



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1613 OF 2015

METHUSELLAH ONYANGO.....CLAIMANT

VERSUS

JAMBO GRILL LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed suit on 29th October 2015 praying for compensation for unfair summary dismissal and payment of terminal benefits to wit:

- (i) One month salary in lieu of notice.
- (ii) Payment in lieu of leave days not taken for two years.
- (iii) Payment of overtime calculated at three hours per day for seven years.
- (iv) Costs and interest.

2. The claimant testified that he was employed by the respondent in April 2006 and worked up to July 2014. That the claimant worked as a food and beverage supervisor in the hotel. That on 9th June 2014, the claimant went on leave and upon his return on 15th July 2014, the claimant was told that he had been retrenched and that he should go home. The claimant testified that the General Manager informed him that he was underperforming but he had no letter of warning. That he was not given notice to show cause nor was he subjected to a disciplinary hearing. That the claimant and other staff were called for a supervisors meeting and told to pull up their socks. That the claimant had not taken leave for two years and was not paid in lieu of leave. That he was paid one month salary for the days worked upon dismissal.

3. The claimant prays for the reliefs set out in the statement of claim including overtime. CW1 testified that an internal memo dated 6th June 2014 asked the claimant to take daily inventory. CW1 denied he was employed in 2011 as alleged by the respondent and insisted that he was employed in 2006. CW1 said he had a clean record at work.

4. CW1 Daniel Otieno Obudo testified that he was a Human Resource Manager and now worked for Nation Staff Consumer Society as a Manager. That he worked for the respondent prior as the General Manager and was in charge of operations and supervised all supervisory staff including the claimant. RW1 stated that the claimant was not employed in April 2006 but was employed as a supervisor in 2011. RW1 said that employees had pay slips and that he had joined the respondent in 2005 and left in 2014. That the claimant found him with the respondent. That he had many meetings with supervisors and gave them verbal warnings. That the claimant had served longer than others and so he bore bigger responsibility. That the claimant was a perpetual late comer. That all supervisors were by a letter dated 6th June 2014 asked to keep inventory of utensils because they were getting lost. That the employment of the claimant was terminated for failure to improve his work performance. That RW1 terminated the claimant's employment and wrote the termination letter.

5. RW1 testified that the claimant was not entitled to overtime. That a timetable was followed and the claimant took off days. That the claimant worked eight (8) hours a shift. That an employee could not work overtime without authority. That there is no evidence that the claimant was paid for 11 holidays worked and 11 leave days not taken. Under cross examination RW1 said that the claimant had no letter of appointment and had no record when he started working. RW1 also admitted that he had no written warning given to the claimant. RW1 also admitted that he had no work performance evaluation report for the claimant. That he only had letter of termination. RW1 admitted that he only held general meetings for supervisors addressing various issues and did not hold any specific meeting to address any issues with the claimant. RW1 stated that the claimant was declared redundant. RW1 stated that no notice was given to the labour officer. RW1 admitted that the claimant was owed in respect of leave days set out in exhibit 'Ja3'.

Determination

6. The issues for determination are:

- (i) Whether the termination of the claimant was for a valid reason and if the respondent followed a fair procedure.
- (ii) Whether the claimant is entitled to the reliefs sought.

7. The respondent gave a termination letter to the claimant in the format of a standard form stating the reasons for termination to be:

- (i) Underperformance and laxity at work and
- (ii) Redundancy.

8. RW1 admitted that the claimant was declared redundant. That the labour officer was not notified. That the claimant was not given one month notice of termination but was sent home immediately upon return from leave. RW1 also admitted that the claimant was not paid any terminal benefits upon termination and was only paid for days worked. RW1 admitted that he had no evaluation report of the performance of the claimant. That issues of performance were discussed in respect of supervisors in general meetings of supervisor. Indeed RW1 did not produce any evidence before court that the claimant underperformed in his work as a supervisor.

9. The claimant testified that he had no adverse warning in writing and this was confirmed by RW1. The claimant has proved on a balance of probabilities that the termination of his employment was wrongful in terms of *Section 47(5) of the Employment Act, 2007*. Conversely, the respondent has failed to justify the termination of the claimant in that RW1 did not demonstrate to the satisfaction of the court that the respondent had a valid reason to terminate the employment of the claimant. The respondent readily admitted that it did not follow *sections 36, 40 and 41 of the Employment Act* in that no notice was given to the claimant or labour office of the intended termination of the claimant on grounds of redundancy. In fact, the respondent did not demonstrate that the claimant was redundant in the first place.

10. Accordingly the termination of the employment of the claimant violated *Section 45 of the Act* and the claimant is entitled to compensation in terms of *Section 49(1) (c) and 4 of the Act*. In this respect the claimant was not given termination notice. The claimant was not paid in lieu of leave days not taken and the claimant was not paid severance pay upon being declared redundant. The claimant did not contribute to the loss of his employment. The claimant lost prospects of career growth and was not compensated for the job loss. The claimant suffered loss and damage. The court finds that the claimant had served the respondent from April 2006 up to 15th July 2014 when he was unlawfully dismissed on grounds of redundancy and underperformance. The claimant did not prove the claim for underpayments satisfactorily and the same is dismissed.

11. Considering all the above circumstance, the court awards the claimant the equivalent of six months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs. $(18,000 \times 6) = 108,000$.

12. The claimant is also awarded one month salary in lieu of notice in the sum of Kshs. 18,000. The claimant is entitled to payment of severance pay in terms of *Section 40 of the Employment Act*, based on the admission by the respondent that it had declared the claimant redundant. Minimum severance pay payable is calculated at 15 days salary for each completed year of service. This would be for eight (8) years in respect of the claimant since this is a statutory mandatory right to every employee who is declared redundant. I award the claimant $(9,000 \text{ Kshs.} \times 8) \text{ Kshs. } 72,000$ being mandatory severance pay payable to him upon retrenchment.

13. The claimant is entitled to payment in lieu of 11 leave days not taken in the sum of Kshs. 6,600.

14. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- (i) Six (6) months salary in compensation for unlawful dismissal in the sum of Kshs. 108,000.
- (ii) Kshs. 18,000 in lieu of one month notice.
- (iii) Kshs. 6,600 in lieu of 11 untaken leave days.
- (iv) Kshs. 72,000 being mandatory severance pay payable upon declaration of redundancy.

Total Kshs. 204,600.

(v) Interest at court rates from date of filing suit in respect of (ii) (iii) (iv) above and from date of judgment in respect of (i) above till payment in full.

(vi) Costs of the suit.

Dated, Signed and delivered in Nairobi this 16th day of April , 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment 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 18 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.

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Judge

Appearances

Mr. Wangira for Claimant.

M/S Khisa for Respondent

Mamo – Court clerk.