



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 208 OF 2015**

**FRANCIS MAKAU MULI.....CLAIMANT**

**VERSUS**

**KENYA CONTINENTAL HOTEL.....RESPONDENT**

**JUDGEMENT**

1. The claimant through a memo of claim filed on 18<sup>th</sup> February, 2015 alleged that he was employed by the respondent as a waiter on 15<sup>th</sup> August, 1994 at a monthly salary of Kshs 7,500 and later promoted to a bar man in the year 2000.
2. The claimant alleged that during the period of his employment he was underpaid by Kshs 798 per month for a period of 20 years. That is to say from 15<sup>th</sup> August, 1994 to 3<sup>rd</sup> June, 2014. According to him, he served the respondent with diligence and faithfully until 3<sup>rd</sup> June 2014 when the respondent unlawfully terminated his service and without notice. The claimant further alleged that upon termination the respondent failed to pay his accumulated wages for two months, earned leave for twenty years, off days, service pay, house allowance and medical allowance among others.
3. The respondent on its part pleaded that the claimant was its employee, however he absconded employment following police investigations once theft and loss of stock was first reported on 20<sup>th</sup> July, 2013 when he became unable to account for the stock and cash. The claimant was arrested for questioning at Kileleshwa Police Station and released on police bond but later absconded but was finally arrested on 10<sup>th</sup> October, 2014.
4. The respondent further alleged that while the matter was still pending under investigation and the claimant released on bond, he failed to report to work. The respondent thus denied terminating the claimant's service and reiterated that the claimant was the one who absconded duties while the allegations against him were still under police investigations.
5. The respondent further denied the tabulated dues by the claimant and contended that all its staff went on annual leave, took days off and that there was no provision for medical or house allowance as the staff were housed at the staff quarters within the respondent hotel. According to the respondent, each staff worked for days and was entitled to two days off duty and an extra day off on Sunday or public holidays as a matter of routine.
6. The respondent averred that when its director Mr James Nderitu became sick in the year 2013 and was hospitalized both in the country and abroad, some employees including the claimant took advantage and started stealing cash and stock from the hotel. The respondent further denied the claimant was faithful and diligent in his service to the respondent as he was implicated in losses and theft when the director of the respondent was undergoing treatment. The respondent denied the claim for under payment since the salary agreed at the time of employment in 1994 was Kshs 7,500 and the claimant was provided with food and housing at the hotel.
7. At the oral hearing the claimant stated that he was employed on 15<sup>th</sup> August, 1994 and left on 3<sup>rd</sup> June 2014. He worked for 4 days and went on off but when he returned he was asked to see the manager who referred him to the Director. The Director told him to come after four days. When he went back he was dismissed. He reported the dismissal to the Labour Officer and the respondent was summoned but never attended. The claimant denied being interrogated by the police. He however said he was arrested at the Labour offices.
8. In cross-examination he denied that he agreed with the respondent on monthly pay. It was his evidence that he was initially employed by the respondent as a waiter and that he used to work for four days a week. The rest of the days he was off. While on duty one would be provided with food and accommodation. He denied knowledge of lost stock and cash and stated that he had never been charged in any court. He confirmed that in 2013 the respondent's director was unwell for a long time and was taken abroad for treatment. He denied absconding duty.
9. In re-examination he stated that he was arrested after termination and that he used to report to the police until he was told to stop and pursue his claim against the respondent.

10. The respondent's 1<sup>st</sup> witness Mr Sammy Kiguru stated that he recorded a statement on 14<sup>th</sup> July 2017 which he sought to adopt as his evidence in chief. He also relied on the documents filed with the claim.

11. In cross-examination he stated that he was the manager of the respondent. It was his evidence that the claimant never admitted in writing that he would refund the money allegedly lost. He further stated that the claimant could not be issued with termination letter because he was never at work and could not be traced. He denied receiving any letter from the Ministry of Labour. In re-examination he stated that he was the one who reported the incident to the police. The claimant never returned to work after being interrogated by the police.

