



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 420 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

VIKURU NICHOLAS ADIKA.....CLAIMANT

VERSUS

MERCURY LOUNGE LIMITED.....RESPONDENT

JUDGMENT

Vide his Memorandum of claim dated 17th March 2014 and filed on 19th March 2014, the claimant avers that he was employed by the respondent in the month of September 2011 as a Bar Tender, initially at a monthly salary of Kshs.25,000 per month. He was later promoted to the position of Head Bar Tender and paid a responsibility allowance of Kshs.5,000 per month in addition to his salary.

He avers that on 10th January 2014 he was issued with a letter of suspension which read –

“This letter serves to notify you that you have been suspended from your job as Assistant Manager of Mercury Lastdrop without pay for one (1) month with immediate effect pending investigations into misconduct on incompetence on your duties. This will help in our decision making. You will report back on the 10th of February, 2014 at the Head Office.”

Upon reporting back to work as indicated in the letter of suspension he was issued with a letter of termination in the following terms –

“This letter serves to inform you that you are hereby terminated as a Bar tender of Mercury Last Drop effective immediately.

On 10th January 2014 we suspended you from your duties for one month pending investigations regarding the company losing money through fraud and incurring heavy stock shortages.

We have terminated you from your duties due to gross incompetence and negligence in your performance of your managerial duties.”

The claimant was aggrieved by the suspension and subsequent termination of his employment and filed the instant suit in which he prays for relief as follows –

- a. A declaration that he was wrongfully and unfairly dismissed from his employment.
- b. Unpaid dues totalling Kshs.364,000 comprising of
 - i) One [1] month’s salary in lieu of notice
 - ii) at the rate of Kshs.30,000 Kshs.30,000
 - iii) Unpaid salary for the month of January 2014 Kshs.30,000
 - iv) Unpaid house allowance at the rate of 15% on the gross

- v) Salary from June 2011 to date of termination Kshs.44,000
- vi) Unpaid leave 2 months Kshs.60,000
- vii) Unpaid responsibility allowance Kshs.130,000
- c. Notice period of one month Kshs.30,000
- d. 12 months' salary as compensation for wrongful and unfair termination Kshs.30,000 x 12 Kshs.360,000
- e. Punitive and aggravated damages for breach of the claimant's constitutional rights.
- f. Costs and incidental to this suit.

It is the claimant's averment that the respondent breached the contract of employment in that –

- a. It failed to provide the claimant with reasonable notice prior to termination.*
- b. It failed to accord the claimant a hearing.*
- c. It failed to provide the claimant with adequate compensation in lieu of notice.*
- d. It failed to compensate for outstanding wages and vacation pay.*
- e. It failed to compensate for severance.*
- f. It withheld compensation owed to the claimant in lieu of benefits and bonuses to him by reason of the termination.*
- g. It did not in any event have just cause to terminate the claimant.*

The respondent filed a defence and counter claim in which it admits employing the claimant at a salary of Kshs.25,000 per month and promoting him to Head Barman but denies paying him responsibility allowance as alleged in the claim. The respondent avers that the claimant was incompetent and/or negligent in his duties which amounted to gross misconduct under Section 44(4) of the Employment Act.

The respondent pleads that the reason for suspension of the claimant was to pave way for investigations which disclosed that the claimant's omissions and commissions led to loss of stock and funds from the respondent's establishment. That the summary dismissal of the claimant was therefore justified.

In the counter claim the respondent avers that due to the claimant's negligence it suffered damage as follows –

- a. Loss of income and accrual of debt by the company*
- b. Loss of trust with suppliers and creditors*
- c. General mistrust among the employees*
- d. Stock shortages.*

The Respondent avers that they lost a lot of money due to the actions, omissions and/or negligence on the part of the Claimant and the Respondent intends to recover this amount from the Claimant.

The respondent prays that the claim be dismissed and judgment entered in favour of the respondent as follows –

- 1. An order for the compensation for the loss incurred by the Respondent the exact amount to be ascertained at the hearing of the matter.*
- 2. Any other relief the court may deem fit to grant;*
- 3. Costs of this suit.*

When this matter came up for hearing on 29th July 2020 after several abortive attempts at hearing and out of court settlement, parties by consent agreed that the court adopts the judgment in **Cause No. 421 of 2014 – Ngunyi Mwangi Samuel v Mercury Lounge Limited**, which was filed by a colleague of the claimant who was dismissed under similar circumstances. In the said claim, Abuodha J. made a finding as

follows –

“12. In termination of employment cases, the burden is usually on the employer to prove or justify the reason for dismissal or termination. The respondent herein alleged that the claimant was negligent in his duties leading to loss of approximately Kshs.1 million which it counter claimed. However, no evidence was tendered to show such loss indeed occurred and the claimant was the one to blame.

13. The court is therefore unable to make any finding on the counterclaim and further if the loss and allegation of fraud be the reason for which the claimant was dismissed then they have not met the requisite evidentiary threshold to justify or validate the dismissal as required by law.

14. The court therefore finds the claimants’ dismissal unfair in terms of reasons and procedure and hereby enters judgement

against the respondent as follows;

Kshs

(a) One months’ salary 25,000

(b) Salary for the month of January

(during suspension) 25,000

(c) Seven months’ salary as compensation

for unfair termination of services 175,000

225,000

(d) Costs of the suit

(e) Certificate of service.”

In the circumstances I enter judgment for the claimant against the respondent as follows –

1. One months’ salary Kshs.30,000.00

2. Salary for the month of January

(during suspension) Kshs.30,000.00

3. Seven (7) months’ salary as compensation

for unfair termination of services Kshs.210,000.00

Total Kshs.270,000.00

4. Costs of the suit and interest from date of judgment.

5. Certificate of service.

I have used a salary of Kshs.30,000 per month as per claimant’s payslip for the month of December 2013 at page 3 of the claimant’s bundle.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 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