



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 275 OF 2017

BETWEEN

SHABAN KAINGU KALII.....CLAIMANT

VERSUS

PONTOON LIMITED.....RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

Wandai Matheka & Company Advocates for the Claimant

Wameyo Onyango & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 18th April 2017. He avers, he was employed by the Respondent in its Pontoon Restaurant & Bar Lounge, as a General Manager, on 4th July 2015, on a monthly salary of Kshs. 63,500.

1. He avers, he was a diligent General Manager, but the Respondent frustrated him, by not paying his salary when it was due. In September 2015, he was paid Kshs. 43,500; Kshs. 53,500 for October 2015; and Kshs. 47,500 in January 2016. In March and April 2016, he was denied his entire salary at Kshs. 127,000.

2. The Respondent told the Claimant, it would lower his salary from Kshs. 63,500 to Kshs. 30,000 monthly. This was not justifiable. The Claimant avers, he declined salary reduction. The Respondent consequently summarily dismissed the Claimant. The Claimant does not disclose the date of summary dismissal in his Statements of Claim and Witness.

3. The Respondent filed a short Statement of Response, on 28th June 2017. Its position is the Claimant was its Employee, on a monthly salary of Kshs. 50,000. It does not owe the Claimant any arrears of salary.

4. The Claimant gave evidence, and rested his case, on 30th September 2019. Respondent's Director, Nancy Shivoko, gave evidence for the Respondent on 10th February 2020, closing the hearing.

5. The Claimant restated the contents of his Pleadings, as summarized at the beginning of this Judgment. His full salary was Kshs. 63,500. There were months it was paid in full. The Respondent purported to reduce his salary to Kshs. 30,000. He did not sign the contract exhibited by the Respondent, stating his salary was Kshs. 30,000 monthly. The contract is not on Respondent's letterhead. Guests at the facility were checked out by the Cashier/ Receptionist. It is true that the Respondent suffered loss, because some Guests left without clearing their bills. It was not Claimant's responsibility, to check out Guests. The Claimant last worked in April 2016. He was not given reasons to justify termination.

6. Cross-examined, the Claimant told the Court that he was at one time employed by Eco Dairy Farming Limited. It is a different company from the Respondent. The letter of recommendation dated 15th February 2013, was issued by Eco Dairy Farming Limited. The Claimant was initially employed by the Respondent in 2011- 2012 and released to Eco Dairy Limited momentarily. He later re-joined the Respondent. He was in college in 2013 -2015. He was re-employed in 2015 as the General Manager.

7. He approved payment of salaries. He oversaw filing of KRA returns. He was an Accountant at Eco Dairy Limited. Returns for March 2016 salaries were filed when the Claimant was General Manager. He approved. Salaries of 5 persons as shown on the returns. The Claimant was listed number 3. His salary was indicated to be Kshs. 30,000. PAYE for all Employees was Kshs. 13,701. Payment by the Respondent to KRA was on 7th April 2016. The Claimant signed returns. The Claimant's cell phone number was indicated on the forms. There was no document showing any other salary was payable to the Claimant.

8. There was a regular Guest of the Respondent, well-known to the Claimant, by the name Kinuthia. The Claimant had a business relationship with this Guest. The Claimant knew another contact, Anthony Maina. Maina was to facilitate Kinuthia's stay at the Respondent's hospitality facility. Maina undertook to pay the cost of hosting the Guests. He however left without paying, leaving the other Guests behind. The Claimant had trusted Maina would pay for the others. The Others stayed at the Respondent's business between 20th August 2015 to 7th October 2015. The Claimant was the General Manager. The bills were never paid. They amounted to Kshs. 312,000. The Claimant would not have allowed Kinuthia and his group to continue residing at the Respondent's business, if he did not trust Maina. The Directors raised the issue with the Claimant. It is not true that they were displeased. The Directors wrote to the Claimant on 9th October 2015. They alleged that the Claimant was personally responsible. The Claimant told the Court, that the Directors forgot, there are business risks. He did not respond to the letter. It is not true that the Claimant failed to report back, after receiving the Directors' letter. The Claimant told the Court that he has disclosed the date, and manner of his dismissal, in his Statement of Claim. He approved all KRA returns. He handed over to the Director on 1st May 2016. There was no document recording handover.

9. Redirected, the Claimant told the Court he handed over to the Director's Wife. Eco Dairy Limited and the Respondent shared Directors. Kevin Magotsi was a Director in both companies. KRA returns were filed by the Accountant. The Claimant was Respondent's bank signatory, and his signature appeared on the returns. He came to know Kinuthia in the course of business. He did not have a personal relationship with the Guests. He wrote e-mail to Maina after the Guests left, seeking payment. The Claimant was summarily dismissed in April 2016. There was no letter given to him, communicating summary dismissal decision.

10. Director Nancy Shivoko, similarly adopted in her evidence, the position taken in this dispute by the Respondent, in the Statement of Response.

11. The Claimant worked for Eco Dairy Limited and the Respondent. The Directors closed the Dairy business. The Claimant returned to the Respondent's hospitality business in 2015. He was in charge of returns and reconciliation of accounts. He collected cash. He filed KRA returns. He prepared staff salaries and PAYE deductions. Nancy would entrust the Claimant cash to be paid to KRA and to Employees. His salary is shown in these documents as Kshs. 30,000. KRA was paid a cumulative sum of Kshs. 13,701, as captured at page 3 of Respondent's Further List of Documents. The trend continued in other months, showing consistently what was paid in salaries, and PAYE.

12. Guests would pay on checking in. They could pay later, but not beyond 2 nights after checking in. The bill must not accumulate beyond Kshs, 30,000.

13. 2 Guests, Maina and Kinuthia, stayed for a month. They were not paying their bills as they enjoyed their stay. Their bills accumulated to over Kshs. 400,000. They ran away without paying. The Claimant was the General Manager. He did not enforce management policy. Nancy informed her Co-Director. The Claimant was advised to follow up the debt. He sent e-mail to Anthony. The money was never recovered. The Claimant himself, wrote demand to Anthony. There was no reply. The Manager authorizes Guest who stay beyond 2 nights without paying accumulated bills. The Directors wrote to the Claimant, pointing out that he was negligent. The Claimant was asked to follow up further, have the debt paid, failing which it would be recovered from his salary. He deserted after receiving this letter. He did not hand over. He did not issue any letter of resignation. He was not issued a letter of termination by the Respondent. He deserted. The Respondent was left in disarray, and could not get a Manager for some time. The Claimant did not earn a salary of more than Kshs. 30,000 at any time.

14. Cross-examined, she told the Court that the Claimant was in employment in 2011. He was General Manager and also an Accountant. In 2015 he was General Manager, on a monthly salary of Kshs. 30,000. Nancy is wife to the Director. She has shares in the company. She acted in the absence of her spouse. She was not an Employee of the Respondent. The Claimant declined to sign the letter issued by the Directors. He deserted. He was demanding a salary which was not in his scale. He kept books of account. He is not owed any arrears of salary. Redirected, Nancy told the Court she is a shareholder in the business, and conversant with operations. The Claimant refused to sign the Directors' letter. His monthly salary of Kshs. 30,000 is confirmed by the KRA returns. He was involved in making of returns. There is no document on record showing a salary of Kshs. 63,000.

The Court Finds: -

15. The Claimant worked for the Respondent as General Manager, from the year 2015. He had worked earlier for the Respondent, and Respondent's associate, Eco Dairy Limited from around the year 2011. He took a study break, and returned to the Respondent's hospitality business, in 2015. The Respondent's Directors, divested from dairy business.

16. The Claim is on arrears of salary, and compensation for unfair termination.

17. On unfair termination, the Claimant states the actual event took place in April 2016. He did not give the Court any specific date. He did not produce a letter of termination. This is because there was no date, when termination decision was made against the Claimant by the Respondent. There was no letter of termination produced by the Claimant, because none issued. It is easily to be concluded that the Claimant, encountered with demands that he follows debt sustained by the Respondent, resulting from non-payment of bills by Customers who were well-known to the Claimant, deserted employment. The letter issued to him by the Directors, advising the Claimant to recover the debt, or have it recovered from his salary, triggered desertion.

18. Section 47[5] of the Employment Act 2007 requires that, in any complaint of unfair termination, the burden of proving that an unfair termination has occurred shall rest on the Employee. The Employer's burden lies in justifying the ground for termination, which is a secondary burden. Without the primary burden which is imposed on the Employee under this law, there is no burden to be discharged by the Employer.

19. Quite clearly, the Claimant failed to show that unfair termination occurred. The Respondent is not required to justify termination and show that procedure was fair.

20. The prayer for compensation for unfair termination has no merit and is declined.

21. What was the Claimant's monthly salary? KRA returns across the months the Claimant worked, show his monthly salary was Kshs. 30,000. The returns were endorsed by the General Manager, the Claimant herein. PAYE was remitted to KRA based on Employees' salaries shown in the returns. There is no other document, showing that the Claimant received Kshs. 63,500, as monthly salary. There is no document showing that he was promised a salary of Kshs. 63,500 by the Respondent, at any time. The Claimant, as the General Manager, would not have hurdles accessing documents showing his salary was Kshs. 63,500. Where does he get a figure of Kshs. 63,500 from?

22. And even had the Claimant shown that he was owed salary, he left the Respondent with a debt of Kshs. 312,000. He had been advised that this would be recovered from his salary, at the time he fled. It is unlikely that he would receive arrears of salary, without paying back to the Respondent, what was lost through his managerial ineptitude.

IT IS ORDERED: -

a. The Claim is declined.

b. Costs to the Respondent.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 15th day of December 2020.

James Rika

Judge