



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 696 OF 2015

BETWEEN

MICKY MUSYOKA.....CLAIMANT

VERSUS

KOROGA COUNTRY CLUB LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kitonga O. Kiiva Advocate instructed by Kituo Cha Sheria for the Claimant

Sherman Nyongesa & Mutubia Advocates, for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 8th September 2015. He avers he was employed by the Respondent Hotel as a Manager, on 18th December 2014. He earned a monthly salary of Kshs. 30,000. He had requested Respondent's Directors for a meeting on the material day, to discuss enhancement of business performance. When the meeting started, one of the Directors, without reason, asked the Claimant to hand over Respondent's property to his Deputy and leave. The Claimant was summarily dismissed. He prays for Judgment against the Respondent in the following terms: -

- a) 1 month salary in lieu of notice at Kshs. 30,000.
- b) Unpaid salary for May 2015, at Kshs. 30,000.
- c) Public holidays at Kshs. 11,999.
- d) Severance pay at Kshs. 30,000.
- e) 12 months' salary in compensation for unfair termination at Kshs. 180,000.

Total...Kshs. 281,999.

- f) Certificate of Service to issue.
- g) Costs.
- h) Damages for breach of contract.
- i) Interest.
- j) Any other suitable relief.

2. The Respondent lodged its Statement of Response at the Court's docket on 21st December 2015. Its position is that the Claimant was its Employee as stated in the Claim. His contract was terminated by the Respondent fairly and lawfully. He was found to be heavily intoxicated at the Hotel on 25th May 2015. He turned unruly and attempted to chase away Night Guards. The Guards explained to Management what transpired at night. The Claimant was summoned by Hotel Owner Shakil Ahmed Khan on 26th May 2015 alongside his Co-Manager, and Accountant. Khan questioned the Claimant, who alleged he took alcohol to promote Respondent's business. The Claimant was required to record a Statement by Khan. He declined and abandoned his post. The Respondent did not hear from the Claimant until this Claim was presented in Court. The Respondent urges the Court to dismiss the Claim with costs.

3. The Claimant was heard on 7th March 2018. His 2 Witnesses who served as Respondent's Waiters at the material time, Johnson Righa and Jando Mwangongo, gave evidence on 30th October 2018. Shakil Ahmed, and Guard Ismail Mahamud, gave evidence on the same date, 30th October 2018, when hearing closed.

4. The Claimant restated the contents of his Statements of Claim and Witness, in his oral evidence. He emphasized that he had called a staff meeting on 27th May 2015, with the concurrence of Respondent's Directors. The meeting was attended by Respondent's 2 Directors. He was asked by Director Khan, to hand over and leave. He was not paid terminal benefits. He tried to follow up with the aid of the Labour Office and ultimately Kituo Cha Sheria.

5. Cross-examined, the Claimant told the Court he was hired in December 2014. He worked for 6 months. He did not recall which barmen were on duty on 25th May 2015. Security Guards were present. They included Ismail and the only Lady Security Guard, Madina. The Claimant did not recall getting inebriated on the night. Ismail did not approach the Claimant, and ask the Claimant to stop misbehaving. The Claimant did not recall any confrontation between him and the Guards. The Claimant complained about the matter to the Labour Office. The Complaint was withdrawn from the Labour Office. The Claimant testified it was possible that the Labour Office was compromised. Claimant's net salary was Kshs. 30,000. The Parties had an oral agreement about terms of employment. The Claimant had previously worked at other hotel businesses, and left after short service. Redirected, he told the Court that the Respondent employed him, after carrying out a background check on the Claimant. It was within the Claimant's role to call for staff meetings.

6. Waiter Johnson Righa told the Court that the Claimant was the Hotel Manager. The Claimant convened the meeting of 25th May 2015. After the meeting, Employees were informed by the Directors that a new man, who was present, would be the new Manager. Cross-examined, Righa testified that he saw the Claimant do no wrong. The Witness did not supervise his Manager. He however told the Court on redirection that it was always easy to tell when there was unusual occurrence at the Hotel, such as happened on the material date.

7. Righa's colleague, Jando Mwangongo corroborated the Claimant's and Righa's account of the occurrences of 25th May 2015. He saw the Claimant gather his bags and leave the premises. A new person was introduced as the new Manager. Mwangongo did not witness the Claimant take alcohol. On cross-examination, the Witness told the Court he did not talk to the Claimant about the occurrences.

8. Hotelier Shakil told the Court he runs the Hotel through Managers, as he is engrossed in other businesses elsewhere. There were two Managers overseeing the business. The Claimant indulged in heavy drinking. The Hotel was losing Customers, because of Claimant's persistent intoxication. Some Customers who had use of one of the 13 Bandas, called Shakil on 26th May 2015, and complained that the Claimant was drunk, and very rude to them. The Security Guards confirmed that this was true. The other Manager was off-duty. On the following day, Shakil visited the premises. He confronted the Claimant with allegations arising from the previous night. The Claimant denied the allegations. Shakil met the complaining Customers, who confirmed about Claimant's conduct. The Claimant deserted after this. Shakil later found the Claimant working at another business. The Security Guards and Customers, as well, would not lie to Shakil. Cross-examined, Shakil told the Court it was not the first time allegations of drunkenness while on duty, had been leveled against the Claimant.

9. Ismail confirmed that he was on patrol on the night of 25th May 2015. He witnessed the Claimant take alcohol. The Claimant was extremely drunk. He was staggering. Ismail called Madina who was his Supervisor. There were no Visitors present at the time Ismail saw the Claimant stagger. He was not able to tell on cross-examination what kind of alcohol he witnessed the Claimant drink.

The Court Finds:-

10. The Claimant worked for the Respondent Hotel business as a Co-Manager, for a period of 6 months, running from December 2014 to 27th May 2015.

11. He was alleged to have been extremely drunk, on the night of 25th May 2015. He was staggering and rude to Customers. Customers and Security Guards informed the Director Shakil about Claimant's drunken behaviour.

12. The Director visited the premises on 26th May 2015. The Claimant alleges the Directors had convened to attend staff meeting called by the Claimant.

13. The Court is persuaded by the evidence of Ismail and Shakil Khan, that the Claimant was inebriated at work, and did not discharge his role as Manager, as expected, in his state of inebriation. He was rude to Customers and staggered his way around the Hotel. The Security Guards could not restrain him. He was rude to them. His Co-Manager was off-duty. He exposed the Hotel to reputational damage. The Respondent brought another Manager to replace the Claimant, on 27th May 2015.

14. There was valid reason under Section 44 [4] [b] of the Employment Act, justifying termination of employment.

15. The Court does not agree with the evidence by the Respondent, that the Claimant abandoned his position, after he was confronted with the allegations. The Directors sacked him, brought in a new Manager, and introduced the new Manager to staff.

16. The defect in the whole process of termination, relates to the requirements of Section 41 of the Employment Act, which is on the minimum standards of fairness to apply upon termination. The Claimant was not presented with any charges. He was not asked to show cause why, he should not face disciplinary action.

17. He was not heard at any disciplinary platform, convened in the manner prescribed under Section 41. He was not given a chance to state his case, which would have included calling of Witnesses such as he has called before this Court. The Director Shakil Khan just sought confirmation of the events of 25th May 2015 from Security Guards and Customers. He did not give the Claimant the benefit of fair procedure, before bringing in a new Manager at the premises.

17. Termination did not meet the whole gamut of fairness of procedure.

18. The Claimant worked for a period of 6 months. It is illogical to expect compensation for this procedural defect, equivalent to 12 months' salary, double the period the Claimant had completed in service. Had Section 45 [3] of the Employment Act not been declared unconstitutional through an erroneous Judgment of the High Court, the Claimant, having worked for less than a year, would not have been entitled at all, to bring a Claim for unfair termination. His period of service was equivalent to the period applicable in probationary contracts, notwithstanding the fact that Parties did not have a written contract incorporating a probation clause. Parties would have been expected as of the date of termination, to have been at that formative stage in an employer-employee relationship, when they learn, oftimes the hard way, about mutual strengths and frailties, a necessary exercise in establishment of a productive employer-employee relationship. In this dispute, the Respondent seems to have learnt about the Claimant's frailties within the period of 6 months of service. Under different circumstances, the Claimant could have left employment under Section 42 of the Employment Act 2007. He certainly does not deserve maximum compensation. To grant compensation equivalent of 12 months' salary would be quite unreasonable.

19. Considering his very short period of service; his role in the circumstances leading to termination; and the fact that termination was substantively justifiable, the ***Court awards compensation equivalent of 1 month salary, at Kshs. 30,000.***

20. The prayer for notice pay is rejected on the ground that there was substantive ground to summarily dismiss the Claimant, under Section 44 [4] [b] of the Employment Act 2007.

21. The Claimant has not established on which Public Holidays he worked during the 6 months of service, to warrant Holiday Pay.

22. He did not leave employment on redundancy, to merit severance pay. If his prayer on years worked relates to service pay, he had not completed a year in service to earn service pay under Section 35 [5] of the Employment Act 2007. This law avails service pay based on every year worked, not months worked. It does not suggest that an Employee is paid pro-rata service pay. Service pay is restricted to complete years of service. The Claimant did not have any complete year of service. The prayer for severance/service pay is meritless.

23. The Claimant has not shown that he is entitled to contractual damages, in addition to statutory compensation. It was the Claimant who acted in fundamental breach of the contract, by overindulging in alcoholic beverages. There is no basis for claiming contractual damages as well as statutory compensation.

24. ***Parties shall meet their costs of the Claim.***

25. ***No order on interest.***

26. ***Certificate of Service to issue under Section 51 of the Employment Act.***

IN SUM, IT IS ORDERED:-

a) Termination was based on valid reason but flawed procedure.

b) The Respondent shall pay to the Claimant equivalent of 1 month salary in compensation for unfair termination, at Kshs. 30,000.

c) Certificate of Service to issue.

d) No order on the costs and interest.

Dated and delivered at Mombasa this 27th day of March 2019.

James Rika

Judge