



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CASE NO. 195 OF 2015

JOSEPH MOTONU.....CLAIMANT

VERSUS

SPORTSMAN ARMS HOTEL.....RESPONDENT

JUDGMENT

1.The Claimant sued the Respondent seeking relief for the alleged wrongful dismissal from work. He averred that he was suspended on allegation of desertion of duty and was dismissed for allowing the Respondent's goods to be stolen while on duty. He asserts that the Respondent falsely accused him and he was charged at Nanyuki Chief Magistrate's Court with the offence of bar breaking and committing a felony with an alternative charge of failing to prevent a felony contrary to Section 306(a) and 392 of the Penal Code respectively in Criminal Case No. 155 of 2013. He averred that he was acquitted of all the charges in the criminal trial. He thus sought the salary for the month of February 2015 – Kshs. 8,775/-, one month's salary in lieu of notice – Kshs. 8,775/-, house allowance – Kshs. 6,375/-, lave allowance – Kshs. 28,050/-, gratuity – Kshs. 46,750/-, half salary from 2013-2015 – Kshs 116,875/-, overtime for 8 years – Kshs. 497,693/-, full salary for the dismissal period – Kshs. 233,750/- making a total of Kshs. 902,965/-. He also sought general damages for wrongful dismissal from employment and costs of the suit and interest thereon from the date of the wrongful dismissal. He filed an amended statement of claim in which he added a prayer for 12 months salary compensation amounting to Kshs. 105,300/-.

2.The Respondent denied knowledge of any report to Nanyuki Police station and any subsequent charges at Nanyuki Chief Magistrates court. It asserts that if there was such a case then it was a matter between the Claimant and the State. It denied knowledge of the Claimant's acquittal and averred that the dismissal had nothing to do with the criminal trial. The Respondent denied being served with a demand or notice of intention to sue and denied the jurisdiction of the court.

3.In reply to the Respondent's defence, the Claimant averred that the court was imbued with the requisite jurisdiction to hear and determine this cause and dared the Respondent to argue its preliminary objection. The Respondent's defence was described as an embarrassing and blatant abuse of the court process and ought to be dismissed with costs.

4.The Respondent later filed an amended defence in which it averred that the Claimant was not entitled to any of the remedies he sought for general damages for wrongful dismissal and avers that the claims by the Claimant were farfetched and without a basis in law. The jurisdiction of the court was also admitted.

5.The matter was heard but the Respondent did not participate in the hearing. The Claimant testified that he was a guard for 8 years and that he was guarding the main gate and swimming pool and lower gate. He said that he was called in February 2015 and informed that the side where the keg bar was located had been broken into. He was taken into custody and informed that they would investigate and he was given a suspension letter dated 25th February 2015. He was to report in March and on 27th February 2015 he received a summary dismissal letter. He said he was dismissed before the Police investigation were complete. He testified that he was charged at Nanyuki Law courts and was subsequently acquitted.

6.The Claimant filed submissions in which he stated that the summary dismissal was on the lodging of a false report of bar breaking and committing a felony. He submitted that he was entitled to the prayers in the amended claim as he had proved the case on a balance of probabilities. He submitted that Section 43 of the Employment Act provides that the employer has to establish the grounds for dismissal were valid. He submitted that he was not given a hearing in terms of Section 41 of the Employment Act and therefore his dismissal was not fair or lawful. He cited the cases of **Thomas Mutevu Kitetu & 2 Others v Izaak Walton Inn [2015] eKLR** and **Douglas Ouma Oyobo v P. W. Waswa & Another [2013] eKLR** where the court had awarded the Claimants relief for their dismissal from service.

7. The Claimant's service was terminated after the break-in took place at the Respondent's keg bar. The Claimant was actually charged with the offences at the Nanyuki Court. The charges were however not proved and the Claimant then sought relief for the dismissal. He was clearly not afforded a hearing prior to dismissal as he was sent on suspension then given the dismissal letter while still under suspension. He was not therefore accorded the safeguards under Section 41 despite there being cause for the dismissal, to wit the suspected theft from the keg bar and his suspected failure to prevent the felony.

8.The Claimant failed to prove underpayment as well as the alleged nonpayment of leave allowance and house allowance. He did not prove he was entitled to gratuity or half salary as well as the salary for the period he was not working for the Respondent. Salary is earned when one is in employment and he thus was not entitled to this. He therefore is only entitled to the following reliefs:-

- a. Salary for the month of February 2015 – Kshs. 8,775/-
- b. One month's salary as notice – Kshs. 8,775/-
- c. 3 month's salary as compensation – Kshs. 26,325/-
- d. Costs of the suit
- e. Certificate of service
- f. Interest on a), b) and c) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 20th day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar