REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 132 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

SAMMY ANYINGA MADAHANA...................................CLAIMANT

VERSUS

KENYA INTERNATIONAL HOTEL LIMITED......RESPONDENT

JUDGMENT

The Claimant, Sammy Anyinga Madahana filed this claim vide a Memorandum of Claim dated 3rd February and filed on 4th February 2015 which he later amended and filed on 22nd November 2018. He sued the Respondent, Kenya International Hotel Limited for wrongful and unfair termination of services and failure to pay terminal dues. He avers he was employed by the Respondent as a Cook vide a Contract of Employment on 13th July 2007 at a monthly salary of Kshs.16,000 and that during his employment, he performed his duties diligently, reliably and honestly. Further, that he worked for 7 years and 4 months without any disciplinary action or receiving any warning letters. He contends that the Respondent unlawfully terminated his employment on 14th November 2014 when he requested to be given lighter duties.

He avers he was never paid a house allowance and that he worked for ungodly hours as he would report to work at 4.00 pm, work until midnight and would then take a nap and wake up at 5am to prepare breakfast until 8.00am when he left. That he worked for 11 hours for all night shifts without overtime pay and for 6 days a week without ever being paid for rest days. He avers that on 11th July 2014, he sustained a work related injury which seriously incapacitated him and that during the period of the injury, the Respondent refused to cater for the medical expenses and also never paid him half salary.

The Claimant particularises the unprocedural and illegal manner in which the Respondent terminated his employment, that is the failure and/or refusal by Respondent: to explain orally or in writing and in a language understandable to the Claimant, the reasons for termination on the purported grounds of summary dismissal; to allow another employee of the Claimant's choice to be present at the meeting, if at all; to allow or accept any representations by the Claimant, if at all. He avers that the Respondent has refused and/or neglected to pay to him his lawful dues being:

a) Twelve month' salary based on the monthly salary at the time of dismissal (Kshs. 16.000 x 12 = 192,000) as compensation for unfair termination

b) Kshs.211,200 being pay for unpaid house allowance

c) Kshs.576,000 being pay for unpaid overtime worked

d) Kshs.448,000 being pay for rest days worked.

He prays for judgment against the Respondent for: a declaration that the termination of his employment by the Respondent was wrongful, illegal and unfair; the sum of sum of Kshs.1,427,200 in accordance with paragraph 7 of the Claim; interests and costs incidental to this suit; Certificate of Service; and any such other or further relief as this Court may deem fit and just to grant.

The Respondent filed its Amended Response to Claim on 19th December 2018 averring that allowances were included in the salary of the Claimant as per the Letter of Contract and that the Claimant entered the contract of employment acknowledging that working hours were to be agreed between himself and his superiors. It avers that the Claimant successfully claimed and was compensated for he sustained at work injury in **Civil Suit No. 1008 of 2015 Sammy Anyinga Madahana v Kenya International Hotel Limited.** It denies the particulars of unlawful termination enumerated by the Claimant.

The Respondent contends that it acted within the law and as per the letter of contract signed between it and the claimant and which contract expressly reserved the right of either party to terminate the contract by giving one month's notice or payment of one month's salary in lieu. That it duly paid the Claimant one month's salary in lieu of notice which he acknowledged accepting as the full and final settlement while denouncing any further claims against the Respondent concerning his employment, by affixing his signature in the letter of termination dated 14th November 2014. It prays that this suit be dismissed with costs.

In the Respondent's Amended Witness Statement, one of its managers John Ndungi states that the Respondent did not receive any complaints from the Claimant on his working hours during his period of employment. He states that the hospital bill incurred following the Claimant's injury at work was fully catered for by the Respondent and he was further compensated by the insurance company. That even after the Claimant was cleared to return to work, he failed to do so and the Respondent was left with no option but to terminate the Claimant's employment. That the Claimant then brought a suit against the Respondent for compensation on work injuries, which was determined in his favour and that the Respondent fully settled the decretal amount ordered of Kshs. 530,259.45. He contends that the suit herein is therefore a second claim by the Claimant and insists that the Claimant was paid Notice plus days worked in November 2014.

Evidence

The Claimant testified on 25th November 2019 and relied on his bundle and list of documents dated 20th November 2018. He stated that he was not paid night shift allowance and that he used to manage two kitchens. That when he reported back to work after his accident on 14 th November 2014, the Manager who was also the Human Resource told him that he was not allowed to work. That he was never referred to a company doctor. That he thought he had been dismissed because of the injury but was later informed he had been dismissed because of an advocate's claim for the injury. He confirmed he was paid Kshs.530,259 by the insurance for the injury and prayed for his benefits. Under cross-examination, he stated he did not claim for termination in the civil suit.

RW1 JOHN NDUNGU MWANGI testified on behalf of the respondent and relied on his filed Witness Statement and the Respondent's list of documents. Under cross-examination, he testified that the respondent did not have an agreement on working hours before court. Further, that there was no notification of a meeting or a meeting at all before the Claimant's services were terminated. He could not also confirm whether the Respondent obtained a certificate of fitness of the Claimant to resume work after the injury but confirmed that the reason for termination was the Claimant engaging a firm of advocates who issued a demand letter to the Respondent, without first discussing the issue with the Respondent

Claimant's Submissions

The Claimant submits that the main and sole ground for his termination was *"…your having gone to a firm of advocates and had them issue a demand letter against ourselves..."* and contends that his intention to claim compensation against the Respondent's insurer cannot constitute a fair or valid reason for termination of employment. That **Section 46(h) of the Employment Act** states:

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty-

> h) An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation.

He relies on the case of **Richard Shitehi Isiaho v Eastern Produce Kenya Limited (Kibwari) [2015] eKLR** where the claimant had been summarily dismissed for the reason that he had sued his employer for compensation due to a work related injury and the Court found the termination to be unlawful and unfair. The Claimant contends that the Respondent had a legal obligation to adhere to due procedure as set out in **Section 41 of the Employment Act** and he cites the case of **AM v Spin Knit Limited [2013] eKLR** where Ongaya J. addressed the procedure applicable in terminating an employee on account of ill health and held:

> "*...In the opinion of the court, the procedure applicable in event of removal on account of ill- health is section 41 of the Employment Act, 2007...In view of the provisions of the section, the court holds that an employer who desires to terminate an employment contract on account of the employee's ill-health must give the affected employee the relevant notice and a hearing. The court holds that the process must uphold due process of fairness entailing the following procedure*
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> *a) A notice to the employee, in a language that the employee understands, that it is intended to terminate the employee's contract of employment on account of ill-health;*
>
> *b) Requiring the employee to present himself or herself before a medical professional or board to facilitate a medical certificate for fitness or lack of it for continued employment;*
>
> *c) The employer hearing the employee's representations in view of the medical certificate of fitness or unfitness; and*
>
> *d) The employer making a decision to terminate the employee or to retain the employee taking into account the medical certificate of fitness or unfitness and the employee's representations at the hearing.*
>
> > *The court's opinion is that the affected employee is entitled under the section to follow the proceedings so that where the employee cannot follow the proceedings because of the ill-health, the employee is entitled to remain in the service of the employer until recovery or regaining capacity to follow the proceedings."*

That in this case, RW1 stated he was not aware if the Claimant had been directed to attend a medical re-examination on account of obtaining a medical certificate of fitness. That the Respondent also failed to convene a hearing to hear the claimant's view in regard to the intended

termination and that from the foregoing, the said termination was unfair and unlawful.

It is submitted by the Claimant that he is entitled to a house allowance at 15% of the gross pay as the same was never provided for and that having been unfairly terminated he is entitled to 12 months' compensation. Further, that **Section 20 of the Employment Act** mandates the Employer to provide an itemized pay statement to include the amount of any variables such as house allowance, overtime pay and other allowances. That the pay slips provided showed he was paid a basic salary only. He contends that failure by the Respondent to produce the muster roll further reinforced his working hours. That he is therefore entitled to unpaid overtime of 3 hours for 7 years and 4 months. He relies on the case of Chenqo Kitsao Chengo v Umoja Rubber Products Limited [2016] **eKLR** where the Court held;

> "*The employer being the author and custodian of employment records, she should have produced copy of the employment contract to rebut the allegation by the claimant that his services for her started in 1996. The obligation to produce employment records to dispose verbal allegations by an employee in any legal proceedings before the court is vested by section 10(7) of the Employment Act...."*

Respondents' Submissions

The Respondent submits that it is necessary for employees to ensure they are well versed with what they are signing and that the Claimant is therefore wrong to claim he had no idea what was in his contract. That the 3-Judge Bench (Court of Appeal) in the case of **Pius Kimaiyo Langat v The Co-operative Bank of Kenya Limited [2017] eKLR**, stated that, "*We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved*." Further, that Mbaru J. in the **Narry Philemons Onaya-Odeck v Technical University of Kenya [Formerly, The Kenya Polytechnic University College] [2017] eKLR** expounded the importance of the Employment Contract and stated that:

> "*The sanctity of the employment contract cannot be gainsaid. The parties herein agreed to be bound in the employment relationship by the contract of service and under it the terms and conditions of service. The contract of service carried with it rights and duties, responsibilities and obligations on either party."*

It submits that **Clause 1.2 of the Contract dated 13th July 2007** that was duly signed by the Claimant provides that: '*You will receive a consolidated salary of Kshs. 8,000 per month. This is inclusive of house allowance and other allowances*.' That **Clause 2.1 of the Contract** provided the acceptance clause and by appending his signature, the Claimant agreed to be bound by the terms of the contract. The Respondent refers to **Section 31(2) of the Employment Act** which provides for house allowance as follows:

