminal benefits amounting to Kshs. 4,145,419/-
- (c) The Honourable Court to issue such orders and give such directions as it may deem fit to meet the ends of justice.
- (d) The Respondent to issue the Claimants with certificate of service as.
- (e) The Respondent to pay the costs of this claim.
- (f) Interest on the above at court rates.

2. The Respondent filed defence on 1.12.2015 denying the alleged unfair termination and averred that it is the Claimants who absconded work from 17.2.2015 and refused to sign fresh contract of employment. It further averred that it received demand letter from the Claimant's advocate alleging unfair termination and it responded by asking the Claimant to report back to work by 20.3.2015 or face dismissal but they never did so. Therefore prayed for the suit to be dismissed and counterclaimed for salary in lieu of notice for exiting without prior notice.

3. The suit went to full hearing, both parties tendered evidence and thereafter filed submissions.

Claimant's case

4. The 1st Claimant testified as CW1 on his own behalf and that of the 2nd Claimant who had given him authority to do so. He testified that he was employed by the Respondent on 2.2.2008 while the 2nd Claimant was employed in 10.3.2004. They were both cooks in the Respondent's restaurant. They started with a salary of Kshs. 4500 and Kshs. 5000 respectively but the same was increased to Kshs. 9000 and Kshs. 7000 respectively. They were signing for the salary and the records were kept by the employer but they were not issued with appointment letters.

5. He further testified that they were working every day from Monday to Sunday including public holiday and therefore they never rested except on Christmas and Boxing day. They used to sign Attendance Register which was kept by the employer. They also never went for their annual leave.

6. CW1 further testified that on 16.2.2015 at 2 p.m. he and the 2nd Claimant were given contract papers to sign but they refused to sign because the previous years of service were not factored. As a result, the Respondent told them to go away without giving them time to read through the contracts. Therefore they left after taking copies of the unsigned contracts and went to instruct a lawyer.

7. The lawyer served a demand letter dated 4.3.2015 and the Respondent replied by asking the Claimants to report back to work by 20.3.2015 or else they will be dismissed. He further testified that they reported back on 16.3.2015 and the Respondent demanded that they sign the contracts but when they declined he again told them to go away.

8. CW1 prayed for 12 months' salary as compensation for unfair dismissal because there was no reason for the same.

9. He further prayed for service gratuity contending that the employer never contributed NSSF for them. He also contended that their salary was underpaid because it was below the gazetted wages. Therefore he prayed for salary arrears for the whole period of their service.

10. He contended that they were not paid house allowance or provided with houses by the employer for the whole period of service. Consequently he prayed for the unpaid house allowance in arrears. Finally he prayed for accrued leave for the years served plus a certificate of service.

11. On cross examination, he reiterated that he worked for 7 years from 2008 while the 2nd Claimant worked for 11 years from 2004. He maintained that they were the only employees of the Respondent who were given contracts to sign. He contended that they made copies of the contracts to read later because the boss was hurrying them to sign before reading the contracts.

12. He reiterated that when they refused to sign the contracts the Respondent told them to go away and leave his employment. He contended that the employer told them to leave employment if they did not want to sign the contracts. He confirmed that the two of them were present when the Respondent told them to go away.

13. He admitted that after their lawyer served a demand letter, the Respondent replied and asked them to report back to work. However, he contended that when they reported back the manager told them to wait for the Respondent and when the Respondent came, he told them to either sign the contract or go away completely.

14. He reiterated that the reason why they refused to sign the contracts on 16.12.2015 was because they were being hurried to sign before reading. He denied that they left work without notice and maintained that they were dismissed. He contended that they were the only cooks in the restaurant and it was opening at 7 a.m. and closed at 900 p.m. Monday to Sunday. He maintained that they were signing an Attendance Register and for salary which records are in the custody of the employer. He denied that he caused the 2nd Claimant to leave employment.

Respondent's case

15. The Respondent testified as RW1. He stated that before 17.2.2015 he had 22 employees including the Claimants. He gave all the employees contracts to sign but the claimants and two others refused to sign and went away. The Claimants were both cooks and he wrote to them to return but they never did so or even respond to his letter. As a result their job ended.

16. He further testified that he operated two shifts from 8 a.m. to 2 p.m. and then from 2 p.m. to 11 p.m, Monday to Saturday. He denied the claim for overtime and contended that all the employees worked within the required time. Further, he contended that each employee was given from 30 days leave per year

17. On cross examination, he contended that he gave all the 22 employees one week to read and sign the contract. He denied the allegations that he told them to sign or quit. He reiterated that all the employees signed the contracts except the Claimants and two others. When he asked the claimants why they refused to sign the contracts, they gave no answer and went away until he received demand letters from their lawyer.

