



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1692 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSEPH MWINZI MULWA..... CLAIMANT**

**VERSUS**

**TANGREN RESTAURANT.....1<sup>ST</sup> RESPONDENT**

**MR AMIN JIWE.....2<sup>ND</sup> RESPONDENT**

**MR. PAUL VINCENT.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**Facts of the Case**

The Claimant was employed by the 1<sup>st</sup> Respondent as a cook on 9<sup>th</sup> August, 2012 earning a basic salary of KES 17,000/=. He was dismissed on 16<sup>th</sup> May 2014 by the 1<sup>st</sup> Respondent on account of suspected theft.

Aggrieved by the 1<sup>st</sup> Respondent's termination of his employment, the Claimant filed this suit vide his memorandum of claim dated and filed on 29<sup>th</sup> September 2014. He prays for Judgment against the Respondents and seeks payment of compensation for loss of employment, payment in lieu of notice, severance pay, pro-rata leave, overtime for normal working days as well as public holidays and salary for May, 2014 all amounting to KES 597,043/=. He also prays for the Court to grant any other award that it may deem fit.

The Claimant annexed two documents to the Memorandum of Claim. The first is a letter dated 4<sup>th</sup> July, 2014 from the Kenya Hotel and Allied Workers' Union addressed to the 1<sup>st</sup> Respondent. The second document is the Claimant's payslip for the month of April, 2014. The Claimant also filed an undated witness statement on 17<sup>th</sup> January, 2018.

In addition to the facts summarized above, collectively, the Claimant pleaded, in the Memorandum of Claim and the witness statement that on or about 16<sup>th</sup> May, 2014, the 1<sup>st</sup> Respondent terminated his services without evidence or a dismissal letter alleging that he was a suspected thief. The Claimant averred that there was no explanation given for the termination of his services even after several visits to the 1<sup>st</sup> Respondent's offices to seek an explanation.

The Claimant averred that he reported the matter to the union office on 4<sup>th</sup> July, 2014 and that the union wrote a demand letter to the 1<sup>st</sup> Respondent. However, the union informed him that in the response to the union's letter, the 1<sup>st</sup> Respondent stated that the Claimant ought to go to court hence the filing of this suit.

The Respondents filed a Memorandum of Reply dated 22<sup>nd</sup> January, 2018 and filed on 25<sup>th</sup> January 2018. They admitted the employment and dismissal of the Claimant as averred to by the Claimant in his Memorandum of Claim. The Respondents however denied that they unlawfully terminated the services of the Claimant without paying him his terminal dues.

The Respondents averred that the Claimant was arrested for theft at the work place which he admitted, which led the parties to pursue reconciliation. They denied all other averments made by the Claimant in the Memorandum of Claim. They averred that in terminating the Claimant's employment, they followed due process resulting the Claimant's summary dismissal and fully complied with the Employment Act, 2007.

The Respondents filed a list of witnesses including Mr. Paul Vincent as well as a list of documents that only contained what appears to be a handwritten letter from Parklands Police Station issued on 17<sup>th</sup> May, 2014 with respect to a report made by Paul Vincent. The Respondents did not file a witness statement.

The Court record shows that the matter first came up before this Court on 24<sup>th</sup> November, 2018 for directions on hearing following directions taken by the parties on 9<sup>th</sup> November, 2017 before Hon. Ngumi (DR). As the Respondents had not filed a response to the Memorandum of Claim by then, this Court directed that the case would proceed as an undefended claim.

### **Hearing**

The matter proceeded for hearing on 7<sup>th</sup> November, 2019 where Mr. Kandere appeared for the Claimant and Mr. Osoro represented the Respondents. The Court noted that on 24<sup>th</sup> November 2018, there were directions that the suit would proceed as an undefended claim. Mr. Osoro for the Respondents sought leave of the court to admit the Memorandum of Reply which the Respondents would be relying on fully as it would not be calling any witnesses. As the same was not opposed by the Claimant, the Memorandum of Reply was admitted on record.

