



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1222 OF 2017

LAWRENCE MAINA NYAMU.....CLAIMANT

VERSUS

BOMA HOTELS.....RESPONDENT

JUDGMENT

1. This Cause was heard on 7 February 2019 when Lawrence Maina Nyamu (Claimant) testified, was cross examined and closed his case.
2. Although Boma Hotels (Respondent) had filed a *Memorandum of Appearance* on 2 October 2017, it did not file a *Response* until the morning of the hearing.
3. The Court declined to grant leave for the admission of the Response because the reason(s) advanced for failing to file it in time were found wanting (the reason given was that the advocate who had conduct of the brief had left the employ of the firm of advocates on record for the Respondent).
4. The Court found the reason wanting because the firm representing the Respondent was invited to attend the registry on 14 December 2018 to fix a date but failed to attend. Had the firm been diligent, it would have established at that time the status of its pleadings and moved the Court swiftly to put its house in order, rather than wait till the morning of the hearing.
5. Even more telling is that the said firm had also been served with a mention notice on 21 November 2017 for a pre-trial mention on 31 January 2018. It again failed to attend Court. The Court directed on that day that the Cause proceed to formal proof.
6. A hearing notice was also served on 30 January 2019 but instead of moving Court expeditiously to have a Response filed, the Respondent waited until the hearing day.
7. In the view of the Court, the Respondent cannot contend that it was prejudiced as it failed to file a Response within the timelines prescribed in the Rules and further waited until the hearing date to seek admission of the Response when all along it was aware of the progress/steps taken in the Cause.
8. The Claimant filed his submissions on 21 February 2019 while the Respondent filed its submissions on 11 March 2019 (outside the agreed timeline).
9. The Issues arising for determination are, *whether the summary dismissal of the Claimant was unfair, whether there was breach of contract and appropriate remedies/orders.*

Unfair termination of employment

Procedural fairness

10. The Respondent offered the Claimant employment as a Food & Beverage Waiter in 2012.
11. On 3 May 2017, the Respondent issued to the Claimant a *show cause notice* requesting him to respond to allegations of incurring a shortage of Kshs 41,680/- at Afya bar.
12. The Claimant responded to the show cause in writing and was issued with a dismissal letter on 8 May 2017.
13. The Claimant contended that his employment was subject to a *collective bargaining agreement* between the Union of Kenya Hotel

Keepers and Caterers Association and Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (produced), and that contrary to the law and contractual agreement, he was not afforded a hearing.

14. The Claimant was informed of the allegations to confront and he made a response in writing. However, there was no oral hearing.

15. In the view of the Court, the Respondent was in substantial compliance with the statutory requirements of sections 35(1)(c) and 41 of the Employment Act, 2007 and without having demonstrated that he was prejudiced by failure to have an oral hearing, the Court finds that process followed by the Respondent was fair.

Substantive fairness

16. Sections 43 and 45 of the Employment Act, 2007 have placed a burden on the employer/Respondent to prove the reasons for a dismissal and that the reasons are valid and fair.

17. The particulars (reasons) given for the dismissal of the Claimant were that he carried out tasks not assigned to him in that he made cocktails for guests yet he was not a barman.

18. Further, it was stated that the Claimant handled and signed off for cash leading to loss of Kshs 40,000/-.

19. The Claimant admitted in his written response that he prepared and served customers after being requested by the barman. He also confirmed that he had a job description and that his main task was to clean (glasses).

20. Although the Respondent did not lead any evidence, the Court is satisfied that the Claimant irregularly assumed duties beyond those prescribed to him.

21. The Court is therefore unable to find that the dismissal was unfair.

22. Compensation, a discretionary remedy is therefore not available to the Claimant.

Breach of contract

Uniform refund/shoe

23. Clause 16 of the *collective bargaining agreement* provided that the Respondent would issue to the applicable employees 2 pairs of uniform and footwear or in lieu thereof Kshs 1,000/- and Kshs 500/- respectively for the duration of the *collective bargaining agreement*.

24. The Claimant's testimony that he was not issued with uniform and shoes was not rebutted and because the *collective bargaining agreement* was for 2 years, the Court will allow this head of claim in the sum of Kshs 3,000/-.

Service charge

25. The Claimant sought Kshs 150,000/- on account of service charge refund.

26. In advancing this head of claim, the Claimant stated that pursuant to the Finance Bill 2016/2017, Value Added Tax should not have been deducted but the Respondent went ahead to deduct the same.

27. Apart from the general testimony, the Claimant did not give a breakdown of how he computed the refund as Kshs 150,000/- as he admitted that service charge varied from month to month.

Service gratuity

28. Clause 27(b) as read with clause 9(f) of the *collective bargaining agreement* provided for gratuity in cases of termination of employment for employees with over 5 years of service.

29. The Claimant served for slightly over 5 years and would be entitled to gratuity at rate of one-third of a month's salary for each completed year of service.

30. The Respondent did not interrogate this head of claim and the Court will allow it in the sum of Kshs 83,267/-.

Pay in lieu of notice

31. The case of the Claimant was one of summary dismissal and in terms of clause 9(f) of the *collective bargaining agreement*, he would not be entitled to pay in lieu of notice.

Leave

32. An employee is entitled as of right to at least 21 days annual leave with full pay.

33. The Claimant claimed he did not go on leave in 2017 and sought in lieu thereof Kshs 52,097/-.

34. The commuted leave for 2017, which the Claimant did not serve fully cannot be the amount sought which is nearly double the monthly salary.

35. The computation is therefore exaggerated, and the Court will disallow it.

Conclusion and Orders

36. From the foregoing, save for uniform refund and gratuity, the Court finds no merit in the Cause herein and orders it dismissed.

37. The Claimant is awarded

(a) Uniform refund Kshs 3,000/-

(b) Gratuity Kshs 83,267/-

TOTAL Kshs 86,267/-

38. Respondent to issue a Certificate of Service to the Claimant within 10 days.

39. Claimant to have costs on half scale.

Delivered, dated and signed in Nairobi on this 15th day of March 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates

For Respondent Ms. Njagi instructed by Garane & Somane Advocates

Court Assistant Lindsey