



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 738 OF 2017
(Before Hon. Lady Justice Maureen Onyango)

DANIEL KIOKO MWANGANGI.....CLAIMANT

VERSUS

GRAY’S OAK HOTEL..... RESPONDENT

CORRIGENDA RULING

In the judgment delivered on 23rd April 2020, I awarded the Claimant the following–

The total award is –

- 1... *One month’s salary in lieu of notice..... 11,900.00*
- 2... *6 months’ salary as compensation..... 71,400.00*
- 3... *Service pay..... 13,730.77*
- 4... *House allowance..... 55,335.00*
- 5... *Pay in lieu of public holidays..... 11,376.63*

Total ***Kshs.108,407.40***

It has come to my attention the judgment contained an arithmetic error in the total award, which was not noted at the time of delivery of judgment. I therefore invoke this court’s powers under Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 to correct the judgment to read as follows –

The total award is –

- 1.... *One month’s salary in lieu of notice..... 11,900.00*
- 2.... *6 months’ salary as compensation..... 71,400.00*

3.... Service pay.....	13,730.77
4.... House allowance.....	55,335.00
5.... Pay in lieu of public holidays.....	<u>11,376.63</u>
Total Award is.....	<u>Kshs.163,742.40</u>

The judgment is amended accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2021

MAUREEN ONYANGO

JUDGE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

REPUBLIC OF KENYA

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GRAY'S OAK HOTEL.....RESPONDENT

JUDGMENT

Vide his statement of claim dated 3rd February 2010 and filed in Court on 19th April 2017, the claimant herein avers that his employment was unlawfully, wrongfully and unfairly terminated by the Respondent, a registered limited liability company.

His case is that he was employed by the respondent on or about 8th August 2014 in the position of a waiter deployed to the Respondent's establishment in Kitengela. He was not issued with any contract of employment. He was earning a monthly salary of Kshs.9,000 that was paid into his account and no payslip issued.

The Claimant contends that he worked diligently, faithfully and to the Respondent's satisfaction until 5th March 2017 when he reported for duty and after working for two hours was informed by his supervisor in the presence of another supervisor that he was drunk.

The Claimant disputed the allegation and maintained that he had in fact worked for two hours before being called out. The Claimant averred that he was then directed to go back home on allegation of reporting to work intoxicated.

The Claimant stated that he left the Respondent's premises and as he had earlier applied for leave for 5 days, he reported back to work on 11th March, 2017, when he was served with a suspension letter stating that he had been placed on suspension from 11th March, 2017 to 18th March, 2017 without pay.

He further stated that he did resume duties on 18th March 2017 when he was served with a letter for summary dismissal whose effective date was 18th March 2017 for an incident that occurred on 5th March 2017.

The Claimant maintained that his termination was unlawful, wrongful and unfair as the Respondent failed to adhere to the provisions of the law on fair termination.

Aggrieved by the decision to unfairly terminate his services the Claimant filed the instant claim in which he seeks the following reliefs:

1. A declaration that the dismissal of the Claimant is unlawful, wrongful and unfair.
2. An Order directing the Respondent to pay the Claimant as follows:
 - i. In lieu of termination notice..... Kshs.11,831.70
 - ii. In lieu of Public Holidays..... Kshs.11,376.63
 - iii. House Allowance..... Kshs.56,789.14
 - iv. Underpayment of salary..... Kshs.98,369.80
 - v. Service pay..... Kshs.19,111.94
 - vi. Twelve months' compensation..... Kshs.141,980.40
3. Certificate of Service
4. Costs of this cause
5. Interest on 2 (i) – (v) and 4 herein above.
6. Any other relief this Court may deem fit and just to grant.

The Respondent despite being served with the Summons and the Memorandum of Claim failed to enter appearance and file its defence in this matter. The matter therefore proceeded as undefended Claim on 25th September 2019 with the Claimant testifying on his own behalf.

At the hearing, the claimant adopted his witness statement and documents filed with the claim.

Claimant's Submissions

In his submissions the Claimant submits that he was employed by the Respondent in August 2014 in the position of a waiter and deployed to its establishment in Kitengela. He produced his National Social Security Fund Statement and his bank Statements as evidence. He relied on a warning cum suspension letter and the dismissal letters dated 31st November 2014 and 18th March 2014 respectively.

The Claimant urged this Court to find that he has proved through the said documents that there was an employer-employee relationship that was in existence. The Claimant relied on the provisions of Section 9 and 10 of the Employment Act, 2007 and on the case of **Josephine M. Akinyi O. v Farhiyo Mohamed (2013) eKLR** where the Court held "*that the employer has a duty to produce a written contract, in absence it must prove or disapprove an alleged term of the employment relationship. In absence of which the employees statement as to the terms of the contract must be given more weight.*"

The Claimant further submitted that his termination was unlawful, wrongful and unfair as he was not accorded an opportunity to be heard contrary to the provisions of Sections 41, 43 and 45 of the Employment Act, 2007. The Claimant cited the Authority of **Peter Apolo Ochieng v Amedo Centre Kenya Limited (2016) eKLR** where the Court cited with approval the case of **Kenya Plantation and Agricultural Workers Union v Eastern Produce Kenya Limited (2017) eKLR** where the Court held –

"The provisions with regards to fair procedures leading to a termination under section 41 of the Employment Act are mandatory.

Where not followed, a termination becomes procedurally unfair.”

The claimant also relied on the case of **Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Ltd (2014) eKLR** where the Court held that the purpose of a disciplinary hearing was to objectively enquire whether an employee is guilty of misconduct, poor performance or has some incapacity that lessens his ability to perform the job functions to the employer’s standard, and for which a sanction such as a warning, suspension or dismissal may be given.

The Claimant submitted that he is entitled to the reliefs sought in his Memorandum of Claim and urged the Court to allow the same as prayed.

The Claimant relied on the provisions of Section 35 and 49 of the Employment Act, 2007.

The Claimant submitted that he is entitled to the relief of payment in lieu of public holidays for the entire period of his employment as he was required to work. He claims for 10 public holidays each year being New Year, Good Friday, Easter Monday, Labour day, Madaraka day, Idd Ul-Fitr, Mashujaa day, Jamhuri day, Christmas and Boxing day.

On underpayment the Claimant submitted that his salary at the time of his dismissal was Kshs.9,000 being less than the minimum provided under the Regulation of Wages (General) (Amendment) Order, 2013 that provided for a minimum of Kshs.9,372.15.

The Claimant further submitted that he is entitled to the relief of house allowance by dint of Section 31 of the Employment Act as he was not provided with any housing or payment in lieu thereof.

The Claimant further maintained that the Respondent had a duty under Section 74(1)(i) of the Employment Act to keep and produce in legal proceedings records relating to the employees’ housing and/or housing allowance. He further averred that in absence of any records he is entitled to the same. The Claimant relied on the case of **Meshack Kiio Ikulume v Prime Fuels Kenya Limited (2013) eKLR** where the Court held that it is the employer’s duty to keep certain records including hours of work and produce the same in legal proceedings.

The Claimant further submitted that he is entitled to service pay having shown by way of NSSF Statements that the Respondent made statutory deductions but failed to remit the same with the statutory body. He urged this Court to award him the same as prayed pursuant to the provisions of Section 35(5) of the Employment Act.

The Claimant maintained that he is entitled to full compensation for unfair termination by dint of Section 49 of the Employment Act having demonstrated that his termination was unlawful, wrongful and unfair. He therefore urged this Court to allow the claim as prayed.

The Claimant submitted that at the time of his dismissal he was not issued with a Certificate of Service as required under Section 51(1) of the Employment Act that provides in mandatory terms that an employer is to issue an employee with a Certificate of Service at the time of his separation. The Claimant therefore urged this Court to allow this Claim as prayed.

The Claimant further maintained that he is entitled to an award for costs and interest as prayed in his Memorandum of Claim and urged this Court to allow the same.

In conclusion, the Claimant submitted that he had proved his Claim on a balance of probabilities as required by law and urged this Court to allow the same as prayed.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the Claimant, the following are the issues for determination:

1. Whether an employee-employer relationship existed between the Claimant and the Respondent herein
2. Whether the termination of the Claimant’s employment by the Respondents was wrongful, unfair and unlawful.
3. Whether the Claimant is entitled to the reliefs sought.

Whether an employee-employer relationship existed between the Claimant and the Respondent herein

The Claimant in his pleadings, evidence and submissions averred that he was employed by the Respondent herein on 8th August 2014 as a waiter and was deployed to its establishment in Kitengela.

He further averred that he worked for the Respondent in that position until 18th March 2017 when his services were summarily dismissed effective 18th March 2017 for an incident that occurred on 5th March 2017.

The Claimant further submitted that he was indeed an employee of the Respondent as he had attached letters from the Respondent herein, suspending him (dated 11th March, 2017) and another dated 18th March, 2017 dismissing him. He further relied on his Bank Statements in which there are entries of bank transfer from the Respondent indicating payment of his salary. The Claimant relied on the provisions of Section 9 and 10 of the Employment Act, 2007 and the case of **Josephine M. Akinyi O. v Farhiyo Mohamed (2013) eKLR**.

In the case of *Monica Kanini Mutua v Al-Arafat Shopping Centre & another [2018] eKLR*, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

Further, in the case of *Herman Ilangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR*, the court noted that the respondent had failed to enter appearance or file a defence despite being served with summons and held that the claimant had proved his employment relationship with the respondent through bank statements, which fact was not contested by the respondent. The Court also held that the claimant had been unfairly terminated.

In the instant case which is an undefended claim, I find that the Claimant has established existence of an employment relationship with the Respondent through copies of pay slips, which evidence payment of salary periodically by the Respondent as well as the suspension and dismissal letters that were similarly issued by the Respondent herein. I further rely on the case of *Elijah Kipkoros Tonui v Ngara Opticians T/A Bright Eyes Limited (2014) eKLR* where the Court considered letters placed on record by the Claimant and made the following findings:

“There is abundant evidence showing the Claimant was, and the Court finds he was, an employee of the Respondent on the terms and conditions stated in the Statement of Claim.”

Whether the termination of the Claimant’s employment by the Respondents was wrongful, unfair and unlawful

The Claimant has submitted that the Respondent did not adhere to due process while dismissing him from employment contending that he was not accorded a hearing prior to his termination before a disciplinary committee. Further, that the reasons for termination were never explained to him. This evidence is uncontroverted as there is no defence filed by the respondent. In that regard, I find that indeed the Claimant was unfairly and unlawfully dismissed from employment by the Respondent.

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.”

Whether the Claimant is entitled to the reliefs sought

The Claimant is entitled to the following:

i. Salary in lieu of notice – Kshs.11,900

The Claimant is entitled to one (1) month’s salary in lieu of notice by dint of Section 36 of the Employment Act, 2007. Looking at the Bank Statement the last salary earned by the Claimant as at 20th March 2017 was Kshs.11,900. I award the claimant **Kshs.11,900** as one month’s salary in lieu of notice.

ii. Compensation for unfair termination Kshs.11,900 x 6 months total Kshs.71,400

Having found that the Claimant’s termination was unfair, he is entitled to compensation under this head. Given the length of service and the fact that the termination was unfair, I award him 6 months’ salary as compensation in the sum of **Kshs.71,400**.

iii. Service Pay

As the respondent did not pay his NSSF regularly and this assertion having not been controverted by the Respondent, the Claimant is entitled to service pay as prayed. The same is calculated as below –

$15 \times 11,900 \times 2 \text{ years} = 13,730.77$

26 days

I award the claimant **Kshs.13,730.77** as service pay.

iv. House Allowance

The Claimant is entitled to this relief by dint of Section 31 of the Employment Act, 2007 as the salary he was paid was not consolidated going by the mandatory statutory minimum rates of pay.

The Claimant contended that he was not provided with any housing nor was he paid in lieu thereof. In absence of any evidence from the Respondent to controvert this assertion the Claimant is entitled to the same.

15/100 x 11,900 x 31 months = 55,335.

I award the claimant house allowance in the sum of **Kshs.55,335**.

v. Underpayment of Salary

The Claimant in his pleadings, evidence and submissions maintained that he was earning a monthly salary of Kshs.9,000 which amount was below the minimum wage pursuant to the Regulation of Wages (General) (Amendment) Order, 2013 that provides for a minimum of Kshs.9,372.15 for waiters and waitresses deployed within a municipality as was his case.

Looking at his last bank statement, I note that the Claimant's last salary was Kshs.11,900 which is above the minimum as provided under the Regulation of Wages (General) (Amendment) Order, 2013. This claim therefore fails.

vi. Payment in lieu of Public Holidays

The Claimant submitted that he worked through the public holidays (10 in total in a year) and was not paid in lieu of the same. In absence of any evidence from the Respondent to controvert this assertion I find that the Claimant is entitled to the same. Reference is made to the case of **Meshack Kiio Ikulume v Prime Fuels Kenya Limited (supra)** where the Court held that it is the employer's duty to keep certain records including hours of work and produce the same in legal proceedings. I award the Claimant the relief as prayed in the sum of **Kshs.11,376.63**.

The total award is –

1. One month's salary in lieu of notice.....	11,900.00
2. 6 months' salary as compensation.....	71,400.00
3. Service pay.....	13,730.77
4. House allowance.....	55,335.00
5. Pay in lieu of public holidays.....	<u>11,376.63</u>
Total	Kshs.108,407.40

6. Certificate of Service

The Claimant is entitled to the same by dint of Section 51 of the Employment Act, 2007 and the respondent is ordered to issue same to the claimant.

7. Costs and Interest

The Claimant is awarded costs of the suit and interest at Court rates from the date of Judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE