



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 790 OF 2015

MUTUNGA NYAMAI.....CLAIMANT

-VERSUS-

THE CHANCERY RESTAURANT LIMITED

T/A CHINA PLATE.....RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim on 17/5/2015 alleging that he was unfairly dismissed by the Respondent and prayed for the following:

- a. A declaration that the Respondent's aforesaid actions amount to summary dismissal from employment which dismissal was unlawful and unfair.**
- b. A declaration that the Claimant is entitled to payment of their terminal dues and compensatory damages as pleaded.**
- c. An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs. 276,354/-**
- d. Interest on (c) above from the date of filing suit till payment in full.**
- e. Costs of this suit plus interest thereon.**

2. The Respondent filed a Statement of Response and Counter-claim on 15.6.2015 contending that on 3.1.2015, the Claimant tendered a resignation letter stating that due to circumstances beyond his control, he would resign with effect from 7.1.2015. She therefore denied the allegation that she dismissed the claimant from employment on 1.1.2015 and claimed for kshs. 10,600 from the claimant being one- month salary in lieu of notice for resigning without proper notice.

3. The claimant filed a Response to the Defence and Counter-Claim on 28.10.2015, denying that he resigned from employment on 3.1.2015 as alleged and maintained that on 1/1/2015, the Respondent's Director dismissed him without prior notice, on false allegation that he was late for work.

4. The suit was heard on 18/2/2020 when both parties tendered evidence and thereafter filed submissions.

Claimant's case

5. The Claimant testified as Cw1 and basically adopted his written statement dated 20.2.2018 as his evidence in chief. In the statement he stated that he joined the respondent on 1.7.2002 as a Cleaner and later became a Butchery Attendant; that his last salary was kshs. 21,258; that on 1.1.2015, he reported to work as usual but shortly thereafter the respondent's Director/ Manager, Mr. Shamir, summoned him and dismissed him verbally without any reason.

6. During his testimony before this Court, Cw1 stated that his salary was kshs.8000 and he was dismissed on 1.1.2015 verbally and he was told the offence he committed. He denied the allegation that he resigned vide the typed letter dated 3.1.2015 and contended that he was not on duty that day. He further disowned the signature appended on the said resignation letter and urged the court grant him the reliefs sought in his Claim.

7. On cross-examination, he stated that his signature on an appointment letter dated 1.7.2002 does not resemble the one on the resignation letter dated 3.1.2015. He further stated that he reported to the labour office after the dismissal and a letter was issued to the employer. He denied knowing whether or not the Respondent replied to the Labour Office's letter. He further told Court that he sought assistance from the Kenya Human Rights Commission but he never got a response from them.

8. He told the court that the respondent's manager came to where he was working and dismissed him. He admitted that there was a supervisor but he did not wish to call him as a witness in this suit. He further admitted that he never lodged a complaint with the police over the forgery of his signature. Finally, he denied knowledge that the employer sent his certificate of service and break down of his dues to the labour office.

Respondent's case

9. Mr. Shamir Shamji, the Respondent's Managing Director testified as Rw1. He adopted his written statement dated 9.6.2015 as his evidence in chief. He also produced the 6 documents annexed to the defence as exhibits. In brief Rw1 denied that he dismissed and contended that the Claimant tendered a resignation letter on 3.1.2015 which was to take effect from 7.1.2015; that after serving the resignation letter on 3.1.2015 the Claimant away immediately; that on 19.1.2015, he received a demand letter from the labour office which he responded to adequately and he never heard from the labour office again; finally, that again on 30.1.2015, he received another demand letter from the claimant's Advocates and he responded to denying the alleged unlawful dismissal.

10. Rw1 maintained that the claimant was never dismissed but he resigned without proper notice and prayed for the respondent's counter claim to be allowed.

11. On cross-examination, Rw1 confirmed that the Claimant worked for him from 2002 to 2015 in the kitchen helping in cooking. He declined to comment on the similarity between signatures on the appointment letter and resignation letter. He admitted that he never signed on the resignation letter; and that in his letter dated 26.1.2015, he stated that the Claimant left on 31.12.2015. He clarified that Chancery Restaurant Ltd is the owner of China Plate which is a trading name. Finally, Rw1 denied that the resignation letter was forged and contended that the Claimant did not call a document examiner to prove the alleged forgery.

