



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2158 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

JOHN KAHAGURI MAINA.....CLAIMANT

VERSUS

PREMIER TERVAN HOTEL LIMITED.....1ST RESPONDENT

CHARLES GATHOGO.....2ND RESPONDENT

EMILY MAINA.....3RD RESPONDENT

JUDGMENT

The Claimant, John Kahuguri Maina filed a Memorandum of Claim on 19th October 2016 for unfair and unlawful termination of employment by the Respondents, Premier Tervan Hotel Limited, Charles Gathogo and Emily Maina. He avers that he was employed by the Respondent on contractual basis on or about 25th March 2016 as a Hotel Manager and that his employment was terminated on 17th June 2016 without being informed of the reason for termination.

He avers that at the time of termination of his employment, he was not given notice or any kind of warning and that no fair hearing was accorded to him for whatever wrong he had done. Further, that the Respondents never settled arrears of his salary and caused him undue suffering as he could not attain basic needs. That it is also noteworthy that the Respondents borrowed some money from him with a promise to refund, but in vain. That the Respondents acted contrary to the company’s policies and the labour laws and that they have refused to pay for the damages and dues he seeks. He prays that this Court do award and order the Respondents to pay him dues as tabulated below:

- i. Notice pay..... 80,000
- ii. Damages for unfair termination
(20,000 (sic) x 12 months)..... 960,000
- iii. Salary arrears for various months..... 196,600
- iv. Service charge..... 40,000
- v. Costs of the suit.
- vi. Interest in the above until payment in full.
- vii. Any other relief this Court may deem fit to award under the circumstances.

The Respondents filed a Memorandum of Response dated 23rd November 2018 admitting that the Claimant worked for them but on a ‘Contract for services’ basis as a Cook and not as alleged, since there was neither an oral nor written contract on the same. They aver that the Claimant was not entitled to any terminal dues and that he is hence barred in law from claiming for the non-payment of terminal dues. The Respondents deny the authenticity of the documents produced by the Claimant and aver that they have not breached any Employment laws or labour practices. That the Claimant cannot use this Court to derive benefit from a baseless and unfounded claim and that he is therefore not

entitled to any of the reliefs sought. The Respondents pray that the Memorandum of Claim herein be dismissed with costs.

The 2nd Respondent filed a Statement dated 5th March 2019 stating that he and the 3rd Respondent are Directors in the 1st Respondent company and that they had engaged the Claimant as a casual employee in the hotel. That they had verbally agreed to a salary of Kshs.70,000 per month and that after the Claimant had worked for two months, April and May 2016, they suspended him because music systems in the hotel were stolen under his watch. Further, when they engaged the accountant, the hotel books revealed massive loss of money. That he asked the Claimant to account for the same as he was in charge during the period the impropriety occurred but the Claimant has failed to account for the above said issues to date. He also states that the Claimant was paid a total of Kshs.140,000 for the two months he worked and that the Respondents do not therefore owe the Claimant any money.

Evidence

The Claimant testified that he met with the 3rd Respondent at the commencement of his employment and agreed that his salary would be Kshs.80,000. That his duties commenced on 23rd March 2016 and that he was paid around Kshs.14,000 for the few days he worked in March 2016. Further, that he was paid Kshs.50,000 in April 2016 by Emily Maina who promised to clear the balance of Kshs.30,000 the following month. He further stated that he was never paid in May and for the 17 days worked in June 2016. He stated that the 2nd Respondent called him and terminated his services on 18th June 2016 when he was on his way to work and advised that he does not report to work. That they never gave him an audience and that following up on his dues proved futile. Under cross-examination, CW1 stated that he signed against a master roll, he was paid in cash and that he is claiming a total of **Kshs.161,933**. He confirmed to this Court that he was employed by the Respondent as a Manager.

RW1, CHARLES GATHOGO relied on his filed witness statement as his evidence and testified that the only money the Claimant was not paid was for the 17 days he worked in June and reiterated that the 3rd Respondent had informed him that the agreed salary was Kshs.70,000.

Claimant's Submissions

The Claimant submits that the Respondents keep on contradicting themselves and occupy different positions on different occasions, as witnessed in the last hearing versus the response they have provided. That while in the Memorandum of Response they state he worked for them as a cook, during hearing the 2nd Respondent testified that he was indeed employed as a manager. That it is important to note that the integrity of information provided by the Respondents is extremely questionable all the time. He urges this Court to examine the text messages correspondences between him and the Respondents at the back of his memorandum of claim; **second page of printed Safaricom records of 20th June, 2016** the 3rd Respondent wrote, *"May and onwards we agreed Kshs.70,000"*.

The Claimant submits that he who alleges must prove and that the Respondents ought to produce the relevant records and documents for material information such as the Master roll book, reporting book, payment records book and alleged theft records. That this Court should examine why he was still receiving operational messages in June if indeed he only worked for April and May as alleged. That the Respondents denied the authenticity of the documents he produced in court but were mute on the same during the hearing and that they also did not dispute that his last working day was 17th June 2016. He urges this Court to treat the Respondents' testimony with great caution.

He submits that he has demonstrated in his evidence that he was not given any notice of termination as required by the law; he was not paid fully for the time worked; and that he suffered damages from the said illegal/unlawful termination considering he was poached from where he was working only to be unlawfully terminated after 3½ months. The Claimant requests the Court to extend its scope of judgment to include compensation for tarnishing his name, reputation and injury of his profession for associating him with theft.

Respondents' Submissions

The Respondents submit that they do not dispute that the Claimant stopped working on 17th June 2016 and that the Claimant did not dispute he was still on probationary employment. They submit that they terminated the Claimant's employment as under **Section 42(4) of the Employment Act** since he was still on probation. That the 2nd Respondent admitted in his testimony he had not paid the Claimant the 7 days' notice set under section 42 of the Act as the Claimant had threatened him on phone and became a nuisance by calling and insulting him. They submit that the documents referenced and attached to the Claimant's Memorandum of Claim should be expunged from the record as they were not produced as exhibits.

That it is trite law that for a termination to be unlawful and unfair, the same should have been done without any justifiable reason. That the 2nd Respondent has spelt out a few of the misconducts by the Claimant while he was a Manager which was never challenged during cross-examination and the Respondents pray that the same is taken as an admission by the Claimant. That **Section 47(6) of the Employment Act** clearly spells out that an employee who is dismissed while on probation cannot make a complaint under that enabling provision of law.

The Respondents submit that the 2nd Respondent confirmed in his testimony that the Claimant was paid Kshs.70,000 and that since this evidence was not challenged in cross-examination, the same remains admitted as the true facts. They further submit that the Claimant is incapable of claiming one month's notice given that he was still on probation and that neither should he claim damages for a period not worked or confirmed. That the Claimant also admitted he worked from 23rd March 2016 and he therefore cannot be paid a full month's salary but should only be awarded pay for the 8 days he worked in March 2016 and for 17 days in June 2016. That the prayer for service pay is unrealistic and unfounded since the Claimant only worked for a few months and further, gratuity cannot be awarded in a situation where the Claimant's services were terminated while on probation and less than one year of service.

They submit that the Claimant has failed to prove that he was unfairly terminated and that he is legally entitled to damages as prayed in the Memorandum of claim. They rely on the case of **Patrick Lumumba Shiroya v Nairobi Upperhill Hotel [2016] eKLR** where the Hon. Judge held at paragraph 10 that:

“In the final analysis, having found that the dismissal was unlawful to the extent of the non-payment of notice, would the Claimant be entitled to compensation? Section 41 of the Employment Act does not apply to the Claimant. This however does not mean that Section 43 of the Employment Act did not apply. As the employer failed to prove a valid reason for the dismissal therefore Section 45 and 49 of the Employment Act would apply. The Claimant was yet to complete his probation period and the Court would not be inclined to grant compensation beyond one month.”

Analysis and Determination

The first issue for determination is whether the Claimant was on probationary employment when his employment was terminated by the Respondent. The second issue for determination is whether the Claimant was unlawfully and unfairly terminated from employment by the Respondent. The third issue for determination is whether the Claimant is entitled to the reliefs sought.

Section 10 (7) of the Employment Act provides that:

If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

In **Joseph Okelo Adhiambo & Another v Y. J. Elmi & 2 Others [2012] eKLR**, the court held:

“As indicated above the employer-employee relationship existed but the terms of engagement remain vague. In absence of any tangible contract agreement this court resorts back to the minimum terms of an employment relationship as provided for under the Employment Act 2007.”

Under **Section 2 of the Employment Act**, a probationary contract must be in writing and expressly state that it is for a probationary period. Pursuant to section 2 of the Act, the Claimant was not on probation as the Respondents did not produce any written probationary contract. It is not every contract of employment that provides for probation. Probation can also not be presumed in any contract as the law specifically states that a probationary contract must be in writing and define the probationary period which in fact varies from one contract to another. The only requirement of the law is that should the contract provide for a probationary period, it cannot be longer than 6 months.

The foregoing notwithstanding, the averment that the Claimant's employment was terminated while he was on probation was only raised by the Respondents in their submissions. A perusal of the Respondents' Response and a review of the testimony of RW1 confirm that the same was never pleaded or part of the evidence. I find that the Claimant was engaged verbally by the Respondents between 23rd March 2016 and 17th June 2016 both days inclusive and that he was never on a probationary contract of service.

