



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.94 OF 2015**

**JOEL NDUNGU KINGORI.....CLAIMANT**

**VERSUS**

**NOBLE CONFERENCE CENTRE LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent in August, 2009 as a Chef at a wage of Ksh.10, 000.00 per month and was offered accommodation for the 4 initial months of employment. Later the claimant was required to source own housing without any allowance.

The claimant worked until 23<sup>rd</sup> January, 2014 when he was summarily dismissed by the respondent. at the time he was earning Ksh.23, 000.00 per month.

The letter of summary dismissal stated that the claimant had been sent on compulsory leave in June, 2013 to facilitate investigations on the quality of food being produced. No investigations were done and the claimant was reinstated into his job without the matter being raised again.

Following good performance of work, the claimant's contract was renewed for the period of 2012-2013 with a salary increase.

In January, 2014 the claimant reported back to work but on 16<sup>th</sup> January, 2014 when he reported for the night shift he found the executive chef checking out without finishing up the orders which had been started with him and left the claimant to attend. Such was contrary to company policy as the other chef ought to have finished his work before handing over to the claimant.

When the manager came to enquire about the delayed orders, the claimant tried to explain but he was not given a chance to. He was berated, scolded and shouted at and asked to resign which the claimant refused to do as the manager refused to give him a hearing. The claimant was then sent away and directed to wait until he was called back.

On 23<sup>rd</sup> January, 2014 the claimant was called by the respondent had issued with letter of summary dismissal.

Upon dismissal the claimant cleared with the respondent so as to be paid his terminal dues which the respondent has refused to pay. The claimant is seeking the following;

- a) January, 2014 salary Ksh.23,000.00;
- b) One month notice pay Ksh.23,000.00;
- c) House allowance Ksh.121,350.00;
- d) Unpaid annual leave Ksh.71,124.00;
- e) compensation for unfair termination of employment; and
- f) costs.

The claimant testified in support of his claims. upon employment the claimant was accommodated by the respondent for 4 months then directed to secure own housing without being paid an allowance. Work was on shift and the claimant was laced in the 5pm to 8am shift without break, leave, rest days or compensation thereof. The respondent had a lot of work hosting conferences and which required the claimant to be at work for long hours and without a break.

The claimant also testified that on 16<sup>th</sup> January, 2014 he reported to work for his shift and the chef clocking off left without finishing up his work which left the claimant to attend to. There were delays before the claimant would establish which orders related to which customer and the manager came in and started berating him and all efforts to give an explanation were thwarted. The claimant was sent away and called back on 23<sup>rd</sup> and was issued with a letter of summary dismissal.

The claimant testified that he had done his work diligently and on the subject night he was left to attend to work without proper directions but the manager could not give him a hearing. Such resulted in unfair termination of his employment by summary dismissal.

In response, the respondent admit the claimant is the former employee as a Cook from 1<sup>st</sup> June, 2011. He was paid a consolidated salary which included a house allowance.

The defence is also that the claimant was dismissed from his employment for gross misconduct after a disciplinary hearing.

The claimant was sent on compulsory leave in June, 2013 and was reinstated after a disciplinary hearing which resolved that he be reinstated back to his position.

The alleged reasons leading to dismissal are not true. On 16<sup>th</sup> January, 2014 the claimant was required to explain why there were long delays in meeting clients orders leading to loss of business and the claimant failed to give any response. He walked out rudely and despite the manager making effort to hear him, he failed to attend.

Upon dismissal, the claimant failed to hand over his clearance forms so as to be paid his terminal dues.

The process leading to dismissal was lawful following gross misconduct. no dues are owing.

Mr Norbert Kiplagat kipkirui testified for the respondent that he is a Senior Accountant from the year 2016 and is relying on records filed by Catherine Sebastian who formerly worked with the respondent as human resource manager since the year 2014. He got access to the claimant's work records.

Mr Kipkirui testified that the respondent is engaged in hotel, accommodation and hotel business and is very keen to offer quality service to customers. the claimant was dismissed for gross misconduct following client's complaints about the quality of food and then their needs were not being met. The claimant also lacked obedience to his seniors and despite being issued with verbal warnings he failed to take heed. The claimant had previously been sent away following similar complaints.

Both parties filed written submissions at the close of the hearing.

In analysing the emerging issues the court has put into account the pleadings, the evidence and the written submissions.

By letter dated 23<sup>rd</sup> January, 2014 the claimant was dismissed from his employment with the respondent on the grounds that on 16<sup>th</sup> January he refused to produce food for guests as instructed by the chef. The claimant is also accused of leaving his work station without permission contrary to in-house by laws. The respondent also noted that in June, 2013 the claimant had been sent on compulsory leave due to poor standards of production which did not conform with hotel standards.

The sanction of gross misconduct is stipulated under section 44 of the Employment Act, 2007 where an employee is in breach of the employment contract or commits acts outlined under section 44(4) of the Act.

Where the various acts of gross misconduct set out under section 44(4) of the Act do not adequately cover what an employer may find to be acts of gross misconduct due to the specific nature of business, section 12 and 13 of the Employment Act, 2007 give the employer the duty to amend the employment contract and include such matter subject to notification to the employee of such matters.

At paragraph 14 of the statement of defence the respondent avers that;

*... On 16/1/2014 the claimant was requested to tender an explanation as to why there was long delay in meeting client's orders leading to loss of business and the claimant tendered a non-satisfactory answer.*

Such details as to the nature of explanation and the *non-satisfactory answer* is not submitted for the court to assess the matters require of the claimant to respond to and his response which was found as not being satisfactory.

In the statement of Catherine Sebastian at bullet 8 similar averments as in the defence are repeated.

The sanction of summary dismissal of an employee is the most harsh and should be issued on commission of serious and gross misconduct. Such sanction should only issue upon the employer being satisfied that they have met the provisions of section 41(2) of the Employment Act, 2007. When challenged that summary dismissal was unfair and contrary to section 47(5), the respondent as the employer must demonstrate that there existed a genuine and valid grounds to take such action.

In this case, the defence that the claimant as a cook delayed the preparation of food for clients was insubordinate and failed to apply hotel standards interrogated on the evidence submitted that the claimant took over from another employee without proper hand over and thus was not able to process all the orders on-going is reasonable and responsible account. Had the respondent interrogated the matters as to the

defences the claimant had, allowed him the chance to explain himself in the presence of another employee and be able to call the chef from who he had taken over from, the circumstances leading to delayed orders would have come out clear. on its merits and the evidence submitted a sanction of summary dismissal was too harsh in the circumstances of the case.

The case for summary dismissal is not justified. Without the claimant being given a hearing, such negated the action taken against him. such resulted in unfair termination of employment.

On the remedies sought, the contracts of employment issued did not provide for a consolidated wage.no payment statements have been produced by the respondent as the employer and as required under section 10(6) of the Act to confirm that the wage paid was consolidated and inclusive of house allowance. Without such proof, house allowance is due and awarded at 121,350.00.

Pay for time worked is due. the claimant was dismissed on 23<sup>rd</sup> January, 2014 and the pay for the 23 days is assessed at Ksh.17, 633.00 and due house allowance of Ksh.3, 450.00 all being Ksh.21, 084.00.

Notice pay is due under section 35 of the Act where there is unfair termination of employment and the claimant is awarded ksh.23, 000.00.

The records submitted for leave relate to 20<sup>th</sup> June, 2013 when the claimant was sent on compulsory leave for unspecified period. The last leave taken was in September, 2013 with notes that the claimant had 7 days leave balance form 2012/2013 years. Leave taken in April, 2013 related to compassionate reasons and the leave taken in January, 2013 related to 6 days.

Effectively for the year and work ending January, 2014 the claimant had earned his annual leave for the period 2013/2014 all compensated at a month's wage at ksh.23, 000.00.

On the finding there was unfair termination of employment, and putting into account the work record that the claimant had been sanctioned previously over work performance and as required under section 45(5) of the Employment Act, 2007 compensation is assessed at 6 months gross wage as being appropriate. Such is assessed at ksh.138, 000.00.

**Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;**

- (a) compensation at Ksh.138,000.00;**
- (b) notice pay Ksh.23,000.00;**
- (c) January, 2014 pay Ksh.21,084.00;**
- (d) House allowance Ksh.121,350.00;**
- (e) Unpaid annual leave Ksh.23,000.00**
- (f) Costs of the suit.**

Delivered at Nakuru and dated this 21<sup>st</sup> day of January, 2019.

**M. MBARU JUDGE.**

In the presence of .....

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