



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1212 OF 2015

MWENDWA NDOO MAINGA.....CLAIMANT

v

KATRINA HOTEL LIMITEDRESPONDENT

JUDGMENT

1. Mwendwa Ndoos Mainga (Claimant) instituted legal proceedings against Katrina Hotel Ltd (Respondent) on 10 July 2015 alleging unfair termination of employment and breach of contract/statute.
2. In a *Defence and Counterclaim* filed on 13 August 2015, the Respondent contended that the Claimant deserted work after an audit uncovered fraud of Kshs 359,956/-, which amount the Respondent counterclaimed.
3. The Claimant filed an *Amended Memorandum of Claim* on 28 August 2015 and an *Answer to Defence and Defence to Counterclaim* on 9 September 2015, and the Cause was heard on 18 November 2019.
4. The Claimant and a Director of the Respondent testified (the witnesses adopted their written witness statements and also produced documents).
5. The Claimant filed his submissions on 19 December 2019 while the Respondent filed its submissions on 17 January 2020.
6. The Court has considered the pleadings, evidence and submissions.

Desertion or unfair termination of employment?

7. The Claimant's case was that on 10 March 2015 a supervisor of the Respondent called Simiyu instructed him not to report to work until further notice, and the reason given was a downturn in sales. He stated that he was never recalled, hence the suit.
8. Under cross-examination, the Claimant denied that he was issued with a written contract, but when pressed and shown a copy of the contract admitted that he signed the contract.
9. The Claimant also admitted that he was aware that an audit was done.
10. The Respondent's Director testified that he caused an audit to be conducted after noticing cash flow problems and that the audit established understating of stock by the Claimant, a colleague (named) and Simiyu and when he confronted the Claimant, he disappeared even leaving his jacket behind (which the witness stated he still kept).
11. The witness also stated that he reported the theft to the Police and Simiyu was arrested. He denied that Simiyu had the authority to dismiss the Claimant or that he dismissed the Claimant.
12. The Claimant did not deny or advert to the assertion that the supervisor he alleged instructed him not to report to work was arrested by the Police, despite the assertion in the witness statement. The Claimant denied having signed any contract but when pressed and shown copies he had filed in Court himself, relented. The Claimant did not appear to be a truthful or honest witness.
13. Further, the Claimant admitted that he was aware of an audit.
14. The sum of the above suggest to the Court that the Respondent did not terminate the services of the Claimant on account of operational reasons as pleaded and/or as testified.

15. The Claimant, perhaps apprehensive of arrest by the Police after getting wind of the arrest of his colleague decided to keep off work. He disappeared and left his jacket.

16. In the view of the Court, this was not a case of unfair termination of contract but repudiation of the contract by the Claimant.

17. *Compensation, severance pay and pay in lieu of notice* are therefore not available remedies.

Breach of contract/statute

Underpayments

18. The Claimant sought underpayment of wages amounting to Kshs 168,443/- during the year 2014. He contended that he was earning Kshs 8,034/- instead of the prescribed minimum salary of Kshs 22,070/- for cashiers.

19. The Claimant filed in Court copies of employment contracts. The last contract dated 1 January 2014 show that he was a general labourer.

20. In the circumstances, the Court finds no evidential basis to find that the Claimant was a cashier and/or entitled to the minimum prescribed wage for cashiers.

Leave

21. Annual leave is a statutory entitlement. The Claimant alleged he had not taken annual leave from 2005 to 2014 but produced a copy of leave application form for 2006 which was approved.

22. Despite the failure to lead any further records in respect of the leave, the Court finds that the claim for annual leave from 2005 cannot succeed because the number of leave days which can be carried forward is circumscribed by section 28(4) of the Employment Act, 2007.

23. There was no evidence from the Claimant that he carried the leave forward with the permission of the Respondent and/or applied that he applied for leave but was denied the leave.

Overtime

24. The Respondent filed numerous pay records for the Claimant to counteract the contention that overtime worked was not paid for.

25. In light of the records, the Court finds that the Claimant was paid for overtime worked.

Wages for March 2015

26. The Claimant sought Kshs 7,283/- being earned wages for March 2015 and the Respondent admitted owing the same in the submissions. The Court, therefore, allow the head of the claim.

Counterclaim

27. The Respondent counterclaimed for Kshs 359,956/- which it contended the Claimant could not account for but in the witness statement, the amount was stated as Kshs 168,020/-.

28. For unexplained reasons, the Respondent did not address the head of the claim in the written submissions.

29. The Court will in the circumstances consider the claim as having been abandoned.

Conclusion and Orders

30. From the foregoing, save for Kshs 7,283/- being earned March 2015 wages, the Court finds no merit in the Cause herein and orders it dismissed.

31. No order on costs.

Delivered, dated and signed in Nairobi on this 7th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mulaku instructed by Namada & Co. Advocates

For Respondent Mr. Mugalo instructed by Kakai Mugalo & Co. Advocates

Court Assistant Judy Maina