18. He further reiterated that he responded to the demand letters and asked them to report back by 20.3.2021 but they never did so even after being threatened that they would be dismissed.

19. He denied the allegation that he dismissed them after failing to report back. He further denied that they reported back and found his manager and the latter demanded that they either sign the contracts or leave.

20. He admitted that the contracts he gave to the Claimants to sign did not indicate the salary payable. However he denied that they refused to sign because of the blank space with respect to salary. He admitted that the contracts were for 6 months renewable.

21. He explained that when he took over the business in 2008 he found the Claimants working in the restaurant as casual workers with no written contracts and he chose to issue them with written contract but they refused to sign and left work. He maintained that the Claimants never reported back on 20.3.2015 and he never made any follow up on them because he could not force them to work.

Claimant's Submissions

22. The Claimants submitted that the Respondent terminated their employment contract on 16.2.2015 when they refused to sign new contract. They relied on **Kenya Hotels and Allied Workers Union v Mada Holdings Ltd [2020]eKLR** where the court dealing with a similar dispute found that the employer had terminated the employees contracts and awarded damages including salary in lieu of notice.

23. The Claimants further submitted that the Respondent has not proved any valid reasons for terminating their services and urged the court to find that the termination was unfair and unlawful.

24. In addition the Claimant's submitted that termination was not done in accordance with the procedure set out by section 41 of the

Employment Act because they were not accorded a fair hearing before the termination. They contended that the new contract given was not favourable to them but the employers refused to discuss the matter with them and just chased them away. Consequently, according to the Claimants their contracts of employment was unfairly terminated and they are entitled to the reliefs sought plus costs.

Respondent's submission

25. The Respondent reiterated that he did not dismiss the Claimants and submitted that they left work protesting to sign contracts. He submitted that he suffered loss as a result of the said conduct by the Claimant because they were the only cooks in the restaurant. He contended that the Claimants left without raising any issue in respect to the contract.

26. He further submitted that the allegations that the Claimants reported back after the threat of dismissal is neither true nor is it backed by their pleadings. He contended that he has demonstrated that he made effort to call them back by the letter dated 13.3.2015 but they refused to comply and thereby terminated their employment without being dismissed.

27. For emphasis he relied on **Banking Insurance & Finance Union (Kenya) v Barclays Bank Kenya Ltd. [2014]eKLR** and **Simon Mbithi Mbane v Inter Security Services Ltd [2018]eKLR** where the court dismissed the suits on grounds that after the employee absconded, the employer gave evidence to show that it made effort to accord the Claimant the chance to report back but the employees failed.

28. The Respondent further submitted that the Claimants are not entitled to the reliefs sought because they are the ones who left employment. Further, he submitted that the claims lack particulars and supporting evidence.

Issues for determination

29. Having perused the pleadings evidence and submissions presented by both sides, the issues for determination are:

- (a) Whether the Claimants left their employment or they were dismissed by the Respondent.
- (b) If the answer to (a) is termination, whether there was valid reasons for the same.
- (c) Whether fair procedure was followed.
- (d) Whether the Claimant is entitled to the reliefs sought.
- (e) Whether the counter claim is merited.

Resignation or dismissal

30. The Claimants contended that they were dismissed while the employer says they deserted. There is no dispute that the claimants worked at the Respondent's hotel even before he took over the business in 2008; that the Claimants had no written contract of service; and that the Respondent gave them written contract to sign on 16.2.2015 but they refused because it was silent about the years they had served previously without written contract.

31. It is further without dispute that the Claimants never reported to work from 17.2.2015 until their lawyer served the Respondent with demand letters dated 4.3.2015 alleging that the Claimants had been unfairly dismissed and demanded damages. It is also not in dispute that the Respondent responded by the letter dated 13.3.2015 denying the alleged unfair dismissal and asked the Claimant to report back to work by 20.3.2015 or else they be dismissed. Finally it is a fact that the Claimant's never worked again.

32. The Claimant's contended that they were dismissed on 16.2.2015 for refusing to sign the unfavourable contract. They contended that they were not given time to read the contract before signing.

33. The Respondent alleged that he gave the Claimants one week to read and sign the contract before returning to him but the Claimants absconded from 17.2.215 until he received a demand letter from their lawyer. He maintained that the Claimants never reported back even after he called them back vide his letter dated 13.3.2015.

34. I have perused the exhibits produced but I did not see any documents informing the Claimants that they had one week to read and sign the contract even the letter dated 13.3.015 and the defence did not mention that they were given the said one week to read and sign new contracts. Consequently, I find that the said allegation is unfounded and only intended to deny the fact that he dismissed the Claimants on 16.2.2015 for refusing to sign a contract which they were not agreeable to the terms.

35. On the other hand, I find that the evidence by the Claimants is truthful and consistent with the natural consequences of the respondent's actions because after feeling aggrieved by the conduct of the Respondent, they instructed a lawyer to serve a demand. The Respondent did nothing until he received the demand letter. I see no reason why an employee who is given a week to read and sign a contract would leave work immediately and go to instruct a lawyer to serve a demand letter. Consequently, I find and hold that the Claimants have proved on a balance of probability that they did not resign but they were dismissed by the Respondent.

Reason for the termination

36. Under section 43 and 45 of the Employment Act, the burden of proving or justifying the reason for termination lies with the employer. In

this case the Respondent stated that the Claimants absconded work from 17.2.2015. However, the Claimants contended that they were dismissed summarily after they refused to sign the contract on 16.2.2015. Considering the evidence on record, I agree with the Claimants that they were dismissed on 16.2.2015 for refusing to sign a new contract.

37. A contract is a freely negotiated document and no party should force another to sign. Consequently, I find and hold that, the refusal to sign the contract was not a valid and fair reason for dismissing the Claimants.

Procedure followed

38. Section 41 of the Employment Act provided that:

“41(1) Subject to section 42(1), An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

(2)Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

39. In this case the Claimants contended that they tried to discuss the contract with the Respondent but he refused and ordered them to leave employment. The Claimants had worked for many years continuously and they were entitled to fair hearing in line with section 41 above, before dismissal for whatever reason. They were not accorded any hearing and as such I find that they were not dismissed in accordance with a fair procedure as required by section 45(2) (c) of the Act.

Reliefs

40. In view of the finding that the Respondent has failed to prove valid and fair reason for dismissing the Claimant and that fair procedure was not followed, I make declaration that the dismissal was unfair and unlawful within the meaning of section 45 of the Employment Act.

41. Flowing from the foregoing I find that the Claimants are entitled to damages under section 49 of the Act including salary in lieu of notice plus compensation for unfair termination. The Claimants worked for 7 and 11 years respectively and the only offence they committed was to refuse to sign a new contract whose terms they considered unfavourable to them. Consequently I award them 10 months’ salary as compensation for unfair termination.

42. The Claimants alleged that they were underpaid in terms of salary for the years of service and prayed for the arrears from 2008. The Claimant never filed the relevant legal notices as evidence to support the claim for underpayment. I will not aid them by going to look for evidence on their behalf. Consequently, I dismiss that claim. For the same reason I will assess any damages granted herein based on the basic salaries they were receiving namely Kshs. 9000 and Kshs. 7000 respectively plus house allowance of 15% of the said basic salary.

43. The claim for leave is granted only for one year because the Claimants were working in a restaurant which fall under the Regulation for Hotels and Caterers Trade, which bar accumulation of leave except with the employer’s consent. The Claimants have not shown by evidence that the employer accepted to accumulation their leave or that they applied for the leave but it was declined. Under the said Regulations, the minimum leave days per year is 24 days which I grant to each claimant.

44. The Claimants evidence that the employer never contributed to NSSF has not been rebutted. Consequently, I grant the prayer for service pay at the rate of 15 days’ pay for each completed year of service. The 1st Claimant served for 7 years while the 2nd Claimant served for 11 years.

45. The Claims for overtime, policy holidays and off days lack material particulars and are declined. However the claim for Certificate of Service is granted as prayed.

Counterclaim

46. In view for the finding that the claimants never left employment but were dismissed the counterclaim by the Respondent is not merited and it is dismissed

47. In conclusion I enter judgment for the Claimant’s as follows:

1st Claimant

NoticeKshs. 10,350

CompensationKshs. 103,500

LeaveKshs. 8307.70

Service Pay	<u>Kshs. 31500</u>
TOTAL	<u>Kshs. 153,657.70</u>
<u>2nd Claimant</u>	
Notice	<u>Kshs. 8050</u>
Compensation	<u>Kshs. 80,500</u>
Leave	<u>Kshs. 6,461.50</u>
Service Pay	<u>Kshs. 38,500</u>
TOTAL	<u>Kshs. 133,511.50</u>

48. The above awards are subject to statutory deductions but the Claimants are awarded costs and interest at court rate from the date hereof.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2021

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE