



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1111 OF 2015**

**ERNEST TONY OGUTU.....CLAIMANT**

**v**

**THE PANARI HOTEL.....RESPONDENT**

**JUDGMENT**

1. On 3 June 2015, the Panari Hotel (Respondent) issued a one month *termination notice* to Ernest Tony Ogutu (Claimant), and the reasons given was work performance based shortcomings.
2. The Claimant was aggrieved and on 29 June 2015, he lodged a *Statement of Claim* in Court contending that the termination of employment was unfair.
3. The *Statement of Claim* was filed together with a motion seeking interlocutory relief. The said application was heard on 31 July 2015. The application was dismissed.
4. On 21 October 27 November 2017, the Cause was fixed for hearing on 13 February 2018, but on the hearing date, none of the parties was in Court despite being present when the hearing date was scheduled.
5. The Cause next came up for hearing on 27 November 2018, but the hearing aborted because there was no evidence that the Claimant had served a hearing notice upon the Respondent.
6. The Claimant then caused the Cause to be fixed for hearing on 25 March 2019.
7. When the Cause was called out for hearing, the Respondent and its advocate were not in Court. On record was an affidavit of service attesting to service of a hearing notice upon the firm of Mbugua Mureithi & Co. Advocates.
8. The Court was satisfied with the service and allowed the Claimant to proceed.
9. The Claimant gave sworn testimony and produced exhibits.

**Unfair termination of employment**

**Procedural fairness**

10. Section 35(1)(c) of the Employment Act, 2007 envisages a *written notice of termination of employment* of at least 28 days.
11. The Respondent issued a one month notice to the Claimant, which was compliant with the aforesaid proviso.
12. In terms of section 41 of the Act, the employer should afford an opportunity to the employee to make representations before termination of employment.
13. The Respondent did not appear or participate in the proceedings to demonstrate that it complied with the mandatory requirements of section 41 of the Employment Act, 2007 by granting an opportunity to the Claimant to be heard after the issuance of the 1 month notice.

**Substantive fairness**

14. Apart from procedural fairness, sections 43 and 45 of the Employment Act, 2007 make it incumbent upon an employer to prove the

reasons for termination of employment, and that the reasons are valid and fair.

15. The reason given for the termination of the Claimant's employment was performance.

16. Unfortunately, the Respondent did not file a *Response* or attend the hearing to discharge the burden.

17. Despite the failure, the Claimant denied that his performance was wanting, and he produced a schedule with hotel guests' comments/feedback (exhibit 4) for March 2015. There are no untoward comments on the Claimant in the schedule.

18. The Court can therefore conclude that the termination of the Claimant's employment was not for valid and fair reasons, and it is so found.

### **Reinstatement**

19. Although the Claimant indicated that he wanted to be reinstated, the Court is of the view that this is not a suitable case for reinstatement considering that 3 years have lapsed since the separation.

### **Compensation**

20. The Claimant served the Respondent for about 1 year, and in consideration of the length of service is of the view that the equivalent of 1 month gross wages as compensation would be appropriate (gross wage was Kshs 250,000/-).

### **Conclusion and Orders**

21. The Court finds and declares that the termination of the Claimant's employment was unfair and awards him

(a) Compensation **Kshs 250,000/-**

22. No order as to costs.

**Delivered, dated and signed in Nairobi on this 27<sup>th</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant in person

For Respondent Mbugua Mureithi & Co. Advocates

Court Assistant Lindsey