



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 43 OF 2018

MATHO KAINGU KALAMA.....CLAIMANT

VS

THE BEAUMONT RESORT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 27th March 2018 and filed in court on 9th April 2018, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent filed a Statement of Response on 8th May 2018 to which the Claimant responded on 6th July 2018.

2. The matter came up for hearing on 3rd December 2018, when the Claimant testified on his own behalf and the Respondent called its Manager, Emmanuel Mjomba Mmeku. The parties subsequently filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent in the position of Chef from the year 2012. He was issued with a written employment contract on 16th October 2015.

4. By letter dated 18th July 2017 the Claimant was suspended from duty. He was further asked to write an explanation regarding allegations of missing stock. In his explanation, the Claimant stated that he had forgotten to capture the said stock on the list though it was physically available and had been used to prepare meals for the Respondent’s clients.

5. The Claimant was issued with a warning letter dated 24th July 2017. In the said letter, the Respondent’s management sought to know when the Claimant would resume duty. However, when the Claimant reported to work, he was notified that there was no more work for him and was thus forced out of employment.

6. The Claimant states that the termination of his employment was unlawful and unfair. He adds that he worked every day from 5.45 am until 5.00 pm without a rest day.

7. The Claimant claims the following from the Respondent:

- a) Salary in lieu of notice.....Kshs. 17,200
- b) Service pay for 5 years.....43,000
- c) 12 months’ salary in compensation.....206,400
- d) Unpaid overtime (2 hours daily) for 5 years.....234,000

The Respondent’s Case

8. In its Statement of Response dated 8th May 2018 and filed in court on even date, the Respondent admits having employed the Claimant in the position of Chef on a one year contract effective 21st September 2015.

9. The Respondent states that the Claimant was suspended on 24th July 2017 after being found guilty of misappropriation of kitchen stock. The Respondent in good faith gave the Claimant 48 hours to resume work which he failed to do. The Respondent adds that the Claimant's employment contract had lapsed.

10. It is the Respondent's case that the Claimant absconded duty and was therefore not entitled to any terminal dues. Further, the Respondent states that the Claimant took his leave during the pendency of his employment and did not work overtime.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a) Whether the Claimant deserted duty or was unlawfully terminated;
- b) Whether the Claimant is entitled to the remedies sought.

Desertion of Duty or Unlawful Termination?

12. The Claimant was suspended by letter dated 18th July 2018 in the following terms:

"Dear Mathu

REF:-SUSPENSION FROM WORK

The management is disappointed to find out kitchen stock malpractice on Monday 17th July, 2017 not being taken and recorded as per physical stock in place. Further, it was shocking to find out that you came and filled in particularly Green vegetables as NILL (sic) on kitchen stock sheet with reasons best known to yourself. This is against the company daily stock management and practice.

The management has made a decision to suspended you from work pending investigation into this issue. This suspension starts today 18/07/2017.

Please supply us with a written explanation within 48 hours of why further action should not be taken against you for stock manipulation.

Your cooperation into (sic) this matter is very necessary.

Yours for BRL

(Signed)

Emmanuel Mmeku

General Manager."

13. The Claimant wrote a response dated 19th July 2017 apologizing for omitting one food item being green vegetables from the closing stock. He attributed this mistake to his health condition at the time.

14. The Claimant was subsequently issued with a warning letter dated 24th July 2017. Apart from reiterating the issue of stock manipulation, the warning letter raised issues of negligence, rudeness and negative attitude against the Claimant. The letter further required the Claimant to indicate when he would be ready to resume work within 48 hours.

15. The Claimant testified that upon reporting back to work on 26th July 2017, he was told that his employment had been terminated. Conversely, the Respondent's Manager, Emmanuel Mmeku told the Court that the Claimant never reported back and was therefore deemed to have deserted duty.

16. Desertion of duty is a grave administrative offence that renders an employee liable to dismissal. It is however now settled in case law that an employer who asserts that an employee has deserted duty must demonstrate efforts made towards reaching the employee. At the very least, the employer is required to have notified the employee that termination of employment on the ground of desertion is being considered (see ***Dickson Matingi v Db Schenker Limited [2016] eKLR***).

17. The Respondent did not provide any evidence to show that the Claimant was summoned to explain his absence from work. The argument that he deserted work was therefore unsupported and the Court rejects it. Consequently, the only conclusion to make is that the Respondent terminated the Claimant's employment without justifiable cause and in violation of due procedure. As a result, the Claimant is entitled to compensation.

Remedies

18. Having arrived at the conclusion that the termination of the Claimant's employment was unlawful and unfair, I award him six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction. I also award the Claimant one (1) month's salary in lieu of notice.

19. From the evidence on record, the Claimant was a contributing member of the National Social Security Fund (NSSF). He is therefore not entitled to service pay. The claim for overtime was not proved and is dismissed.

20. Finally, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 103,200
b) 1 month's salary in lieu of notice.....	<u>17,200</u>
Total.....	120,400

21. This amount will attract interest at court rates from the date of judgment until payment in full.

22. The Claimant will have the costs of the case.

23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Nyongesa for the Claimant

Mr. Mwabonje for the Respondent