



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2107 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

RAPHAEL KIMATHI KAMUYU..... 1ST CLAIMANT
JESSE WANJOHI KAMBUNI..... 2ND CLAIMANT
KASYOKA MUTHOKA..... 3RD CLAIMANT
ROBINSON IRUNGU MWANGLI..... 4TH CLAIMANT
FELIMONA MULELE INJESHI..... 5TH CLAIMANT
ALEX MUSEMBI KITHOME..... 6TH CLAIMANT

VERSUS

AFYA RESTAURANT LIMITED..... 1ST RESPONDENT
ANTHONY KANINU..... 2ND RESPONDENT
JANE MUTHONI NJUGUNA..... 3RD RESPONDENT

JUDGMENT

The Claimants in their Statement of Claim dated 16th December 2011 and filed in Court on 20th December 2011 allege wrongful dismissal from their employment by the Respondents herein and subsequent failure by the Respondents to pay their terminal benefits.

The Claimants contend that they were orally employed on diverse dates between May, 2007 and April, 2009 in the 1st Respondent's premises to serve in the capacities of waiters and cooks earning diverse salaries which was exclusive of house allowance.

The Claimants aver that they performed their duties diligently and to the Respondents' satisfaction until on or about 31st July, 2010 when the 1st Respondent unlawfully dismissed them from their employment without any valid or justifiable reason.

With regards to each individual Claim the Claimants contended as follows:

1st Claimant, Raphael Kimathi Kamuyu

He contended that he was employed on 14th April 2007 in the position of a waiter, a position he held until his termination on 31st July 2010.

He further contended that at the time of his separation he was earning a monthly salary of Kshs.6,800. His Claim is as follows:

- i. One month's salary in lieu of notice..... Kshs.6,800
- ii. Leave due for three (3) years..... Kshs.20,400

iii. Service Gratuity at the rate of 15 days	
for each completed year of service.....	Kshs.10,200
iv. 12 months' salary compensation for loss	
of employment 6,800 x 12.....	Kshs.81,600
v. House allowance.....	Kshs.39,780
vi. Off duty.....	Kshs.25,204
vii. Public Holidays.....	Kshs.11,557
viii. Overtime.....	Kshs.100,814
ix. Certificate of Service	
Total Amount due	Kshs.296,355

2nd Claimant, Jesse Wanjohi Kambuni

He contended that he was employed on 4th January 2009 in the position of a cook, a position he held until his termination on 31st July 2010.

He further contended that at the time of his separation he was earning a monthly salary of Kshs.8,400. His Claim is as follows:

i. One month's salary in lieu of notice.....	Kshs.8,400
ii. Leave due for one (1) year.....	Kshs.8,400
iii. Service Gratuity at the rate of 15 days	
For each completed year of service.....	Kshs.4,200
iv. 12 months' salary compensation for loss	
of employment 8,400 x 12.....	Kshs. 100,800
v. House allowance.....	Kshs. 17,640
vi. Off duty.....	Kshs. 8,401.20
vii. Public Holidays.....	Kshs. 5,776
viii. Overtime.....	Kshs. 50,407.20
ix. Certificate of Service	
Total Amount due	Kshs.204,024.40

3rd Claimant, Kasyoka Muthoka

He contended that he was employed on April, 2009 in the position of a cook, a position he held until his termination on 31st July 2010.

He further contended that at the time of his separation he was earning a monthly salary of Kshs.5,670. His Claim is as follows:

i. One month's salary in lieu of notice.....	Kshs.5,670
ii. Leave due for one (1) year.....	Kshs.5,670
iii. Service Gratuity at the rate of 15 days	
for each completed year of service.....	Kshs.2,800

iv. 12 months' salary compensation for loss of employment 5,670 x 12.....	Kshs.68,040
v. House allowance.....	Kshs.12,096
vi. Public Holidays (11).....	Kshs.12,096
vii. Overtime 96 days x 350.05.....	Kshs.3,850.55
viii. Certificate of Service	
Total Amount due	Kshs.131,811.35

4th Claimant, Robinson Irungu Mwangi

He contended that he was employed on 5th February 2008 in the position of a waiter, a position he held until his termination on 31st July 2010.

He further contended that at the time of his separation he was earning a monthly salary of Kshs.6,800. His Claim is as follows:

i. One month's salary in lieu of notice.....	Kshs.6,800
ii. Leave due for two (2) years.....	Kshs.13,600
ii. Service Gratuity at the rate of 15 days for each completed year of service.....	Kshs.6,800
iv. 12 months' salary compensation for loss of employment 6,800 x 12.....	Kshs.81,600
v. House allowance.....	Kshs.26,520
vi. Public Holidays.....	Kshs.7,701.10
vii. Overtime.....	Kshs.81,211.60
viii. Certificate of Service	
Total Amount due	Kshs.241,035.70

5th Claimant, Alex Musembi Kithome

He contended that he was employed on 13th January 2007 in the position of a cook/chef, a position he held until his termination on 31st July 2010.

He further contended that at the time of his separation he was earning a monthly salary of Kshs.8,400. His Claim is as follows:

i. One month's salary in lieu of notice.....	Kshs.8,400
ii. Leave due for three (3) years.....	Kshs.25,200
iii. Service Gratuity at the rate of 15 days for each completed year of service.....	Kshs.12,600
iv. 12 months' salary compensation for loss Of employment 8,400 x 12.....	Kshs.100,800
v. House allowance.....	Kshs.52,920

Claimants herein as alleged and contends that the Claimants were employees of the 1st Respondent. He further contends that the 1st Respondent hotel is still operational and that he ceased being in the management of the hotel.

The 2nd Respondent further avers that he did inform the Claimants of the changes in management of the 1st Respondent and the said Claimants continued working for the 1st Respondent with the 3rd and 6th Claimants still being under the 1st Respondent's employment at the time of filing this Claim.

The 2nd Respondent contends that he was also an employee of the 1st Respondent and is therefore not liable for any claim. He however contends that the Claimants were engaged by the 1st Respondent on a casual basis and are therefore not entitled to the reliefs sought in their Statement of Claim.

The 2nd Respondent urges this Court to dismiss the Claim against him with costs.

The 1st and 3rd respondents did not enter appearance or file defence to the claim.

The case was heard on 4th April, 2019 with the Claimants calling one witness to testify on their behalf. The Respondents failed to attend the court for hearing despite proper service.

Evidence

CW1, JESSE WANJOHI KAMBUNI adopted his witness statement dated 22nd January, 2019 as his evidence in chief. In his witness statement, CW1 states that all the claimants were engaged by the respondents as chefs and waiters. That they worked overtime for the entire period they were in employment of the respondents. That they reported to work at 6.00 am and left at 9.00 pm delay and there was no overtime pay. That their services were terminated on 31st July 2010 without a hearing and for no valid grounds.

CW1 further testified that the Claimants were not paid any of their terminal dues at the time of separation. He further testified that their salaries were paid on a monthly basis and that prior to their termination they were not given any notice or any hearing.

CW1 urged this Court to allow the Claim in terms of the reliefs sought therein.

Claimants' Submissions

The Claimants submitted that their termination was in contravention of the requirements of the mandatory provisions provided under Section 40 of the Employment Act, 2007.

They further submitted that their termination was contrary to the provisions of Sections 35, 41, 43 and 45 of the Employment Act, 2007. The Claimants relied on the cases of **Kennedy Maina Mirera v Barclays Bank (K) Limited (2018) eKLR** and **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited (2013) eKLR**.

The Claimants submitted that they are entitled to the reliefs sought in their Claim and urged this Court to allow the same as pleaded in the Statement of Claim.

Analysis and Determination

Having considered the facts of this cause, evidence, submissions and authorities, the following are the issues for determination:

- 1) Whether the Claimants have any claim as against the 2nd and 3rd Respondents herein
- 2) Whether the termination of the Claimants' employment was valid both procedurally and substantively
- 3) Whether the Claimant is entitled to the reliefs sought

The 2nd Respondent herein raised a Notice of Preliminary Objection, dated 23rd April, 2012 alleging to have been improperly sued as the Claimants' employer. The court through its ruling delivered on 11th March 2014 upheld the Preliminary Objection and directed that the 2nd Respondent's name be expunged from the record and that the Claimants proceed with their Claim as against the 1st Respondent.

The Claimants subsequently filed a Notice of Motion Application dated 24th November, 2017 seeking to enjoin the 2nd and 3rd Respondent herein being directors of the 1st Respondent herein. The said application was allowed by the Court on 16th January, 2018.

The question that then arises is whether the said 2nd and 3rd Respondents are proper parties to this Claim.

The Claimants in the aforementioned Application contended that they sought to enjoin the 2 respondents by the fact that the 1st Respondent had closed down in a bid to ensure that they do not get justice.

Should the corporate veil in this case be lifted?

A corporate entity is capable of suing and being sued in its own name. The House of Lords in **Salomon v Salomon (1897) AC 78**, recognized that whereas a registered company is a legal person separate from its members, the veil of incorporation may be lifted in certain cases for instance, where it is shown that the company was incorporated with or was carrying on business as no more than a mask or device for enabling the directors to hide themselves from the eyes of equity.

As regards the lifting of the corporate veil, Halsbury's Laws of England (4th Edition) at Para 90 states that lifting of the corporate veil will be done where, *"there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders"*

The instant case does not fit the description above. Closing of a business does not necessarily mean that the Company is wound up. Further, the 2nd Respondent in his Response to the Statement of Claim averred that there was a change in the management of the 1st Respondent which is still in operation and in fact he was no longer a Director thereto. Should there be need, the Civil Procedure Rules provide for cross examination of Directors in execution of decree.

In the circumstances I find that the Claim as against the 2nd and 3rd Respondent are not valid and the claim will proceed as against the 1st respondent alone.

The Law

The law relating to fair termination is contained in Section 41, 43 and 45(2) of the Employment Act.

The Claimants submitted that the termination of their employment was unfair as it contravened the provisions of Section 41, 43 and 45 of the Employment Act that provides that an employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure.

CW1 testified that no notice was issued to them prior to their termination.

The statutory burden for a complaint of unfair termination of employment or wrongful dismissal is contained in **Section 47(5)** of the Employment Act. The section provides that –

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

An employee therefore has the burden of proving that an unfair termination of employment has occurred while the employer's burden is justify the reasons such termination.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."

In Francis Mbugua Boro v **Smartchip Dynamics Ltd (2017) eKLR** it was held:

"...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair."

Other than the 2nd respondent, the other respondents did not file any response to the claim and the averments of the claimants remain uncontroverted, the 2nd respondent having confirmed that the claimants were indeed in the employment of the respondent. The termination was thus unfair for want of both procedure and valid reason.

Having found that the Claimants' termination was unfair both procedurally and substantively and in the absence of any evidence from the 1st Respondent to rebut the position, the Claimants are entitled to the following remedies against the 1st Respondent:

One Month's Salary in lieu of notice.

The Claimants are entitled to this relief by dint of Section 36 and 49(1) of the Employment Act, 2007 at one month's salary for each claimant.

Compensation for unfair termination

6. Certificate of Service

Total Amount due Kshs.93,457.10

The Claimants are awarded costs of this suit and interest shall accrue from the date of the Judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE