



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT IN NAIROBI

CAUSE NO. 1413 OF 2014

SAMSON MURIU NJAU.....CLAIMANT

VERSUS

BLUE HUT HOTEL LIMITED.....RESPONDENT

JUDGMENT

1. Samson Muriu Njau (Claimant) instituted proceedings against Blue Hut Hotel Ltd (Respondent) alleging unlawful termination of employment and refusal to pay terminal benefits.
2. The Respondent filed a Response in which it denied unlawfully terminating the employment of the Claimant. It contended that the Claimant failed to report back to work after being arrested by the Police after a break in.
3. The Cause was heard on 5 December 2018. The Claimant and a Director of the Respondent testified.
4. The Claimant filed his submissions on 18 January 2019 (should have been filed by 30 December 2018) while the Respondent filed its submissions on 31 January 2019.
5. The Court has considered the pleadings, evidence and submissions.

Desertion or termination

6. The Claimant's testimony was that after a break in at the hotel on 28 June 2011 he and others were arrested and detained by the Police after which they were charged in Court (eventually he was acquitted).
7. According to the Claimant, after being released from prison, he reported to the Respondent but was instructed to keep off work until the conclusion of the criminal case.
8. The Claimant stated that after acquittal in 2014 he made several attempts to reach the Respondent's General Manager and the Director in vain, and that letters he wrote were not responded to.
9. The Respondent's Director on his part testified that he was not aware that the Claimant had been acquitted and further that the Claimant did not report back to work after he had been arrested.
10. Under cross examination, the witness admitted that the proper course would have been to write a show cause letter to the Claimant to seek for an explanation for the absence.
11. Contextualising the two versions, and fortified by the admission by the Respondent's Director that the Claimant was not requested to explain the failure to report to work, the Court is satisfied that the Claimant was instructed not to report to work pending the determination of the criminal case. This was not a case of desertion.

Unfair termination

12. The Claimant testified that after acquittal he attempted to contact the Respondent's General Manager but was not successful and that he wrote letters (18 August 2011, 4 February 2012 and 6 May 2014) which were not responded to.
13. The General Manager had however written to a human resource consultant on 8 July 2011 informing him that the Claimant had gone absent.

14. If the Claimant failed to report to work as contended by the Respondent, he should have been called upon to explain the same as contemplated by section 35(1)(c) as read with section 41(2) of the Employment Act, 2007.

15. It cannot be true that the Respondent did not have the contacts of the Claimant.

16. The Court is satisfied that this was a case of unfair termination of employment which was not communicated to the Claimant. He was also not notified of intention of the termination or afforded an opportunity to make representations, and it so finds.

17. With the conclusion, the Court finds that the Claimant is entitled to 1 month pay in lieu of notice (salary was Kshs 9,800/-) and the equivalent of 5 months compensation (considering the length of service).

Salary August 2011 to July 2014

18. The Claimant did not lay any evidential, contractual or legal foundation for the salary he would have earned from August 2011 after separation to when this Cause was filed in August 2014.

Leave

19. Unless there is contractual agreement to the contrary, the carrying forward of annual leave is circumscribed by section 28(4) of the Employment Act, 2007.

20. The Claimant would therefore be legally entitled only to leave for the last 18 months to separation. Since this was not computed, the Court will consider this in awarding compensation.

House allowance

21. The Claimant sought Kshs 104,369/- on account of house allowance for the duration of the employment.

22. In the view of the Court, failure to pay house allowance constitutes a *continuing injury* and the same ceases within 12 months of the separation of the parties.

23. Because the Cause here was lodged in Court over 12 months after separation, the Court holds that the remedy/claim for house allowance is statute barred by section 90 of the Employment Act, 2007.

Gratuity

24. On account of gratuity, the Claimant sought Kshs 139,160/-.

25. The Claimant did not disclose the legal anchor to this head of claim or whether the gratuity sought was the same as *service pay* as envisaged by section 35(5) & (6) of the Employment Act, 2007 (the Claimant admitted he was registered with the National Social Security Fund).

Conclusion and Orders

26. The Court finds and holds that the Claimant did not desert work but had his employment unfairly terminated and awards him

(a) Pay in lieu of notice Kshs 9,800/-

(b) Compensation Kshs 49,000/-

TOTAL **Kshs 58,800/-**

27. Respondent to issue a Certificate of Service within 10 days.

28. Each party to bear own costs as Claimant did not file submissions within agreed timeline.

Delivered, dated and signed in Nairobi on this 15th day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Ms. Muhanji instructed by Osoro Chege Kibathi & Co. Advocates

For Respondent Mr. Mbabu instructed by T.K. Kariba Mbabu & Co. Advocates

Court Assistant Lindsey