The second issue is whether the termination of the claimant's employment was unfair

Under **Section 47(5) of the Employment Act**, the burden of proving that an unfair termination of employment has occurred rests on the employee and it is my opinion that the Claimant has discharged the said burden in his case before this court. In **Industrial Cause No. 146 of 2012, Alphonse Maghanga Mwanchanya v Operations 680 Limited** Radido J. stated that;

"The doctrine of natural justice on procedural fairness is now essential part of the employment relationship. An employer must comply with procedures set out in section 41 even in circumstances under summary dismissal or what the Respondent referred to as instant dismissal is contemplated."

The claimant testified that he was called by the 2nd respondent on 18th June 2016 while on his way to work and informed that his services had been terminated and he should not report to work. His attempt to meet the respondents to discuss the issue of his termination were not

successful. RW1 confirmed that he called the claimant on 18th June 2016 and told him not to report to work. It is clear from the forgoing that the termination of the claimant's employment did not comply with Section 41 of the Employment Act. Further, there were no reasons given or proved for his dismissal through a phone call.

The respondent submits that the claimant did not produce his documents. Rule 21 of the Employment and Labour Relations Court (Procedure) Rules provides that the court may determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties. Further, Rule 25(1) to (4) provide as follows –

25. Hearing procedure

- 1. The Court shall give such directions as may be necessary to enable the parties to prepare for and conduct the hearing.**
- 2. The Court shall, at the beginning of the hearing, explain the order of the proceedings which it proposes to adopt.**
- 3. Evidence before the Court may be given orally or if the judge so orders, by affidavit or a written statement, and the Court may at any stage of hearing, require the attendance of a deponent or an author of a written statement for the purposes of examination of the facts deponed or written.**
- 4. The Court shall conduct the hearing in a manner it considers most suitable to the just handling and recording of proceedings and shall, if appropriate, avoid legal technicalities and formalities.**

There is no provision for production of documents which have already been filed and are part of the court record. The argument of the respondents that no evidence was produced by the claimant is therefore not the correct position.

From the evidence on record, the claimant was unfairly terminated by the respondent as the same was verbal and there was no reason given. The claimant was also not given an opportunity to defend himself.

I thus find the termination of the claimant's employment unfair.

Remedies

The claimant prayed for notice which he is entitled to and I award him one month's salary in lieu of notice.

He prayed for damages. Taking into account all the circumstances of his case especially the length of service and manner in which his employment was terminated, I award the claimant two months' salary as compensation for the unfair termination of his employment.

The prayer for service charge has not been substantiated and is unknown to the law. The same is thus dismissed for want of proof.

The claimant further prayed for salary arrears. The claimant worked from 23rd March 2016 to 17th June 2016. He testified that he was paid for March for the days worked. That in April he was paid Kshs.50,000 leaving a balance of Kshs.30,000. That he was not paid in May and the 17 days worked in June. He therefore claims arrears in the sum of Kshs.161,933 based on the agreed salary of Kshs.80,000 per month. He further claims a sum of Kshs.3,000 which according to him he was asked to pay the police by Emily Maina, the 3rd respondent and would be reimbursed.

The respondent's case is that the claimant was engaged at a salary of Kshs.70,000 per month. That the claimant was paid Kshs.70,00 at the end of April and another Kshs.70,000 in the month of May. RW1 admitted that no payments were made for days worked in June.

RW1 testified that the rate of pay was agreed between the claimant and his wife and it is the wife who paid. The wife, who is the 3rd respondent was not called to testify. She did not even file a witness statement.

The evidence of RW1 is thus hearsay that is not supported by any other evidence. Taking into account the fact that what RW1 stated in evidence was totally at variance with the respondent's pleadings and the witness statement, and further taking into account the provisions of Section 10(6) read together with Section 10(7) of the Employment Act, further considering that it was the duty of the respondents to prepare and ensure the claimant signed a contract of service, I am inclined to decide in favour of the claimant to the effect that his salary was agreed at Kshs.80,000 per month and he was paid for March in full, part payment made in April leaving a balance of Kshs.30,00 and no payment made in May and June. Further, RW1 admitted that there was some intervention by police at Kamukunji who recovered some items that had been stolen from the respondents. I am thus inclined to believe the claimant's evidence that he was asked by the 3rd respondent to pay Kshs.3,000 to the police which was never refunded.

I thus award the claimant the balance of salary for April in the sum of Kshs.30,000, salary for May Kshs.80,000 and salary up to 18th June 2016 in the sum of Kshs.55,384.60.

In conclusion, judgment is entered for the claimant as follows: -

1. Notice ----- Kshs.80,000
2. Compensation----- Kshs.160,000

3. Salary arrears----- Kshs.165,000

4. Refund----- Kshs.3,000

Total Kshs.408,000

The claimant is awarded costs and interest from date of judgment.

In view of the fact that the pleadings were filed by an advocate but the claimant appeared in person at the hearing, I will assess his costs at Kshs.50,000 all inclusive.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF AUGUST 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, 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