> **(2) This section shall not apply to an employee whose contract of service—**
>
> **(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or**
>
> **(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).**

That the court in ***Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] eKLR*** stated that consolidated wages need to be expressly provided in the employment contract and held that if there are express clauses addressing the same, then **Section 31(2) (a)** need to be excluded. The Respondent submits that it ensured the Claimant had his one (1) day off-day per week as under **Clause 1.4 of the Contract** and further refers to **Clause 1.5 of the Contract signed by the Claimant on 15th November 2007** which expressly provided that:

> "*You will report punctually at your place of work and shall devote your whole time and attention to your assignments, diligently and to the best of your skills perform your duties as per designation. The hours of reporting and departure from work will be agreed upon between you and the superiors taking into account the exigencies of the company operations."*

That **Clause 1.9 of the contract** provided the termination clause and lays down the instances that the employment contract may be terminated and the procedure the employer needs to meet to summarily dismiss the employee. The Respondent submits that giving in to the Claimant's request for lighter duties and extending his employment would have meant creating another role for him.

The Respondent submits that during cross-examination, the Claimant confirmed that he never raised an issue or complaint with the Respondent with regard to the alleged unfavourable working hours in the seven years he had worked for the Respondent. Further, that the Claimant failed to inform the court that he never worked both the day and night shift in one day but rotated the shifts with other cooks employed by the Respondent. It contends that the claim for hours worked overtime is therefore unfounded and relies on the case of Kenya Hotels and Allied Workers Union v Sunset Hotel [2017] eKLR where the court stated that it was necessary for the claimant to prove that he worked overtime and on rest days. In concluding, the Respondent submits that the Claimant has not proved his case on a balance of probabilities and that the suit herein should thus be dismissed with costs.

Analysis and Determination

The first issue for determination is whether the Claimant was wrongfully and unfairly dismissed from employment by the Respondent. The second issue for determination is whether the Claimant is entitled to the reliefs sought.

In this case, the Claimant was not given a chance to be heard before termination. RW1 admitted in his testimony that he was not aware whether the Claimant was called for any meeting before his services were terminated. The reason for termination which was also confirmed by RW1 was because the Claimant engaged a firm of advocates who sent a demand letter to the respondent for compensation for his work related injuries before discussing the issue with the Respondent. This is not a fair and valid reason for termination of employment. Under **Section 46(h) of the Employment Act,** termination of employment is automatically unfair if it is for reasons of an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer except where the complaint is shown to be irresponsible and without foundation. The same ground is reiterated in Section 8 of the Occupational Safety and Health Act.

In the **AM v Spin Knit Limited case above** Ongaya J. stated that the procedure of terminating an employee on account of ill health must be fair and include the relevant notice and a hearing. Further, that the procedure should also entail the said employee appearing before a medical professional or board to facilitate a medical certificate for fitness or lack of it for continued employment. The Respondent in the instant case did not accord the Claimant a hearing nor require him to get a medical certificate for fitness before deciding to dismiss him and for those reason the Claimant was wrongfully and unfairly dismissed from his employment by the Respondent.

Remedies

The Claimant is entitled to compensation as under **Section 49 of the Employment Act** for want of both procedural and substantive fairness. The Respondent did not provide evidence to prove the Claimant's working hours and RW1 further confirmed in his testimony that the same was not before court and was never recorded contrary to **Section 20 of the Employment Act**. The Claimant is therefore entitled to the claims for overtime.

The claimant however did not prove that he did not take rest days as he testified that he worked for 6 days a week meaning he rested on the 7th day.

Having worked for the respondent for 7 years and taking into account that the cause of termination was a work related injury and further that the claimant was not paid during his sick off, taking into account the length of service and all relevant circumstances, it is my view that this is one case where the claimant deserves maximum compensation which I award him at **Kshs.192,000.00** (16,000 x 12).

The claimant is also awarded overtime at 2.5 hours per day but limited to 12 months (52 weeks) for 6 days per week being 2.5 x 52 x 6 x 1.5 based on a monthly salary of Kshs.16,000 at **Kshs.83,728.00**

The claimant is not entitled to house allowance as his contract specifically provided that this salary was consolidated meaning it was inclusive of house allowance. He did not adduce evidence that the consolidated pay was below the gazetted statutory minimum rate of pay prove that his salary was not consolidated. The prayer thus fails and is dismissed.

I thus award the claimant a total of Kshs.275,725.00.

The respondent shall issue a certificate of service to the claimant.

The respondent shall further pray the claimant's costs to this suit.

Interest shall accrue on decretal sum from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JULY 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 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, 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