12. The respondent's second witness Mr James Nderitu stated that he recorded a witness statement on 14<sup>th</sup> June, 2017 which he adopted his evidence in chief. It was further his evidence that between 2003 and 2004 he was unwell and unable to attend duties. He was taken to India for treatment. He was in India for more than four months. According to him he was not in the country in June 2014 hence was not aware of the termination of the claimant's service.

13. He denied issuing any termination letter. It was his evidence that when he returned from India he was informed that there had been cases of theft and several staff including the claimant had been implicated. Since he returned he never saw the claimant. Regarding leave he stated that the claimant took leave every time it was due. He denied underpaying the claimant.

14. In cross-examination he stated that his wife and him were the directors of the respondent and they were both in India at the material time. Further, it was Chege who reported the theft to the police. He denied the claimant worked for 20 years. He however had nothing to show the claimant was registered for NSSF.

15. The claimant alleged that the respondent terminated his service without lawful cause or reason. The respondent on its part denied terminating the claimant's service. According to the respondent, the claimant absconded duties after incidents of theft of stock were detected and the issue reported to the police and were called upon to record the statements in order to assist the police with investigations.

16. According to the respondent, the claimant did not resume duty after recording statement with the police. As per the OB extract, the report to the police was made on 20<sup>th</sup> February, 2013 and the police directed the claimant to report again on 21<sup>st</sup> July, 2013. By a report to the Ministry of Labour dated 11<sup>th</sup> July, 2014 the claimant alleged that he was terminated on 3<sup>rd</sup> June, 2014 without lawful cause. The claimant did not attach any termination letter. The respondent however on its part stated that it could not issue a termination letter because the claimant absconded duty.

17. The claimant did not deny that he was arrested and made to record a statement over the theft of stock. Allegation of theft is a valid reason for termination of employment hence the claimant cannot deny that he was unaware of the reason for the termination of his service. The respondent alleged that the claimant did not return to work after he was called upon to record a statement over the theft of stock with the police.

18. The respondent however did not produce any letter or evidence of an attempt to call the claimant back to work at the pain of dismissal if he failed to do so. On a claim for dismissal on account of absconding duty, the employer must show that reasonable efforts were made to contact the employee and that he was called upon to show cause why his service should not be terminated for unlawful absenteeism.

19. To this extent the court finds and holds that the claimant's service was unfairly terminated. The claimant has made a claim for unpaid leave for 20 years, off days for 20 years, medical allowance for 20 years, house allowance for 20 years and underpayment for 20 years. The claimant however did not produce any evidence to support these heads of claim. On the issue of leave and off days the claimant in his own evidence stated he used to go on leave and further that they used to work four days a week and further go on off on Sundays.

20. On the claim for underpayment the claimant did not produce any operative wage order for the court to peruse and see what the official wage for a person of his trade and skill was to be paid and what the respondent actually paid in order for the court to understand the extend and quantum of the underpayment.

21. The court will once again observe here as elsewhere that it smacks of unjust enrichment and extortion for an employee to sit on his rights to lawful wage, leave, house allowance and so on and only raise these claims when the contract of employment has been terminated in a manner which such employee disputes. There was no evidence or any allegation that for the alleged twenty years the claimant raised the issues now being raised in the claim and they were refused by the employer. These heads of claim are therefore rejected.

22. In conclusion the court awards the claimant as follows:

- a. One month's salary in lieu of notice                      7,500
- b. Six months' pay for unlawful termination              45,000
- c. Service pay at the rate of 15 days pay for  
each complete year of service                              4,750

**57,250**

- d. Costs of the suit

23. Items (a) (b) and (d) shall where applicable attract taxes and statutory deductions.

24. It is so ordered.

**Dated at Nairobi this 6<sup>th</sup> day of May, 2020**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 6<sup>th</sup> day of May, 2020**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

[kivuvaadvocates@gmail.com](mailto:kivuvaadvocates@gmail.com)

tom@tokopere.coma