



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1134 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS NJOROGE NGARUIA.....CLAIMANT

VERSUS

OLOOLTEPES PICNIC SITE LIMITED.....RESPONDENT

JUDGMENT

Francis Njoroge Ngaruiya instituted this suit vide a Memorandum of Claim dated 18th May 2016 against Olooltepes Picnic Site Limited for unfairly terminating his employment. He avers that he was employed by the Respondent as a Waiter effective March 2014 earning a monthly salary of Kshs.8,000/=. That the Respondent without proper communication and reason, abruptly and unlawfully terminated his services on 22nd January 2016. That he was earning Kshs.10,000/= per month at the time of termination.

The Claimant further avers that the Respondent acted in breach of **Articles 41 and 47(1) of the Constitution of Kenya** and **ILO Convention 158 on termination of employment, 1982** and that the Respondent's failure to proffer factual and genuine reasons for terminating his employment violates the mandatory provisions of **Section 45 of the Employment Act, 2007**.

He avers that the Respondent has failed and/or refused to pay him contractual and terminal benefits and he thus claims from the Respondent: one month's pay in lieu of notice; service pay for 1.10 years; house allowance; unpaid unattended leave for 1.10 years; public holidays; overtime; maximum compensation for unfair termination; and a certificate of service, as enumerated in his Memorandum of Claim. The Claimant prays for award against the Respondent for:

- (i) That the Respondent be ordered to pay the Claimant his terminal and contractual dues amounting to Kshs.491,843.68/=.**
- (ii) Costs of this claim and interest thereon at Court rates;**
- (iii) A declaration that termination of the Claimant's employment was unfair and unjust;**
- (iv) Any other relief that this Court may deem just and fit to grant.**

The Claimant filed his Witness Statement together with his claim wherein he states that on the said 22nd January 2016 at around 7 pm, the Respondent's Manager, Ruth Mopol came to the counter, placed on the wall a list with names and told them that those whose names appeared on the list were not to report to work until 15th February 2016. That when they reported as instructed on 16th February 2016, the manager told them she would call to inform them when they would report back to work. He states that he waited in vain. He states that the company never considered the proper guidelines to terminate his employment, which culminated to the suit herein.

In a Witness Statement made on 11th October by a former employee of the Respondent Regina Wangari Mucheru, she states that she received a call from the Claimant on 22nd January 2016 who told her that her name was in the aforesaid list. She further states that she reported to work the next day to seek explanation for the same but the manager informed her to adhere to the information on the list. She thus went back to the Respondent on 15th February 2016 at or about 12 pm as indicated on the said notice. That they waited until 7 pm when they were finally met by the manager, who did not give them any conclusive determination.

The Respondent filed a Memorandum of Response dated 20th July 2016 generally denying the averments made by the Claimant in his Claim in terms of his employment and subsequent termination. The Respondent avers that it only engaged the Claimant on casual basis without any contractual employment terms and conditions and that he was therefore not entitled to any of the benefits as claimed in his Claim. It also

avers that it has a workforce of approximately 30 staff members all engaged on casual basis because it only functions over the weekends and public holidays and does not need to engage staff on permanent basis.

It further avers that the Claimant who was answerable to the Manager would at times be engaged as a Bar man managing the counter and at times serve customers whenever the premise was less busy. That the Claimant failed to diligently perform his obligations and responsibilities from January 2015 to December 2015 and that a keen assessment of the same revealed gross misconduct. It avers that the misconduct led to the Claimant having his salary severally deducted for the shortages of the stock sold, being served with several disciplinary and warning letters and sent on suspension.

The Respondent avers that the Claimant and 3 other staff members came to the work place on 15th February 2016 and got themselves completely intoxicated with alcoholic drinks and decided to confront the manager using abusive language. That the management decided to suspend them indefinitely for the said misbehaviour. That it is while the management was contemplating the action to take against them that the suit herein was filed against the Respondent. That the Claimant's employment was therefore not terminated and he is consequently not entitled to any of the reliefs and prayers sought in his Claim. It further avers that the Claim is "*unfunded*", "*irreverent*", (sic) baseless, scandalous, frivolous, vexatious, and an abuse of the due process of law and should therefore be dismissed.

The Respondent filed 5 witness statements made by Ruth Mopel, Joshua M. Mbithi – the Accounts Clerk, William Mopel – Director, Saruni Mopel – Director and Salome Akinyi – a Bar tender/Waitress. All the five statements reiterate the averments made by the Respondent in its Memorandum of Response.

Ruth Mopel further states in her Statement that the Claimant was found to have engaged in theft of employee's property and regularly conspired with other employees to secretly purchase their stock from the market then bribing the guard at the gate to allow them sneak the illicit stock into the premises for them to sell at the expense of the management. She states that the same was mainly done on Sundays while the management was away attending church service. She narrates the occurrence of the 15th February 2016 and states that she was in her office when she heard a group of people shouting and singing obscene and derogatory songs whom she found out later to have been the Claimant and other staff members. That the said employees stormed into her office while completely intoxicated and threatened to physically attack her while hurling abusive language at her. That the management reported the matter to the Kiserian Police Station but the police declined to interfere on grounds that the same was an internal matter.

The Claimant filed a Reply to the Respondent's Response on 9th August 2016 denying that he was drunk as alleged. He avers that after his employment was terminated, the Respondent kept making false promises about his compensation and reiterates that he was unfairly and unlawfully terminated. He prays for the dismissal of the Respondent's Response.

Evidence

The Claimant testified as CW1. He adopted his filed witness statement and stated under cross-examination that the record of his employment is in the office of the Respondent's manager. He stated that he worked 6 days every week including weekends and used to sign at the gate with the watchman but that he could not get a copy of the register since all staff signed in it. He testified that he was informed of termination of his employment verbally and was not issued with any letter. That he was told to return on 15th February 2016 to be told the reasons for stopping him from working. That when he went back on the said date, the manager told him and the other employees with him that there were things such as sodas and beer being sold at the field which they denied knowledge of. That she then told them to wait for her to discuss their case with the Director. The Claimant denies ever receiving the warning letters produced by the Respondent. He stated that he would have signed and retained copies of the same had they been issued to him. He further stated that he was not given an opportunity to defend himself as were his colleagues who were in the same list.

CW2, REGINA WANGARI MUCHERU adopted her filed witness statement as her evidence in chief. In the witness statement she reiterated the averments in the claim. She stated under cross-examination that she also worked 6 days a week. That the employment records were at the office. She further stated that the manager told them there were rumours of theft but that she did not have any evidence of the same. She denied that they were found drunk at work or that the Claimant was ever warned for being drunk while at work.

The Respondent through its advocates on record adopted all its documents as filed together with the Memorandum of Response and closed its case on 28th September 2019 without calling any witness.

Claimant's Submissions

The Claimant refers to the definition of a casual employee under **Section 2 of the Employment Act** as a person whose terms of engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time. That **Section 37 of the Employment Act** provides for the conversion of casual employment to contractual or permanent employment where an employee works continuously for a period not less than one month or performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more. He cites the case of **Francis Ndirangu Wachira v Betty Wairimu Maina (2019) eKLR** where the court stated that the claimant had worked for the respondent continuously for slightly over two years thereby bringing him within the ambit of section 37 of the Employment Act. It is the Claimant's submission that he therefore was a permanent employee having worked for the Respondent for two years.

The Claimant submits that no proper procedure was followed by the Respondent in terminating his employment on the ground of misconduct as he was neither presented before a disciplinary tribunal nor accorded an opportunity to defend himself. He cites the case of **Gilbert Mariera Makori v Equity Bank Limited (2016) eKLR** where the court observed that Section 41 of the Employment Act 2007 is categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. That first the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal and in the presence of a witness of the employee's choice.

He further cites the case of **CMC Aviation Limited v Mohammed Noor, Civil Appeal No. 199 of 2013** where it was held that even where there is a fair reason for terminating an employee's service but the employer does not adhere to the procedure prescribed by statute, the same amounts to unfair termination. Further, that an employer dismissing an employee without notice or without the right amount of notice is in breach of the employment contract which constitutes wrongful dismissal. The Claimant also relied on the decisions in **Nicholas Muasya Kyula v FarmChem Limited, Industrial Cause No. 1992 of 2011: (2012) LLR 235 (ICK)** and in **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Limited (2014) eKLR**.

The Claimant submits that **Rule 16 of the Second Schedule of the Employment General Rules** provides that an employer who intends to terminate the employment of an employee shall either give the employee a one month's notice or give the employee a one month's salary for failure to give notice. That he did not receive any notice of termination and is thus entitled to payment in lieu of notice under **Section 36 of the Employment Act**.

He further submits that he is entitled to service pay as under **section 35(5) of the Employment Act** and cites the case of **Martin Ireri Ndwiga v Olerai Company Limited (2018) eKLR** where service pay was defined as dues to an employee who has not enjoyed the benefit of statutory deductions and was thus covered under section 35(5) and (6) of the Employment Act 2007. It is the Claimant's submission that since the Respondent has not produced any written statement of payments nor demonstrated compliance with the statutory requirements of payments to KRA, NSSF and NHIF, he is entitled to service pay for the one year and ten months that he worked for the Respondent.

He also submits that he worked from 8.30am to 12 midnight but was never paid overtime. Further, that he also worked during public holidays without any compensation and was not allowed to go on leave contrary to **sections 27 and 28(1)(a) of the Employment Act**. It is the Claimant's submission that he is entitled to the damages claimed as compensation for the loss suffered.

The Respondent did not file any submissions.

Analysis and Determination

Issues for determination:

1. Whether the Claimant was employed by the Respondent on casual or permanent basis.
2. Whether the Claimant was unlawfully and unfairly terminated from his employment by the Respondent.
3. Whether the Claimant is entitled to the reliefs sought in the Claim.

Section 2 of the Employment Act provides-

“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;

Section 37 of the Employment Act provides as follows:

37. Conversion of causal employment to term contract

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

(4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.

The employment relationship between the Claimant and Respondent is not denied. What is up for determination is whether the Claimant was a casual as alleged by the Respondent or a permanent employee as he alleges. Although the Respondent's case is that it engaged the Claimant

on casual basis, it did not comment on the Claimant's averment that he worked for the Respondent for 1 year and 10 months. Further, the Respondent has admitted in its pleadings that the Claimant served it for at the least a period of not less than a year. It pleaded that the Claimant failed to diligently perform his obligations and responsibilities from **January 2015 to December 2015**. Consequently, the provisions of **Section 37 of the Employment Act** apply in this case to the effect that the Claimant's employment converted to term contract and he was eligible for payment of wages on a monthly basis.

The Respondent did not produce any documentary evidence to demonstrate that it engaged the Claimant on casual basis. Section 10(1) and (2) of the Employment Act provides that –

10. Employment particulars

(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.

(2) A written contract of service shall state—

- (a) the name, age, permanent address and sex of the employee;**
- (b) the name of the employer;**
- (c) the job description of the employment;**
- (d) the date of commencement of the employment;**
- (e) the form and duration of the contract;**
- (f) the place of work;**
- (g) the hours of work;**
- (h) the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;**
- (i) the intervals at which remuneration is paid; and**
- (j) the date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and**
- (k) any other prescribed matter.**

In the absence of documentary evidence or any evidence to support the averments in the defence, the Claimant's averments remain uncontroverted. Further, the Respondent did not contest the claimant's averments that he was paid monthly.

In the case of **Joseph Okelo Adhiambo & another v Y. J. Elmi & 2 others [2012] eKLR**, the court held as follows:

“...It was the duty of the Respondents to issue the Claimants with letters of appointment.

It is true such letters of appointment would have revealed terms and conditions of service. In the absence of such letter, it is apparent that there was unfair labour practice contrary to Article 41(1) of the Constitution. The terms and conditions

of engagement and even dismissal are missing.

....

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.”

The second issue is whether the Claimant was unfairly and unlawfully terminated from employment. **Section 41 of the Employment Act** provides the procedure to be followed before an employee is dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. **Sections 43(1) and 45(2) of the Employment Act** vest upon the employer the duty to prove that the reasons for termination are justifiable while **Section 47(5) of the Employment Act** bestows on the employee the burden of proving that an unfair termination of employment has occurred.

The Court in **Joseph Okelo Adhiambo & another (supra)** observed in particular that *“The procedure of sending away a worker on suspicion of wrong doing without any hearing is indeed unfair and I find that the claimants were indeed unfairly terminated.”* The Court

went on to hold that where employment is terminated without adherence to fair procedure then termination is unfair as stipulated under Section 45(2)(c).

It is the Respondent's case that the Claimant was on indefinite suspension awaiting further decision on his and other employees' conduct at work. On the other hand, the Claimant's case is that he and the other staff were verbally told to go away and await discussions between the manager and the Respondent's director on their alleged illegal sale of drinks and theft. The Claimant in his testimony in court denied receiving the two warning letters filed in court by the Respondent who also filed two copies of suspension letters addressed to the Claimant. It is unfortunate that the Respondent closed its case without any of its five witnesses giving oral testimony to rebut the Claimant's evidence. This Court is left with only the testimony of the claimant and his witness.

In the Memorandum of Response and in the witness statements, the Respondent avers that the claimant was sent on indefinite suspension. The claimant's case is that he filed this suit after the Respondent failed to call him back as promised. An indefinite suspension is akin to an unfair termination. In the case of **Donald Odeke v Fidelity Security Ltd, Cause No. 1998 of 2011**, the court observed that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them and it does not matter what offence the employee is charged with if the employee is not heard, the termination is *ipso facto* unfair. The indefinite suspension of the claimant from 15th February to May 2016 when he filed this suit amounted to an unfair dismissal.

Having determined that the Claimant was unfairly terminated from his employment by the Respondent, he is entitled to compensation for the same as stipulated under **Section 49 of the Employment Act**. In determining the amount of compensation the Court has considered that he served the Respondent for 1 year and 10 months and the manner in which his services were terminated. I award the claimant 4 months' salary as compensation. The Claimant is also entitled to notice pay by virtue of **section 35(1)(c) of the Employment Act** and pursuant to **Section 49(1)(a)**. He is further entitled to service pay for every year worked as under **section 35(5) of the Employment Act** and also entitled to a Certificate of Service as provided for under **Section 51 of the Employment Act**.

Since the Respondent did not produce any written particulars to dispute or controvert the Claimant's claim for unpaid leave and public holidays, the Claimant is entitled to the same. As for house allowance, the Claimant did not produce proof of his entitlement to the same and it should thus fail and be dismissed. This Court in the case of **Millicent Owade v Essentials Manufacturing Company Limited [2020] eKLR** held that:

“The claimant did not produce her employment contract or other proof of entitlement to house allowance. Section 31 of the Employment Act permits payment of a salary inclusive of house allowance. The respondent would only be required to prove the payment after the claimant has proved entitlement thereto. I find no proof that the claimant's salary did not include house allowance. The claim for house allowance therefore fails and is dismissed.”

The statutory minimum wage for all other areas under the Regulation of Wages (General) Order for 2016 was Kshs.7,968.95. With 15% house allowance this would come to Kshs.9,164.30 which is below what the claimant was paid. The Claimant is thus not entitled to house allowance as he was paid a consolidated wage.

On the prayer for overtime, the claimant did not adduce evidence to prove the same. The prayer therefore also fails and is dismissed.

Conclusion

Having made findings as above, judgment is entered for the claimant against the Respondent as follows –

1. One month's salary in lieu of notice..... Kshs.10,000.00
2. Service pay (one year)..... Kshs.5,000.00
3. Annual leave for one year, 10 months
(38.5 days)..... Kshs.14,808.00
4. Public holidays (10 days paid at double the daily rate
as per law)..... Kshs.7,692.30
5. Compensation 4 months' salary..... Kshs.40,000.00

Total Kshs.77,500.30

6. Respondent to issue certificate of service to the claimant in terms of Section 51 of the Employment Act.

7. Respondent to pay claimant's costs for this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF DECEMBER 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