



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 806 OF 2016

BETWEEN

JOSEPH GACHOKA.....CLAIMANT

VERSUS

KISIWA GUEST HOUSE LODGE LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ngonze & Ngonze Advocates, for the Claimant

S.W.Ndegwa & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 11th October 2016. He states, he was employed by the Respondent Hospitality Company as a Chef, from 13th December 2012 to 6th August 2016. His salary was Kshs. 15,000 monthly. The reasons cited by the Respondent in justifying termination were not valid. He was not given a fair opportunity to state his case. He prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 15,000.
- b. Annual leave pay over a period of 4 years, 21 days a year, at Kshs. 60,000.
- c. Service pay at rate of 15 days' salary for every complete year of service at Kshs. 3,750.
- d. 12 months' salary in compensation for unfair termination.
- e. Overtime for 4 years at Kshs. 136,875.
- f. Public holidays at Kshs. 18,000.
- g. Certificate of Service to issue.
- h. Costs.
- i. Interest
- j. Any other suitable order.

2. The Respondent filed its Statement of Response on 1st December 2016. It is not contested that the Claimant was employed by the Respondent, on terms and conditions of service stated in the Claim. He was summarily dismissed for theft of Respondent's property. Theft

was reported at Central Police Station vide OB No. 23/6/16. The Respondent counterclaims loss of its goods. The Respondent raises preliminary objection on the admissibility of the Claim, relying on the contents of OB No. 23/6/16. It prays the Court to dismiss the Claim and allow the Counterclaim with costs to the Respondent.

3. The Claimant testified, and rested his case, on 19th February 2019. He adopted his Pleadings and Witness Statement on record, as summarized at paragraph 1 above. He amplified that he was suspended on 6th December 2016. He was told he was involved in loss of Respondent's cutlery. He was not given any hearing. He was not charged for any criminal offence. He did not steal anything from the Respondent. He was never given details of the stolen items.

4. Cross-examined, the Claimant testified he is a qualified Chef. He was not charged with any offence. Redirected, the Claimant restated he was not charged with any criminal offence, and was not heard at the workplace.

5. The Respondent's case was scheduled for hearing on 19th February 2019. The Court was told the Advocate for the Respondent was unwell and granted adjournment. On 1st July 2019 the Respondent's case once again was set to be heard. The Advocate for the Respondent was said to be unwell and once again the Court granted adjournment, a last adjournment. Hearing was rescheduled to 23rd September 2019. There was no appearance for the Respondent. It was ordered that the Respondent's case is closed, and Parties advised to file Closing Submissions. The order was served upon the Respondent. On 8th November 2019, the Respondent had not filed Submissions. The Court was told that Respondent's Advocate was unwell. The Respondent was allowed 21 days to file its Submissions. Nothing was filed by 5th December 2019 when the Cause was last mentioned and date reserved for Judgment.

The Court Finds:-

6. The Respondent has failed to give evidence and/or submit.

7. The Claimant has established he was employed by the Respondent as a Chef, from 13th December 2012 to 6th August 2016 (not 2106 as pleaded at paragraph 3 [a]) of the Statement of Claim.

8. He earned a monthly salary of Kshs. 15,000.

9. He was summarily dismissed by the Respondent on allegation that he stole Respondent's cutlery. He was reported to the Police, but no criminal charges were brought against the Claimant. He was not charged at the workplace with any employment offence. He was not heard at any disciplinary forum.

10. It is clear the Respondent did not show valid reason or reasons to justify its decision, under Section 43, 45 and 47 of the Employment Act. The Claimant has satisfied the Court, that he was unfairly dismissed. Termination was on all counts, unfair and compensation is merited.

11. He worked for 4 years. His record was clean. Nothing has been placed before the Court by the Respondent, to suggest that the Claimant was to any degree, to blame for the circumstances leading to his dismissal. The Respondent has not given any evidence against grant of compensation at a ceiling amount of equivalent of 12 months' salary. **The Claimant is allowed his prayer for compensation assessed at equivalent of 12 months' salary at Kshs. 180,000.**

12. **The prayer for 1 month salary in lieu of notice at Kshs. 15,000 is allowed.**

13. The Respondent not only failed to call a Witness, but filed no employment records, except what is described as a Police OB abstract.

14. There is no document contradicting the Claimant on his annual leave claim. **He is allowed the prayer for annual leave, at the rate of 21 days' salary for 4 years [84 days], amounting to Kshs. 48,462.**

15. No evidence has been adduced, to show that the Claimant was subscribed to any Social Security Plan, contemplated under Section 35 [6], to disentitle him from service pay. He worked for 4 years, earned a monthly salary of Kshs. 15,000, which on a 26 day working month, would yield a daily rate of Kshs. 576.90. 15 days salary for 4 complete years of service, would yield Kshs. 36,615. The Claimant seeks outstanding service pay of Kshs. 3,750, which would imply the rest of service dues, was paid to the Claimant. **He is allowed service pay at Kshs. 3,750.**

16. He was imprecise about the prayer for overtime. Details of the hours worked and the mode of computation are not shown. The prayer is declined. The same applies for public holidays. The days are not specified. No document showing the Claimant at work on a public holiday has been availed to the Court. The rate applied in coming up with an amount of Kshs. 18,000 is not specific.

IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: compensation for unfair termination, equivalent of Claimant's 12 months' salary at Kshs. 180,000; notice at Kshs. 15,000; annual leave at Kshs. 48,462; and service at Kshs. 3,750 – total Kshs. 247,212.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Interest granted at 16% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 31st day of January 2020.

James Rika

Judge