The Claimant adopted his witness statement as his evidence in chief and gave his sworn testimony on the statements contained therein. Further, the Claimant testified that he worked between 11:00 am and 3:00 pm and then from 6:00 pm until 11:00 pm though the same would usually be extended to 12:00 am or 1:00 am depending on when the restaurant closed.

The Claimant testified that on 15<sup>th</sup> May 2014 during his usual break at 3 pm, he went to visit a friend who worked in Westlands. While there, the friend gave him a jerry can with 10 litres of water which he placed in an *Uchumi* paper bag. On the way back to work, he met a lady selling chicken and purchased one which he also placed inside the *Uchumi* paper bag. He testified that he left the items with the security guards once he got to the work place.

The Claimant testified that Mr. Paul Vincent, a Director of the Restaurant and the 3<sup>rd</sup> Respondent herein, arrived at the restaurant at about 9:00 pm on that day. The said Mr. Vincent did not speak to him until after the restaurant was closed. The Claimant testified that when he went to the parking area, Mr. Vincent and others were waiting for him. As the Claimant approached, Mr. Vincent asked him what he was carrying. He responded that he was carrying water and a chicken. Mr. Vincent accused him of stealing the chicken at which point, the Claimant asked that they return to the restaurant and confirm that the stock was in order which they did. Despite the stock being in order, Mr. Vincent called the police and within 10 minutes, officers from the CID-Parklands came and interrogated him.

The Claimant testified that the said officers took him to the Parklands Police Station where they were later joined by Mr. Vincent. Following the interrogation, the officers asked him and Mr. Vincent to leave the station and go and resolve their issues at the work place.

It was the Claimant's testimony that on the following day, Mr.

Vincent asked him for an apology letter which the Claimant declined to write as he felt that he was the one aggrieved. It was at this point that Mr. Vincent informed him that his employment was terminated. He was not paid any terminal dues or notice pay. That he has not been paid the same to date.

The Claimant also testified that he worked on weekends and public holidays but had taken his leave and had no pending leave. He had not been paid his salary for the month of May 2014.

During cross-examination by Mr. Osoro, the Claimant testified that he worked for the 1<sup>st</sup> Respondent for about 2 years and that in the course of his employment; they were allowed to carry their personal property provided they did not bring it into the restaurant. He testified that on 15<sup>th</sup> May, 2014, he left the luggage which contained the chicken and water with the security guards on the 1<sup>st</sup> floor of the building where the restaurant was located.

When Mr. Osoro referred the Claimant to the letter issued by Parklands Police Station, the Claimant stated that there was no OB (Occurrence Book) number or statement recorded by him or anyone else. On further questioning on the visit to the police station, he testified that Mr. Vincent informed him that he was a Christian and would forgive him at which point the officers asked them to go and resolve the matter at the office.

He testified that the last paragraph of the letter alluding to his admission of theft was not true as he did not admit, apologise or ask for forgiveness from Mr. Vincent for stealing the chicken.

He further testified that it was not the first time he carried food to work as he carried food such as tripe which he left with the security. He testified that he was dismissed because he did not write an apology letter.

It was the Claimant's testimony that he worked overtime but could not recall the dates as it was a long time ago. He stated that the same was in the 1<sup>st</sup> Respondent's file and he had no evidence of the same.

On re-examination by Mr. Kandere, the Claimant, testified that he was not found guilty of stealing but was dismissed from employment because he refused to write an apology letter.

Mr. Osoro for the Respondents informed this Court that the respondents would be relying on the Memorandum of Reply and closed the Respondents' case. Parties thereafter filed and exchanged written submissions.

The Claimant submitted that he was a bonafide employee of the 1<sup>st</sup> Respondent based on the Respondents' admission in the memorandum of reply.

With regards to the termination of the Claimant's services, it is the Claimant's submission that the Respondents admitted in the Memorandum of Reply that the Claimant's employment was terminated as he was caught stealing. He submitted that the Respondents did not call any witnesses in their defence to shed light on the process leading to the Claimant's termination. That he Claimant was clear and unequivocal on the manner in which he was terminated and gave testimony that the items that he was accused of stealing were his having purchased them from a third party. The Claimant also clarified that the items in question were found outside the place of work and the stock count did not reveal any missing items.