Claimant's submissions

12. The Claimant submitted that the Respondent dismissed him based on untrue facts and fabrications and that the allegation that he tendered a resignation letter are untrue. He further submitted that the Respondent's letter dated 16.1.2015 indicates that he left employment on 31.12.2014 thus it is untrue that he resigned and that it is questionable why the respondent in the letter did not compute the 7 days worked in January 2015 should he have resigned with effect from 7.1.2015.

13. He relied on sections 107 and 70 of the Evidence Act to argue that it was incumbent upon the respondent to prove that the handwriting appended on the letter belonged to him. He further relied on **Aloiyis Jume Ogola v Pepco Kenya Limited [2014] eKLR** where the Court held that the Claimant never signed the purported resignation letter but he was unfairly terminated. He also relied on **Stephen Miheso v Kaimosi Tea Estate Limited [2014] eKLR** where the Court made a finding that the Claimant was hoodwinked into appending his signature on a purported resignation letter.

14. In addition, the claimant submitted that under sections 43 and 45 of the Employment Act, it is mandatory for the employer to prove that the Claimant reported to work late, and further prove that the dismissal of the Claimant was done in compliance with section 41 of the Employment Act. For emphasis, he relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held that for a termination of employment to pass the fairness test there must be substantive justification and procedural fairness.

15. Finally, he submitted that he is entitled to the prayers sought because he has proved his case. He contended that he is entitled to salary in lieu of notice by dint of section 36 of the Employment Act because he was not served with notice before the termination of his contract. He further submitted that he is entitled to 12 months gross salary as compensation for unfair termination of his contract by dint of section 49 of the Act considering his long service of 12 years. Finally, he prayed for costs of the suit and interest.

Respondent's submissions

16. The Respondent submitted that the Claimant's employment was not unfairly terminated rather he voluntarily resigned from employment. she contended that an employee who voluntarily resigns cannot sustain a claim for unlawful termination and relied on **Catherine Kanaiza Aradi v Little Lambs Company Limited (Little Lambs Children Centre) [2017] eKLR** where the court held that the words in the Claimant's resignation letter did not express any involuntary cause of her termination thus there was no proof of constructive dismissal.

17. The respondent further submitted that when confronted with the resignation letter, the Claimant merely denied it without giving any explanation which is insufficient to dislodge the Respondent's testimony. For emphasis he relied on the case of **Cheruiyot Kipkemoi Joel v Tirgaga Tea Factory Co. Limited [2017] eKLR** where the Court held that the respondent's case of resignation by the claimant was clear cut and the claimant was merely denying the same.

18. The respondent argued that the Claimant failed to prove that he was terminated on 1.1.2015 and also the allegations of fraud levelled against her. Therefore, she submitted that the Claimant is not entitled to the reliefs sought as he voluntarily resigned.

19. With respect to the counter claim, she submitted that the Claimant failed to give adequate notice contrary to the provisions of section 36 of the Employment Act and urged the court to find that she is entitled to Kshs. 10,600 being one month's salary in lieu of notice. She further prayed for costs of suit and the counter claim.

Issues for determination and analysis

20. There is no dispute from the pleadings, evidence and submissions that the Claimant was employed by the Respondent vide a letter of appointment dated 1.7.2002, until January 2015. The issues for determination are:

- a. Whether the Claimant voluntarily resigned or he was dismissed by the respondent.
- b. Whether the dismissal was unfair.
- c. Whether the Claimant is entitled to the reliefs sought.
- d. Whether the counter-claim should be allowed as prayed.

Whether the Claimant voluntarily resigned or he was dismissed

21. The respondent contended that the claimant tendered his resignation vide the letter dated 3.1.2015 citing circumstances beyond his control as the reason for the resignation. Rw1 testified that although the resignation was effective from 7.1.2015, he disappeared immediately after serving the resignation letter. A copy of the said letter was produced by Rw1 as an exhibit and it is copied below:

“MUTUNGA NYAMAI,

P.O BOX 99.

MUKAATINI,

0710767454,

3RD JANUARY 2015.

THE H.R MANAGER,

CHINA PLATE AT THE CHANCERY,

P.O BOX 10271,

NAIROBI.

Dear Mr. Shamir,

Please accept this letter as a notification that I am resigning from my position with China Plate at chancery company on January 7th. I apologize for not being able to provide two weeks notice. However, I regret that, due to circumstances beyond my control, I need to resign immediately.

Thank you for the support that you have provided for me during my tenure with the company.

Sincerely,

MUTUNGA NYAMAI”

22. The Claimant denied resigning from employment and contended that he was not on duty on 3.1.2015. He also disowned the signature in the letter and contended that it did not resemble the signature he had appended on the Appointment Letter. Although he consented to the production of the letter as an exhibit alongside other documents during the hearing, the burden of proving that the letter was authored by him remained with the respondent who is relying on it as his evidence. However, she did not call a handwriting expert to prove that the signature on the letter belonged to the claimant and as such I hold that the respondent has not proved on a balance of probability that the claimant resigned from employment vide the letter dated 3.1.2015.

23. On the other hand, I am satisfied that the claimant has established on a balance of probability that he was dismissed verbally by Rw1 on 1.1.2015. The foregoing holding is grounded on the fact that the respondent indicated in her various correspondences that the claimant worked for her until 31.12.2014. The said correspondences include her response to the Sub-County Labour Officer dated 26/1/2015, the tabulation of the dues payable to the Claimant dated 26.1.2015 and the Certificate of service dated 26.1.2015.

Whether the dismissal of the Claimant was unfair and unlawful.

24. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

25. As regards the reason for the dismissal, the claimant's case that he was dismissed on false allegation that he reported to work late. He maintained that the said reason was invalid. The respondent did not make an effort to prove the validity of the said reason and instead maintained that the claimant resigned from his employment vide the letter dated 3.1.2015. Section 43(1) of the Employment Act requires that in every claim arising out of termination of contract of service, the employer shall prove the reason(s) for the termination and in default the termination is unfair within the meaning of section 45 of the Act.

26. In addition to the foregoing, the claimant contended that he was dismissed without being heard on the alleged misconduct. Section 41 provides:

“(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.

(2) Notwithstanding any other provision of 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.”

27. Again the respondent did not bother to prove that a fair procedure was followed before dismissing the claimant and insisted that the claimant resigned voluntarily from employment. Having found that the respondent has failed to prove that the dismissal of the claimant was grounded on a valid reason and that a fair procedure was followed, it is my holding that the dismissal was unfair within the meaning of section 45 of the Employment Act. I gather support from **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

Whether the Claimant is entitled to the reliefs sought

28. Taking into account the finding that the respondent did not prove that the reason for dismissal the claimant was valid and fair and that fair procedure was followed, I make a declaration that the dismissal was unfair and unlawful within the meaning of section 45 of the Employment Act and he is entitled to damages. Under section 49(1) of the Act, I award him one-month salary in lieu of notice. Considering his payslip for the month of December 2014 the Claimant was paid Kshs. 21,258 comprising basic pay of Kshs. 10,600, house allowance of Kshs.1600, overtime pay of Kshs. 2446 and ex gratia payment of Kshs. 6,000. In my view the last two items are not part of the claimant's monthly gross pay because they are dependent on the actual performance of work by the claimant or employer's discretion. Consequently, I award the claimant kshs. 12,200 as his salary in lieu of notice.

29. To fortify the foregoing holding, I rely on **Richard Erskine Leakey & 2 Others vs. Samson Kipkoeh Chemai [2019] eKLR** where the Court of Appeal held that: -

“In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.”

30. In addition, I award the claimant 12 months' salary as compensation for the unfair dismissal considering his long service of 12 years and the fact that he did not contribute to the dismissal through misconduct. I have further considered the fact that the claimant was not paid service gratuity or pension after the dismissal.

Whether the counterclaim should be allowed

31. In view of the finding hereinabove that the respondent did not prove that the claimant resigned from employment as alleged, it is my

holding that the counter-claim is devoid of merits and it stands dismissed.

32. In conclusion I enter judgment for the claimant in the following terms:

Notice Kshs. 12,200.00

Compensation Kshs. 146,400.00

Total Kshs. 158,600.00

The above award is subject to statutory deductions but the claimant will have costs plus interests at the court rates from the date hereof.

Dated and delivered at Nairobi this 8th day of October, 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