



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 866 OF 2016

JOSEPHAT KIMANI KARANJA.....CLAIMANT

VERSUS

MAXLAND RESTAURANT BAR & LOUNGE.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 16.5.2016 stating that he was employed by the respondent as a Butcher/ Cook in October 2013 earning Kshs. 12,000 per month and worked until 11.12,2014 when he was unfairly and wrongfully dismissed. He seeks the following reliefs: -

a) A declaration that the termination of his employment was unfair and wrongful.

b) Compensation for unfair termination kshs. 144,000.

c) One- month salary in lieu of notice kshs. 12,000.

d) One month leave kshs. 12,000

e) Salary for October, November and December 2014 kshs.36,000

f) Gratuity for one year three months kshs. 7,500.

g) Refund of salary deductions kshs. 56,545

h) Certificate of service.

i) Costs and interest.

2. The Respondent never entered appearance after being served with summons and as such the suit proceeded by way of formal proof on 10.3.2020 when the claimant gave evidence. Thereafter his counsel filed written submissions.

3. In brief the claimant's case is that he was employed as stated above in October 2013 based at the respondent's Westlands restaurant before being transferred to Mountain Mall Thika Road Branch in December 2013. His qualification includes Certificate in A la Carte Cookery, and Mass Food Preparation & Presentation from Kenya Utalii College. He was never issued with any written contract of employment.

4. He testified that he was verbally dismissed by Mr. Macharia and reported that matter to the Labour Office as a result of which the respondent was summoned for conciliation. However the respondent declined the summons and instead served a summary dismissal letter dated 11.12.2014 alleging loss of meat valued kshs. 56,545.60. The claimant denied the alleged loss of meat and contended that he was not given opportunity to defend himself. He prayed for compensation contending that he has since the said dismissal not secured alternative employment.

5. He further testified that he never took any leave during his service and prayed for compensation. He contended that he was working for 22 hours per day instead of 8 hours and he was never paid for the extra hours worked. He therefore prayed for the reliefs sought in the Claim.

Issues for determination and analysis

6. There is no dispute from the pleadings and evidence that the claimant was employed by the respondent. The issues for determination are:

- a) Whether the summary dismissal of the claimant was unfair and wrongful.
- b) Whether the claimant is entitled to the reliefs sought.

whether the summary dismissal unfair and wrongful.

7. Under section 47(5) of the Employment Act, the burden of proving unfair termination rests on the employee. The claimant has produced a summary dismissal letter dated 11.12.2014 indicating the reason for the dismissal as misconduct and poor performance of duty. **Section 44(4) of the Employment Act** provides for termination of an employee's services on grounds of misconduct while **Section 43** and **45(2)** of the Act provides for proof of the reason for the termination by the employment in any legal proceedings challenging the termination.

8. As earlier observed, the respondent did not enter appearance and as such he she did not adduce any evidence to prove that the dismissal of the claimant was grounded on a valid and fair reasons and that a fair procedure was followed as required by section 45 of the Employment Act. Consequently, I hold that the alleged misconduct has not been proved by the respondent and as such the reason for the dismissal was invalid.

9. The claimant further testified that he was dismissed without being accorded a fair hearing. Section 41 of the Employment Act provides that: -

(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

Notwithstanding any other provision on this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make."

10. The evidence by the claimant has not been rebutted by the respondent and consequently, I am therefore satisfied that the claimant has proved on a balance of probability that his dismissal was unfair within the meaning of section 45 of the Employment Act.

Reliefs

11. In view of the foregoing finding, I make declaration that the said summary dismissal was unfair and wrongful and under section 49 of the said Act, the claimant is entitled to one month's salary in lieu of notice plus 3 months' salary compensation for the unfair dismissal. In awarding the said compensation, I have considered the fact that he served for less than 2 years and that he was not able to secure another job within 12 months.

12. The claim for leave for leave is granted at the rate of 24 days per year in line with regulation for 15 months. I further award the claim for unpaid salary for October, November and December 2014 being 2 months and 11 days at the rate of kshs.12000 per month. The claim for gratuity is declined because the claimant was a member of NSSF and the employer remitted contributions. The claim for salary deduction is declined because the claimant did not prove that the salary was indeed deducted. The claim for overtime has not been proved by evidence and it is also declined. Finally, the prayer for certificate of service is granted as prayed.

13. In conclusion, I enter judgment for the claimant against the respondent as follows: -

Notice	kshs 12,000
Compensation	<u>kshs 36,000</u>
Unpaid salary	kshs. 29,500
30 days leave	<u>kshs. 12,000</u>
Total	<u>kshs 89,500</u>

The said award is less statutory deductions but in addition to costs and interest at court rates from today.

Dated and delivered at Nairobi this 24th day of September, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE