



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MALINDI
CAUSE NO 80 OF 2018

JOHN ALBANO MBAE.....CLAIMANT

VERSUS

CARLO SOLIANO LUIGI T/A DOUBLEHEART RESORT.....RESPONDENT

JUDGMENT

1. This is a claim by the Claimant against the Respondent for compensation for alleged unlawful termination. The claim is opposed.
2. In his Statement of Claim, the Claimant alleges that he was employed by the Respondent in January 2009. That he was engaged as a receptionist with a starting salary of Ksh. 16,500/= per month.
3. In the course of time, the Claimant asserts that he continued to gain the confidence of the Respondent. As a result, he was given added responsibilities of a sales representative for the Respondent's business. However, the Claimant asserts that he was not compensated for these added responsibilities.
4. The Claimant asserts that he remained in the employment of the Respondent until 14th May 2018 when he was unfairly terminated. According to the Claimant, the Respondent accused him of working for the Respondent's competitors while still in the Respondent's employment. That as a result, the Respondent terminated his services.
5. The Claimant asserts that the accusations against him were unfounded. That the Respondent did not substantiate them. And neither did the Claimant own up to them.
6. It is the Claimant's case that the Respondent disregarded the law in terminating the contract of service between them. The Claimant asserts that the Respondent did not issue him with a termination notice. And neither did the Respondent process and pay him terminal dues.
7. The Claimant has claimed for terminal dues worked out at Ksh. 403,096/=. The particulars of the aforesaid sum of money are set out in the Statement of Claim.
8. The Respondent filed a response to the claim. In the response, the Respondent admits that the Claimant was his employee as a receptionist. He further admits that the Claimant's monthly salary was Ksh. 16,500/=.
9. However, the Respondent avers that the employment relationship between the parties was not comprised in an indefinite term contract of service. Rather, the parties had been working on the basis of fixed term contracts of service lasting approximately one (1) year at a time. It is the Respondent's case that the last contract between the parties lasted three (3) months running from 1st January 2018 to 31st March 2018.
10. It is the Respondent's case that he hired the Claimant only as a receptionist. That he never engaged him as a sales representative. That it is the Claimant who requested the Respondent to market the Respondent's business in Nairobi on three occasions in October 2015, February 2016 and January 2017. That on all these occasions, the Respondent remunerated the Claimant for his efforts at the rate of Ksh. 5000/= per day.
11. The Respondent further asserts that contrary to the Claimant's assertions, it is the Claimant's behavior that cost him his job. That he was often late to report to work and would sometimes come to work drunk. That he was also involved in fraudulent activities of allowing guests in hotel rooms that they had not been booked into.
12. In the Respondent's view, the Claimant's behavior constituted gross misconduct for which the Claimant would not be entitled to notice before his dismissal. As a consequence, the Respondent asserts that the Claimant's case lacks merit and the same ought to be dismissed with

costs.

13. On the trial date, only the Claimant testified. The Respondent who had been served did not attend the trial.

14. In his evidence, the Claimant reiterated the content of his Statement of Claim. He also identified the documents attached to his list of documents and introduced them into the proceedings as exhibits.

15. In the Claimant's evidence, he appeared to indicate that his starting salary was approximately Ksh. 15,000/=. Although there is some variance between this figure and the figure earlier pleaded, I do not think that much turns on it since both parties appear to concur in their pleadings that the Claimant's salary was Ksh. 16,500/=.

16. The Claimant testified that his problems with the Respondent begun on the afternoon of 14th May 2018 when he was accused of placing some guests in rooms other than the ones that they had been booked into. The Claimant denied doing this deliberately.

17. According to the Claimant, he had no information that these particular guests had been booked into standard rooms earlier on that day. When he received them in the evening, he treated them as fresh arrivals and granted them the executive suites that they asked for. In any event, it was the Claimant's case that he so no problem in the guests asking for executive suites even if they had earlier on been booked into standard rooms so long as the high end rooms were available and the guests were willing to pay for them.

18. The Claimant stated that the Respondent appeared to have been unhappy with this development and had reprimanded him for it. However, the Respondent did not indicate how the Claimant's actions had prejudiced the Respondent's business.

19. On 15th May 2018, the Claimant states that as he prepared to report on duty, he received a call from a Mr. Michael, the Respondent's manager, informing the Claimant not to report to work. As a consequence, the Claimant remained at home.

20. The Claimant asserts that he made several calls to the Respondent to know his fate without much success. As a result, the matter was referred to the Ministry of Labour for arbitration. However, the Labour office did not succeed in resolving the case and hence the suit.

21. Although the Respondent filed a response to the claim, he did not testify during trial. As a consequence, the matter is deemed as having proceeded ex-parte.

22. At the close of the case, the Claimant's counsel asked to file submissions. However, as at the time of writing this judgment, the submissions had not been filed. In my judgment, I have considered the pleadings by the parties together with the evidence and exhibits on record.

23. Section 41(1) of the Employment Act is relevant to the dispute. It provides as follows:-

“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 a shop floor union representative of his choice present during this explanation.”

24. In essence, the law requires that before terminating a contract of employment the employer must have substantive reasons to support the decision. These may be: physical incapacity; incompetence; or gross misconduct.

25. Further, the employer must process the proposed termination procedurally in the manner anticipated by law. First, the employer must notify the affected employee of the reason for the proposed termination in a language that the employee understands. Second, the employer must hear the employee's defense against the alleged accusation. Importantly, during this process the employee is entitled to be accompanied by a witness of his choice who may be co-employee or a shop steward. The employer must then communicate the decision reached to the affected employee.

26. Where the employer fails to adhere to these statutory requirements, the outcome of the process is deemed as unlawful in terms of sections 43 and 45 of the Employment Act. And the burden of proving the reason for termination is, by virtue of section 43 of the Act, bestowed on the employer.

27. In the current dispute, there is no evidence to justify the Respondent's assertion that the Claimant engaged in the acts of gross misconduct alluded to by the Respondent. There is also no evidence that the Respondent adhered to the procedure of release of an employee stipulated under section 41 of the Employment Act while taking the decision to terminate the Claimant.

28. From the record, although the Respondent accused the Claimant of drunkenness and perennial lateness, no evidence was tendered to support these assertions. Further, the Respondent accused the Claimant of fraud in processing guest bookings. However, no evidence was provided to support this assertion. The fact that some guests who had earlier on requested for standard rooms ended up being booked in executive suites is not of itself evidence of fraud unless there was evidence that this action caused the Respondent to lose income that went towards irregularly benefitting the Claimant.

29. The available evidence also shows that after the episode of 14th May 2018, the Respondent did not formally notify the Claimant of any accusations leveled against him. There is no record that the Claimant was given a chance to respond to any accusation. All that happened was that the Claimant was asked not to report on duty the following day and that is how he lost his job.

30. Having regard to the foregoing, the court finds that the Respondent has not proved the validity of the reasons for terminating the Claimant. Further, by failing to hear the Claimant out, the court finds that the Respondent did not afford the Claimant procedural fairness before terminating him. The termination of the Claimant's employment is thus declared unfair.

31. The Claimant has prayed for a number of reliefs as set out in the Statement of Claim. He claims for underpayments of Ksh. 82,927.95. However, apart from relying on the letter of 6th July 2018 by the County Labour Officer, Kilifi County, the Claimant does not provide adequate evidence to back this claim. There is no evidence showing how the figure accrued and how it was arrived at. In the absence of this evidence, the court declines to award this amount.

32. The Claimant has also prayed for severance pay of Ksh. 81,908.80. However, as is clear from section 40 of the Employment Act, severance pay is awarded in cases of redundancy and not unfair termination. Indeed, section 49 of the Employment Act provides the guide on what should be awarded in cases of unfair termination. And this does not include severance pay. Accordingly, this head of damages is declined.

33. There is also the claim for rest days computed at Ksh. 24,270/=. However, no evidence was tendered to show which rest days the Claimant worked during the period of engagement with the Respondent. I will therefore decline to make this award.

34. Similarly, there was no evidence to demonstrate that the Claimant did not take his leave between 2015 and 2018. I will therefore decline to award the sum of Ksh. 62,796.70 claimed under this head.

35. The Claimant has proved that he was in continuous employment of the Respondent until May 2018 when he was terminated. The parties agree in their pleadings that the Claimant was drawing a monthly salary. In terms of section 35 of the Employment Act, if either of the parties desired to terminate the contract, they were obligated to give notice that is equivalent to the period the Claimant would serve before drawing a salary. This was one month.

36. Where either party was not in a position to give the notice, then under section 36 of the Act, such party ought to have paid the other salary equivalent to the notice period. In this case, the Respondent ought to have paid the Claimant salary of one month.

37. The Claimant has claimed for damages equivalent to three months salary under this head of damages. However, he did not provide evidence that the parties had by agreement improved on the statutory minimum provided under section 35 of the Employment Act to three months. Accordingly, the court awards damages of Ksh. 16,500/= being equivalent to salary for one month.

38. Under section 49 of the Act, the court is authorized to award damages not exceeding an employee's 12 months as compensation for unfair termination. However, in making this award, the court must consider several factors such as the possibility of the employee securing similar employment from another employer and whether the employee has taken steps to mitigate his losses. Taking all these factors into account, I will award the Claimant compensation equivalent to his gross salary of six (6) months totaling Ksh. 99,000/=. I particularly take note of the fact that the Claimant has mitigated his loss by securing other forms of gainful activities including serving as a court interpreter.

39. I also award the Claimant interest on the sums above from the date of institution of this claim till payment in full. Costs are awarded to the Claimant.

40. Summary of the Award.

- a) The Respondent's termination of the Claimant's contract of service was unfair in the circumstances.**
- b) The Claimant is awarded Ksh 16,500/=being damages equivalent to salary in lieu of notice.**
- c) The Claimant is awarded Ksh. 99,000/= being compensation equivalent to the Claimant's 6months gross salary.**
- d) Interest is awarded on a) and b) from the date of institution of the claim till payment in full.**
- e) Costs of the claim are awarded to the Claimant.**
- f) The award is subject to the applicable statutory deductions in terms of section 49 of the Employment Act.**

Dated, signed and delivered on the 18th day of November, 2021

B O M MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

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.

B O M MANANI

JUDGE