



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE 214 OF 2017

(CONSOLIDATED WITH CAUSE NO. 215 OF 2017 & CAUSE NO. 217 OF 2017)

NAOMI NJOROGE.....1ST CLAIMANT

NELLY MANDOI AENGWO.....2ND CLAIMANT

TOM ONDARI ANGUSAI.....3RD CLAIMANT

VERSUS

THE OLE-KEN HOTEL.....RESPONDENT

JUDGMENT

1. The 1st Claimant filed her memorandum of claim dated 16th May, 2017 on even date through the firm of wachira Wanjiru and company Advocates seeking for judgement against the Respondent for; -

- a) a declaration that the claimant termination was unlawful and unfair.
- b) The Respondent to pay the claimant house allowance for the 3 months worked of Kshs. 11,250.
- c) The claimant be awarded 12 months' compensation for unlawful and unjustified termination of Kshs. 345,000/-.
- d) The Respondent to pay the claimant salary in lieu of notice of Kshs. 28, 750/-.
- e) Payment of public holidays worked of Kshs. 4,717.95.
- f) Payment of overtime worked of Kshs. 97,307.69.
- g) Payment for off days of Kshs. 37,743.59.
- h) The Respondent to issue the claimant with certificate of service.
- i) The Respondent to pay the costs and interest of this claim.
- j) The Court to grant any other relief that they may deem necessary to grant.

2. The 2nd claimant filed her memorandum of claim dated 16th May, 2017 on even date also through the firm of Wachira Wanjiru and company Advocates and prayed for judgment against the Respondent for; -

- a. a declaration that the claimant termination was unlawful and unfair.
- b. The Respondent to pay the claimant house allowance for the 3 months worked of Kshs. 6,750/-.
- c. The claimant be awarded 12 months compensation for unlawful and unjustified termination of Kshs. 207,000/-.

d. The Respondent to pay the claimant salary in lieu of notice of Kshs. 17, 250/-.

e. Payment of public holidays worked of Kshs. 2,830/-.

f. The Respondent to issue the claimant with certificate of service.

g. The Respondent to pay the costs and interest of this claim.

h. The Court to grant any other relief that they may deem necessary to grant.

3. The 3rd Claimant filed his Memorandum of claim dated 16th May, 2017 on even date also through the firm of Wachira Wanjiru and company Advocates and prayed for judgment against the Respondent for;-

a) a declaration that the claimant termination was unlawful and unfair.

b) The Respondent be ordered to pay the illegally deducted salary of Kshs. 15,000.

c) The Respondent to pay the claimant house allowance for the 3 months worked of Kshs. 6,750/-.

d) The claimant be awarded 12 months' compensation for unlawful and unjustified termination of Kshs. 621,000/-.

e) The Respondent to pay the claimant salary in lieu of notice of Kshs. 51, 750/-.

f) Payment of overtime of Kshs. 73,246.15/-.

g) Payment of public holidays worked of Kshs. 16,984.62/-.

h) The Respondent to issue the claimant with certificate of service.

i) The Respondent to pay the costs and interest of this claim.

j) The Court to grant any other relief that they may deem necessary to grant.

4. The three suits herein were consolidated with the cause number 214 of 2017 marked as the lead file.

5. The Respondent entered appearance in all the claims herein on 26th May, 2017 and filed a response to each of the claim on 19th June, 2017 denying the claim and prayed for the claims to be dismissed with costs.

1st Claimant's Case

6. The 1st claimant avers that she was employed by the Respondent on 6th March, 2017 as a pastry chef earning a salary of Kshs. 25,000/- which job she performed with a lot of zeal till 1st May, 2017 when the Respondent fired her.

7. She stated that she reported to work at 6:30 am till 10:30 pm at night every day of the week without any off day or holiday or compensation for the overtime or holiday worked.

8. She stated that the circumstances leading to her termination was that she was paid her April salary on 1st May, 2017 and instructed to go back home till she was called by the Respondent..

9. She contends that her termination was not preceded with a notice as is required in law neither was she subjected to hearing. She avers that she was not paid her terminal dues or was she issued with a certificate of service.

10. The Respondent in response stated that the claimant was indeed employed as a pastry chef on 18th March, 2017 and was thereafter placed on 3 months' probation and was to be confirmed on condition that her expertise and skill met the Respondents expectations.

11. The Respondent contended that the salary paid to the claimant was inclusive of house allowance and that the claimant worked on shift either from 6:30 am to 2:30 pm or from 11:00 am to 7:00pm and all pastry staff never worked for the night shift.

12. It was stated that the Claimant was discharged of her duties when the Respondent received complaints from customers with regard to their cake preparation as they were poorly prepared and the customers' orders were not prepared to match the order therefore the respondent lost several customers as a result of the claimant's poor work therefore her employment was not confirmed and terminated in accordance with section 10 and 12 of Regulation of wages(Baking, Flour Confectionary and Biscuit baking Trade) Order under the Labour Institutions Act and section 42 of the Employment Act.

2nd Claimant's case.

13. The 2nd claimant avers that she was employed by the Respondent on 31st January, 2017 as a waitress earning a salary of Kshs. 15,000 which she continued earning till her dismissal on 1st May, 2017. She stated that she worked either in the morning shift from 7am to 3pm or from 3pm to 11pm at night.

14. The claimant alleged that she worked during public holiday and was not compensated for it. Also that when she was terminated she was not issued with notice of the said termination neither was she paid her terminal dues as required in law or issued with a certificate of service.

15. The Respondent in response to this claim, denied employing the Claimant in January, 2017 rather that the claimant was employed on 13th March, 2017 immediately when it started operation in March, 2017.

16. It was alleged that the claimant herein was employed on casual basis which position was to be confirmed depending on satisfactory performance.

17. The Respondent alleged that the claimant herein underperformed her duties as she was rude to customers, failed to bill customers and also failed to communicate with some customers who communicated in English. Consequently, her performance was assessed and the Respondent found her unsuitable for the position.

18. The Respondent contends that it gave the claimant one week notice before her services were terminated. also that the claimant was granted her 1 day off each week and never worked during Easter holiday.

19. The Respondent therefore averred that the claimant was terminated in accordance with section 10 and 12 of Regulation of wages (Baking, Flour Confectionary and Biscuit baking Trade) Order under the Labour Institutions Act and section 42 of the Employment Act.

3rd Claimants case.

20. The 3rd Claimant herein stated that he was employed by the Respondent on the 5th April, 2017 as a chef on agreed salary of Kshs. 45,000/- however on 1st May, 2017 he was paid Kshs. 30,000/- without any house allowance and thereafter he was dismissed from work.

21. The claimant avers that he reported to work at 7am in the morning till 10.00pm at night thus working for 11 hours per day including all public holidays.

22. He alleged that his termination was not preceded by Notice and was not given her terminal dues nor was he issued with a certificate of service.

23. In response to this claim the Respondent denied that the claimant was employed as a chef rather that he was employed as a casual worker in the kitchen department doing general work since he was not qualified to be a chef.

24. It was stated that in the kitchen department there were 3 shift and the claimant was to work for one shift and was paid Kshs. 1000/- per days, however the claimant had requested to stay for another shift in order to learn how to learn professional cooking.

25. That when evaluation of the claimant's performance was carried out, the Respondent found out that the claimant was not fit for the said job and was given a verbal one week Notice. Subsequently, the claimant was paid his April salary and he never reported back to work.

26. The Respondent avers that the claimant was terminated in accordance with section 10 and 12 of Regulation of wages (Baking, Flour Confectionary and Biscuit Baking Trade) Order under the Labour Institutions Act and section 42 of the Employment Act.

27. These claims proceeded for hearing on the 19th February, 2020. The 1st claimant **Naomi Njoroge** testified that she holds a diploma in food production and reiterated all the contents of her claim.

28. In cross examination she stated that she applied for the said job and was interviewed and offered the job as the pastry chef which work she performed alone without any other pastry chef. she testified that she was paid her April salary and no other monies were paid to her before the termination.

29. The 2nd Claimant, **Nelly Aengwo**, testified that she has a diploma in Hotel and Tourism management and was employed by the Respondent on 31st January, 2017 and worked till her termination on 1st May, 2017. She stated that she worked 6 days in a week from 7am to 3pm without any break and prayed for compensation for unfair termination as per her claim

30. On cross examination she testified that the respondent Human resource manager verbally send her away and gave no reason for the said termination. She testified that she worked 6 days in a week.

31. The 3rd claimant **Tom Angusai**, testified that he has diploma in Food production from Mombasa polytechnic. That he was employed as a cook/chef by the Respondent after undergoing an interview. he stated that he was offered the said job at a salary of Kshs. 45,000 however that on pay day he was paid Kshs. 30,000/-. He testified that he worked from 6:30 am in the morning till 10pm at night without any break.

32. That prior to the termination he was called by the Human Resource manager and instructed not to report to work again that was after he

was paid his April 2017 salary.

33. On cross examination he maintained that he was qualified to be a chef and the Respondent employed him and indicated verbally that his salary was to be Kshs. 45,000/- however on pay day he was paid less Kshs.15,000/-. He stated that the Human Resource manager directed him to go home and wait for a call which he never received to date.

34. The Respondent's case proceeded for hearing on the 15th June, 2021 with the Respondent calling one witness **Miriam Wainanina**, who testified that she is the Human Resource manager with a certificate in personnel management and a diploma in Human Resource management from University of Nairobi. She sought to rely on her statement of 15th June, 2021 which the court allowed.

35. On cross-examination, she testified that the respondent keeps records of all its employee however that she had records for Naomi only and not the other claimants.

36. She testified that all staff signed in when they reported to work and signed out going home. She stated that the claimants were paid their April salary and 7 days' salary in lieu of Notice but contended that she did not have any documentation to prove the same.

Claimants submissions

37. The claimants filed a joint submissions and submitted that the claimants herein were unfairly terminated from employment. It was argued that the only reason given by the Respondent for terminating the services of the claimants was that the claimants were serving on probation period and failed to meet the standard required for them to be confirmed as employees of the Respondent. they argued further that for probationary contract to be valid, they must be put in writing and expressly provided that the contract is for probationary period as envisaged under section 2 of the Employment Act and reinforced by citing the case of **Peter Chironda Begonja –v- Weld-con Limited [2018] eKLR**

38. It was also submitted that the law under section 74 of the Employment Act mandates the employer to keep records of all its employees while section 9(2) and 10(6-7) of the Employment Act makes it compulsory for employers to draw employment contracts.

39. Accordingly, it was submitted that the claimants testified that they were not placed on any probation while the Respondent maintained that the claimants were on probation without producing any documentation in support of their claim. He argues that the failure by the Respondent to produce the said contracts of employment to affirm the allegation that the claimants were serving on probationary basis ought to be construed against them as was held in **Peter Chironda Begonja –v- Weld-con Limited [2018] eKLR (Supra)**

40. The claimants submitted that the Respondent ought to have subjected them to disciplinary process as provided for under section 41 and 45 of the Employment Act for the alleged poor performance as was held in **Edward Shabaya –v- K.K Security Limited [2014] eKLR**.

41. The claimants submitted further that the Respondent fired them without Notice, while the Respondent argued that it gave the claimants 7 day's Notice. The claimants argued that the respondent ought to have tendered evidence to affirm its position and also give reasons for the said dismissal as envisioned under section 45(2) of the Employment Act.

42. It is therefore the claimants' submissions that they were unfairly terminated from employment and urged this Court to allow their claims as prayed.

Respondent's Submissions.

43. The Respondent submitted that the issue of employment relationship with the claimant is not in dispute. What is in dispute is whether the claimants were unfairly terminated from employment.

44. It was submitted that the claimants underperformed in their duties during the probationary period and were verbally warned by the Respondent to improve which they did not leading to their termination.

45. The Respondent submitted that section 42(1) of the Employment Act provides that section 41 of the Act shall not apply where a termination of employment terminates a probationary contract. However, with regard to notice it was submitted that the respondent gave a verbal 7 days' notice of termination in accordance with section 42(4) of the Employment Act.

46. On whether the termination was lawful, it was submitted that the claimant was terminated in accordance with section 44(4)(a-c) of the Employment Act for poor performance of their duties.

47. The Respondent thus implored upon this court to find that the termination of the claimants' employments was fair in the circumstances and dismiss the claims with costs.

48. I have examined all the evidence and submissions of the parties herein. The claimant have all averred that they were employed by the respondents in different capacities.

49. The respondents admitted employing the claimants herein on probationary period. The respondents however insist that the services of the claimants were not satisfactory and so were laid off.

50. The 1st claimant served from 1st March, 2017 (2 months). The 2nd claimant served from 31st January 2017 to 1st May 2017 (4 months)

and the 3rd claimant served from 1st April 2017 to 1st May 2017 (1 month). None of these claimants were however issued with any appointment letters. It is therefore not clear what the terms of employment were.

51. That notwithstanding, from the period of time the claimants worked, they were not within the period when it is anticipated that they would be issued with an appointment letter in writing as provided Vide Section 9 (1) of the Employment Act 2007 which states as follows;-

“9. General provision of contract of service

(1) A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

52. 1st & 3rd claimants had not served for over 3 months and therefore failure to issue them with a contract of employment was not a grievous omission.

53. Be that as it may Section 42 (2) of the Employment Act also envisages that one can serve on probationary appointment for 6 months. Since all the claimants served for less than 6 months, it follows that they were still on probation appointment and were therefore subject to Section 42 (1) of the Employment Act which states as follows;-

“42. Termination of probationary contracts

(1) The provisions of [section 41](#) shall not apply where a termination of employment terminates a probationary contract”.

54. The claimants were terminated while serving on probation and therefore they could be terminated upon being given 7 days notice which they were not given. I therefore find that the claimants are only entitled to the 7 days notice period which I grant them as follows;-

1st Claimant = $7/30 \times 25,000 = 5,833/=$

2nd claimant = $7/30 \times 15,000 = 3,500/=$

3rd claimant = $7/30 \times 45,000 = 10,500/=$

I will also grant the claimants house allowance for the period worked as follows;

1st claimant $15\% \times 25,000 \times 3 = 11,250/=$

2nd claimant $15\% \times 15,000 \times 4 = 9,000/=$

3rd claimant $15\% \times 45,000 \times 1 = 6,750/=$

TOTALS is as follows;

1st claimant = 17,083/=

2nd claimant = 12,500/=

3rd claimant = 17,250/=

All these is subject to statutory deductions. The respondents will also pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 5TH DAY OF OCTOBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mburu S. K. for claimant – present

No appearance for respondents

Court Assistant - Fred