



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.244 OF 2015

MICHAEL KARANJA.....CLAIMANT

VERSUS

NOBLE CONFERNECE CENTRE LIMITED..... RESPONDENT

JUDGEMENT

In December, 2010 the claimant was employed as a Cook by the respondent at a wage of Ksh.15, 000.00 per month. The claimant was later issued with a contract of employment on 1st June, 2011. Such contract was for one (1) year. The contract was renewed from 1st June,, 2012 to 30th May, 2013.

In March, 2014 the claimant was summarily dismissed from his employment by the respondent when the director Mrs Jane Ndubi called him and directed that there was no work for him and that he should not report back to work. At the time the claimant was earning ksh.30, 000.00 per month but no pay slips were issued outlining the nature of payments made.

On 16th January, 2014 the respondent sent the claimant on compulsory leave for a period of one month on fabricated charges and without giving the claimant a chance to defend himself. Before the end of the period the claimant was recalled back to work to take over from another chef who had been dismissed.

The claimant requested to see the investigations report following his suspension but there was none. No investigations had been carried out.

For the period of suspension the claimant was not paid his dues wages. The claimant was also not paid for the month of February, 2014 despite being at work and undertaking his duties diligently.

The claimant would work as the executive chef from 6am to 10pm without overtime pay. He never took annual leave and was not paid in lieu thereof. The respondent was understaffed and overall there was overwork.

During the course of employment, the respondent deducted statutory dues but never remitted to the relevant bodies.

Despite clearing with the respondent, they have failed to pay terminal dues.

The claimant is seeking the following;

- a) February and March, 2014 wages Ksh.60,000.00;
- b) Notice pay Ksh.30,000.00;
- c) House allowance Ksh.18,000.00;
- d) Unpaid annual leave Ksh.72,000.00;
- e) Unremitted NSSF dues ksh.4,000.00;

f) Compensation; and

g) Costs.

The claimant testified that upon employment by the respondent he worked diligently and his employment terms were improved to Ksh.30, 000.00 at the time of his summary dismissal.

In December, 2013 the respondent employed anew manager who also employed a new cook to be trained by the claimant. In January, 2014 the claimant was suspended from duty without being given any reasons. He was directed to be away for a month.

On 16th January, 2014 before the suspension period could end the claimant was recalled back to work as the other cook employed had been dismissed. The claimant was called by the chief executive office Mr Kevin Okwaro who demanded to know why he had been away from work and he was directed to remain at work. The claimant assumed the chief officer knew the reasons he had been sent away on compulsory leave and suspension.

Upon return to work the claimant wanted to know the outcome of the investigations following his being sent away by the manager but no investigation had been undertaken. In the same period another cook was employed and the claimant required to train him in his work.

In March, 2014 the chief officer, Kevin called the claimant to his office and demanded to know whether he knew his work and before he could respond he was dismissed from his employment. The claimant was to undertake clearance before he could be paid. The manager had also been dismissed and only the chief office could clear him and who declined to meet him and directed security officers to deny the claimant access to the premises.

Defence

In response the respondent has denied the claims made save that he did not return to work after being sent on compulsory leave on 16th February, 2014. The claimant failed to clear with the respondent as required after which his terminal dues would have been computed, if any. The claimant had utilised all his leave days.

The defence is also that the claimant was never dismissed from his employment by the respondent, upon being sent on compulsory leave, he did not resume duty. He did not give notice before deserting duty. The claims made have no basis and should be dismissed with costs.

In evidence, the respondent called Nobert Kiplagat Kipkirui the senior accountant who testified from records kept by the former human resource officer Ms Catherine Sebastian who has since left employment with the respondent.

Mr Kipkirui testified that from the work records the claimant had been employed as a Cook and he left his employment following compulsory leave after he failed to account for stock in his department. He was sent on compulsory leave on 16th January, 2014 but never returned to work and the respondent could not trace him. the claimant effectively dismissed himself by absconding duty.

At the close of the hearing, both parties filed written submissions.

By letter dated 1st June, 2011 the respondent employed the claimant in the position of Cook. The one year contract was to commence on 1st May, 2011.

The contract was renewed vide letter dated 7th August, 2012 for the period ending 30th May, 2013.

The period after 30th May, 2013 is grey. There seems to have been no written terms. However, it is apparent that the claimant remained at work and his wage increased to ksh.30, 000.00 per month though

no payment statement was issued to him breaking down the composition of such wage.

By letter dated 16th January, 2014 the claimant was sent on compulsory leave on the grounds that the management was disturbed by operations in the kitchen department where the claimant is alleged to have failed to follow the chart introduced by the accountant, there was no stocks hand over sheets from cooks during shifts and this had resulted on lack of controls in kitchen production hence over purchases and a matter which had affected the hotel operations.

The claimant was to resume duty on 16th February, 2014.

The claimant testified that he was sent on compulsory leave by the manager.

On 7th February, 2014 he was recalled back by the manager following the dismissal of the cook he had left behind.

The respondent asserts that the claimant failed to report back after his compulsory leave. He absconded duty and dismissed himself from work.

Effectively, there is no letter terminating employment.

The respondent as the employer has a duty to invite the claimant for hearing following any acts of misconduct or gross misconduct and pursuant to the provisions of section 41 and 44 of the Employment Act, 2007. Where the claimant was sent on compulsory leave and was due back to work on 16th February, 2014 and he failed to oblige, nothing stopped the respondent as the respondent to summon him to attend and where he failed to, there was a right to issue a letter of summary dismissal. The respondent did not take this option.

I take it, such failure is explained by the claimant. He was recalled back to work and on 7th February, 2016 he resumed without being taken through any disciplinary process. There is no work records procedure to challenge the claimant's evidence.

By its own omissions, the respondent caused the dismissal of the claimant from his employment for no reasonable cause and without following the due process of the law as stipulated under section 41 or section 44 read together with section 41(2) of the Employment Act, 2007. Where employment is terminated without procedural fairness and for a substantive reason(s) such is defined under section 45 of the Act as unfair termination of employment.

The claimant is entitled to compensation following unfair termination of employment. Noting the actions taken by the respondent prior to the dismissal of the claimant, such being procedurally and substantively unfair, an award of compensation under section 49 of the Act at 10 months gross pay is hereby found appropriate. The claimant is awarded Ksh.300, 000.00.

Notice pay is due in a case where due process is not followed. The claimant is hereby awarded ksh.30, 000.00.

The claimant was sent on compulsory leave to await investigations. He was recalled back and no disciplinary proceedings were undertaken. In any event he remained in employment until his dismissal as set out above. He worked until March, 2014 and the due wages are due for the months of January and February, 2014 all being Ksh.60, 000.00.

Section 20 of the Employment Act, 2007 requires an employer to issue an employer with an itemised payment statement each month. Such should set out the basics pay, the statutory payments and any other matter with regard to the terms and conditions of employment. Without such a statement being issued to the claimant or being produced in evidence, I take it the claimant was paid a basic wage of Ksh.30, 000.00 less a house allowance. No housing was provided and the allowance is due thereof. The claim for Ksh.18, 000.00 is hereby confirmed.

On the claims of payment of ksh.4, 000.00 not remitted to the NSSF, such dues are not payable to the employee but to the requisite statutory body. The claimant can only plead for service pay where there is no remittance of the statutory dues. the claimant has the option of reporting the non-payment of such dues to the NSSF which the respondent should be made to pay together with the penalties. A report to the labour officer in this regard is necessary for the commencement of criminal sanctions. In this regard, The claim is therefore declined.

On the claims for annual leave, the respondent has attached the leave sheet where the claimant applied to attend burial on 12th to 14th April, 2013 which is compassionate leave. from the records, the leave taken in January, 2014 was compulsory and the record has approved leave for 6 days, 8th to 14th January, 2013.

Where employment commenced 1st May, 2011 and ended March, 2014 the only annual leave taken in full in that of 2014 for 14 days, and in 2013 for 6 days. Cumulatively, the claimant took 20 days of leave with a balance of 43 days all computed at ksh.43, 000.00.

For the reasons above, judgement is hereby entered for the claimant against the respondent in the following terms;

- (a) Compensation Ksh.300,000.00;]**
- (b) Notice pay Ksh.30,000.00;**
- (c) Unpaid wages Ksh.60,000.00;**
- (d) House allowance Ksh.18,000.00;**
- (e) Due leave days Ksh.43,000.00;**
- (f) Costs of the suit.**

Delivered at Nakuru and dated this 21st day of January, 2019.

M. MBARU

JUDGE.

In the presence of

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