It was the Claimant's submission that his testimony confirmed that he was taken to the police station but released without any charges being preferred against him. The Claimant submitted that the letter from the Parkland Police station ought to be disregarded.

It was the Claimant's submission that in the absence of any tangible evidence, it is clear that the averments of lawful termination by the Respondents are false and intended to deny the Claimant his just dues.

As regards the process that led to the termination, the Claimant submitted that the provisions of Section 41 of the Employment Act were not followed as there were no complaints directed at the Claimant in relation to the alleged theft, a notice to show cause was never issued and there was no hearing conducted. There was thus no disciplinary process undertaken.

The Claimant submitted that with respect to the termination, a notice was never issued specifically in contravention to Section 40(1)(a) and (b) and Section 41(2) of the Employment Act and further a letter of termination was never issued.

It was the Claimant's submission that the Respondents having failed to properly present documents as provided under Section 74 of the Employment Act, 2007 and having failed to provide the Court with tangible reason for termination of the Claimant's employment the Claimant's claim for unlawful termination was justified.

The Claimant submitted that the Respondents' acts by implication declared the Claimant redundant by the meaning proffered by Section 2 of the Employment Act. The Claimant's contention in this regard is that the Respondents by their act of terminating the Claimant's employment wrongfully without paying his dues rendered the Claimant's employment superfluous which would constitute a redundancy. The Claimant prayed for maximum compensation of 12 months' salary in this regard.

The Claimant submitted that he is entitled to the reliefs sought under the various heads of claim. In conclusion, the Claimant relied on **INDUSTRIAL CAUSE NO. 1591 OF 2010: TOM NDADEMA & ANOTHER v CLUB CLICK** where my brother Rika J. held:

*No hearing of either Claimant is shown to have taken place as Section 41 and 45 of the Act demand. Termination was not shown to have been in accordance with justice and equity and amounts to unfair termination for which compensation is awardable.*

The Respondents did not file written submissions despite being granted the opportunity to do so. The Court record shows that following the hearing of the suit, the matter was mentioned on 4<sup>th</sup> February 2020, when Mr. Malonza holding brief for Mr Osoro requested for leave to file his written submissions having been served with the Claimant's submissions the previous day. The Respondents were thus granted 14 days to file their written submissions. The matter was again mentioned on 26<sup>th</sup> May, 2020 when there was no appearance by the Respondents. The Court thus issued the Judgment date.

## **Determination**

The arising issues for this Court's determination are whether the termination of the Claimant's employment by the 1<sup>st</sup> Respondent was unfair and whether the Claimant is entitled to the reliefs sought.

The Employment Act sets clear guidelines on the process of termination that ought to be undertaken by an employer so that even in a case where a breach of the terms of contract or a grave offence is committed such as is alleged by the Respondents, due process must be followed before dismissal.

The due process set out under Section 41(1) of the Employment Act requires an employer before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language the employee understands, the reason for the termination and the employees shall be entitled to have another employee or union representative of his choice present during this explanation. Sub Section 2 provides that the employer shall, before terminating the employee or summarily dismissing him under Section 44(3) and (4) hear and consider any representations which the employee may have.

The Claimant was never taken through a disciplinary process or issued with a notice of termination.

The Respondents have not alluded to any disciplinary process conducted but simply averred in the Memorandum of Reply that the Claimant was arrested for theft. The only document submitted in support of their case is the letter from the Parkland Police Station dated 17<sup>th</sup> May, 2014, where the arrest of the Claimant is discussed and it is alleged that the Claimant confessed to the theft and asked for forgiveness. The Claimant in his sworn testimony unequivocally denied confessing to the theft. The Respondents did not call any witnesses such as the 3<sup>rd</sup> Respondent or the officers arresting to corroborate the contents of this letter. I agree with the submissions of the Claimant, that there is no acknowledgment or signature of the Claimant or an indication that this matter was recorded in the Occurrence Book of the Parklands Police station to ascertain the veracity of the contents of the letter.

Based on the evidence on record, I find that the termination of the claimant's employment was unfair within the meaning of Section 45 of the Employment Act and proceed to consider the reliefs sought under the respective heads of claims.

### **Payment in Lieu of Notice**

The Claimant having been dismissed without notice is entitled to payment in lieu of notice pursuant to Section 49(1) (a) which is accordingly awarded at **KES 17,000/=**.

### **Severance Pay**

The Claimant contends that his dismissal amounted to a redundancy within the meaning of Section 2 of the Employment Act.

Section 2 of the Employment Act defines redundancy as below:

**“Redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.**

The **Black's Law Dictionary, 10<sup>th</sup> edition** defines redundancy as:

**“A situation in which an employee is laid off from work because the employer no longer needs the employee.”**

The Court of Appeal expounded this definition in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR*, where, Maraga JA (as he then was) defined redundancy as follows –

*“There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequence of which will be inevitable loss of employment. The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises “where the services of an employee are superfluous” through “the practices commonly known as abolition of office, job or occupation and loss of employment.”*

It is clear from the above holding of the Court of Appeal that a core ingredient of redundancy is the non-volitional dismissal by the employer such as in cases of economic distress or perhaps the closing down of the business for any number of reasons. In view of the foregoing, I find that the Claimant's dismissal from employment did not amount to a redundancy within the meaning

in the Employment Act and the claim for severance pay thus fails.

### **Pro-rata leave**

The Claimant in his evidence in chief testified that he went on leave and had no pending leave. The Claimant however in his Memorandum of Claim and submissions claims pro-rata leave for one year. On the basis of the sworn testimony of the Claimant, this claim fails as the Claimant unequivocally stated that he went on leave and did not have any pending leave days.

### **Unpaid Overtime**

The Claimant's testimony was that he worked overtime on week days depending on when the restaurant would close. He admitted during cross-examination that he did not know the specific number of hours of overtime that were worked as the records were kept by the 1<sup>st</sup> Respondent.

The claim is founded on a speculation of the hours of overtime. I find that the Claimant failed to discharge the burden of proof to clearly establish that he worked overtime and the number of hours worked. The claim for overtime thus fails.

### **Public Holidays**

Section 10 and 74 of the Employment Act provides for records to be kept by an employer including;

**“entitlement to annual leave, including public holidays,**

**and holiday pay, (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),”**

Section 10(7) provides that where the employer fails to produce the prescribed particulars it will be the burden of the employer to prove or disprove an alleged term of employment.

I accordingly award the Claimant **KES 23,508/=** for public holidays worked in the absence of his evidence being uncontroverted and the Respondents' failure to produce records

### **Salary for the month of May 2015**

The Claimant's employment was terminated on 16<sup>th</sup> May, 2015. I find that he is only entitle to the days worked and accordingly award him **KES 10,462** for the 16 days worked.

### **Compensation**

Having found that the Claimant was unfairly terminated, he is entitled to compensation. Taking into account all the circumstances leading to Claimant's dismissal and the factors set out in **Section 49(4)** of the Act specifically, that he worked for almost 2 years for the 1<sup>st</sup> Respondent and the manner in which he was dismissed, I find that compensation equivalent to 4 months' salary amounting to **KES 68,000/=** would be reasonable.

### **Conclusion**

I thus enter Judgment in favour of the Claimant against the 1<sup>st</sup> Respondent as follows: -

- 1... One month's salary in lieu of notice..... KES 17,000
- 2... Payment for public holidays worked..... KES 23,508
- 3... Salary for days worked in May 2015..... KES 10,462
- 4... Four (4) months' salary as compensation..... KES 68,000

**Total Award      KES 118,970**

The 1<sup>st</sup> Respondent shall pay the Claimant's costs for this suit. The decretal sum shall attract interest at court rates from date of judgment until payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JUNE 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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**