



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 84 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOSPHAT SHAKWILA.....CLAIMANT

VERSUS

SARAH NJOKI MAINA T/A MUKAWA TENTS AND CATERERS.....RESPONDENT

JUDGMENT

The Claim herein is filed by the firm of Ongegu & Associates on behalf of Josephat Shakwila, the Claimant, alleging wrongful and unfair termination of employment by the Respondent and payment of terminal dues owed to the Claimant. He seeks the following reliefs:

- a. Salary for the month of December 2012..... Kshs.11,500.00
- b. One Month salary in lieu of Notice.....Kshs.11,500.00
- c. Severance Pay for 21 years..... Kshs.120,645.00
- d. 12 months’ salary pay as compensation for
 wrongful termination.....Kshs.138,000.00
- e. Any other relief this Court deems just to grant
- f. Cost of the suit and interest thereon at court rates.

The Respondent filed its statement of Reply and Defence to the Claimant’s Statement of Claim dated 19th February 2014 and filed in Court on the 20th February 2014, in which it admits that the Claimant was its employee and contends the Claimant’s services were never terminated by themselves at any time.

The Respondent contends that as a compromise arising from an appeal in lodged in **High Court Civil Appeal No. 149 of 2012 Sarodena Hotel Limited Versus Fairview Investment Limited**, it was forced to vacate its business premises at Cargen House along Harambee Avenue on 31st December 2012 and relocate to another premise at Agro House (Agriculture Industrial Holdings Limited) along Moi Avenue.

The Respondent further contends that at the request of the Claimant herein it did introduce the Claimant to the owners of Wakawaka Hotel situate at Information House, where the Claimant reported for duty within the 1st Week of January 2013 courtesy of the recommendation of the Respondent.

The Respondent avers that it did issue the Claimant with a certificate of service pursuant to Section 51 of the Employment Act. That other employees reported back to work on 28th January, 2013 with an exception of the Claimant. Further, that the Claimant opted to change his employment and never expressed any wish or desire to resume duty with the Respondent.

The Respondent further avers that the December 2012 salary was duly paid as evidenced by the salary voucher executed by the Claimant herein. The respondent urged the court to dismiss the claim with costs to the respondent.

On 4th July 2018, the Claimant testified that he was employed by the Respondent as a kitchen assistant in the year 1992. He worked for the Respondent for a total of 20 years. He further stated that at the time of engagement he was earning a salary of Kshs.4,000/= and was promoted to the position of cook earning a monthly salary of Kshs.11,500 a position he held until termination in December 2012.

The claimant further testified that in December 2012 he was informed that the Respondent was to close down the catering department. He testified that the respondent did not close. He seeks payment of his dues as itemised in his statement of Claim.

On cross examination the claimant stated that he was paid his salary for the month of December 2012. He further stated that he was aware that the business relocated in December 2012 and that at the time of relocation the Respondent had a total of 7 employees.

He testified that he requested the Respondent to issue him with a letter of recommendation which it did and he is currently working for Wakawaka Hotel as from February 2013.

On further cross examination the claimant confirmed that payment of NSSF was made by the Respondent.

On re-examination he stated that NSSF was not paid for the month of September 2012 to December 2012.

RW1 (**Sarah Njoki Maina**) testified on behalf of the Respondent. It was her testimony that the Claimant was a former employee from the year 1992 until December 2012. That he was employed as a kitchen assistant and was promoted to cook.

RW1 confirmed that the Claimant's starting salary was Kshs.4,000/= and increased over the years to Kshs.11,500/=.

RW1 stated that at the expiry of her lease agreement the landlord asked her to vacate the premises. That the business was forced to close on 31st December 2012. She testified that each of the employees was paid Kshs.5,000 as the Respondent did not have a place to relocate the business to immediately.

RW1 stated that she was able to secure new premises in February 2013. That all employees relocated to the new premises save for the Claimant who had already secured employment at Wakawaka hotel.

RW1 further stated that she paid NSSF for the Claimant at all times during the subsistence of his employment with the Respondent.

RW1 urged the Court to dismiss the Claim with costs.

On cross examination RW1 stated that she used to pay the Respondent Kshs.11,500/= monthly as salary. She further stated that she paid his salary for December 2012. However, she testified that she was not sure if NSSF was paid for December 2012.

RW2, **Ruth Wanjiru Ndichu**, who the Court notes was present in Court as RW1 testified, her statement dated 16th April 2018 in which she reiterates the averments in the statement of Defense and the Response to the statement of claim.

RW2 further stated that she has been an accountant with the Respondent since 2005. She testified that the Claims made by the Claimant are completely outrageous and an outright miscarriage of justice against a good employer who has at all times treated all employees with humanity and respect.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Statement of Claim and his oral evidence in Court.

The Claimant submitted that the termination of his employment was unfair as it is against the provisions of Section 41 and 45(2) of the Employment Act, 2007.

The Claimant relied on the authority of *Mary Chemwono Kiptui Versus Kenya Pipeline Company Limited (2014) eKLR* where it was held that;

“Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated under such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the hearing principles as well as natural justice tenets.”

The Claimant further relied on the case of *Patrick Njuguna Kariuki Versus Del Monte (K) Limited (2012) eKLR*, where the Court found that the Claimant's dismissal was unfair based on the fact that the Respondent did not follow the dictates of Section 41 of the Employment Act, 2007.

It is further submitted that the Claimant's termination amounted to summary dismissal as defined under Section 44 of the Employment Act as no notice was issued to the Claimant before his termination.

It is further submitted that the Claimant is entitled to the reliefs sought in his statement of Claim as provided under Section 35(1)(c) and 49(1)(c) of the Employment Act, 2007.

The Claimant urged the Court to allow the Claim as drawn.

Respondent's Submissions.

It is submitted on behalf of the Respondent that the Claimant has failed to adduce adequate evidence to support his assertion that the Respondent unfairly terminated his services and the claim must fail. It is further submitted that the Claimant is not entitled to the reliefs sought as prayed. The Respondent urged the Court to dismiss the Claim with costs to the Respondent.

Determination

Having considered the facts of this cause, evidence, submissions and authorities cited by the Claimant the following are the issues for determination:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought

The facts of this case do not support a claim of termination of employment. The respondent's lease expired and while it was stranded with nowhere to carry on business, the claimant opted to leave and with the respondent's assistance, secured a job at Wakawaka Hotel where he was still working at the time of giving evidence in court.

A person who walks out on his employer because the employer has no premises to operate cannot validly claim that he has been terminated.

The claimant did not challenge the respondent's evidence that once the business obtained alternative premises, it moved with all the staff with the exception of the claimant. This demonstrates that it is the claimant who was impatient and did not wait for the respondent to acquire alternative premises.

The claim for unfair termination must therefore fail as the claimant has not proved that this employment was terminated at all.

Remedies

Having found that the claimant's employment was not terminated, he is not entitled to pay in lieu of notice.

The respondent confirmed payment of salaries up to December 2012. For employees who did not leave, they were paid even their January 2013 salaries although they did not work.

The claimant is not entitled to severance pay as he was not declared redundant. He is not entitled to compensation as he was not unfairly terminated.

For the prayer of non-remittance of NSSF contributions, the copy of statement filed in court is not legible. The claimant may pursue the same with NSSF which has sufficient machinery to collect all outstanding remittances, supported by law and enforcement machinery.

Orders

Having found no proof of unfair termination and the claimant having failed to prove that he is entitled to any of the prayers sought, the claim fails in its entirety and is accordingly dismissed.

Each party shall pay its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE