



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1520 OF 2013

NYAKOI OMACHE PETER.....CLAIMANT

- VERSUS -

NOMAD PALACE HOTEL LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 15th March, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 22.09.2013 in person and alleged unfair termination of employment, unlawful deduction of salary; non-payment of employment benefits and non-compliance with the Employment Act. The amended claim was filed on 29.05.2017. The claimant prayed for judgment against the respondent for:

a) Payment of unpaid salary, wrongful deductions, allowances, leaves, severance pay, notice period, overtime and public holidays worked from 4th November 2011 to July 2013 using Kshs.49, 120.00 as base rate:

- Unpaid salary for July and August 2013 Kshs.98, 240.00
- Underpay for November, December 2011 and January, May and June 2012 Kshs.102, 212.67
- Unpaid housing, commuter and leave allowance Kshs.356, 667.00
- Leave days not taken 9 (Paternity and annual) Kshs.67, 364.58.
- Severance-pay Kshs. 40, 933.33.
- Notice period Kshs.147, 360.00.
- Overtime and public holidays worked Kshs.327, 267.01
- Subtotal Kshs. 1, 140, 044.59.

b) Payment of medical expenses incurred between 04.11.2011 and 30.06.2013 in the sum of Kshs.404,901.45 less medical expenses paid by the respondent Kshs.80,000.00 making a balance of 324, 901.45.

c) Total of (a) and (b) above Kshs. 1, 464, 946.04.

d) 12 months compensation for unfair dismissal.

e) Payment of medical expenses that may be incurred before conclusion of the suit.

f) Disclosure and payment of the amount due as pension.

g) Costs of the suit.

h) Lift of unlawful termination and re-engagement of the claimant or lawful termination and issuance of the certificate of service.

i) Interest at prevailing Court rates.

j) Any other relief that the Honourable Court may deem fit.

By the notice of appointment of Advocate filed on 28.11.2013 the claimant appointed Purity Makori Advocate of Mogeni & Company Advocates to act in the matter.

The respondent filed on 10.10.2013 the reply to the memorandum of claim through Garane & Associates. The respondent prayed that the claimant's suit be dismissed; the costs of the suit should be borne by the claimant; and any other or further relief that the Honourable Court may deem fit to grant.

The parties are in agreement that the claimant started working for the respondent in November 2011. However, parties are not in agreement on the terms of service.

The claimant alleges that he was employed by the letter of appointment dated 20.11.2011 signed by the respondent's director one Mohamed B. Duale and accepted by the claimant on 22.11.2011. The letter provides for employment of the claimant as a Food and Beverage Cost Controller in the Finance Department with a remuneration of Kshs.49, 120.00 per month payable in arrears; house allowance of 10, 000.00 and commuter allowance of Kshs.7, 000.00 per month. The letter states that the annual leave allowance is Kshs.10, 000.00 and the letter further provides for medical cover for the claimant, spouse and children, a staff group life and insurance scheme, joining of staff non-contributory pension scheme upon completion of the probationary period, overtime at Kshs.204.67 per hour exceeding normal 8 hours of work, and compulsory retirement age of 55 years.

The respondent's case is that the letter of appointment relied on by the claimant is a forgery, the claim is based on criminality and it should be dismissed with costs. The respondent's case is that the claimant was employed on consolidated salary of Kshs. 32, 128.00 inclusive of commuter and housing allowances.

The claimant testified that the person who signed the appointment letter for the respondent was the Director for Operations one Mohamed Duale and the other director was Abdi Duale. He further testified that he wrote emails to the director about discrepancies in his pay but he had not exhibited the same because they were on intra net and he had been blocked out since termination. The emails were therefore in the respondent's custody. He confirmed that he was granted leave whenever he asked for leave and for the period worked he took 18 days of leave.

The respondent's witness (RW) was the respondent's General Manager one Yusuf Mohammed. He confirmed that the claimant was employed in November 2011 and the terms of employment were oral as the respondent did not give written contracts.

The Court has carefully considered the evidence on record. Under section 9(2) of the Employment Act, 2007, it is the obligation of the respondent as the employer to set out the terms of the contract of service in writing. Under section 10(7) of the Act the burden of proving or disapproving a term of the contract of service rests with the respondent. RW testified that payslips were issued showing the remuneration that was applicable. Further, the agreed salary was initially Kshs.35, 000.00, then Kshs. 49, 120.00, and when the respondent's economic performance was in difficulty salaries for all employees were reduced and the claimant agreed to receive Kshs. 28,000.00 per month. The Court has no reason to doubt the respondent's account. First, the claimant alleged he complained about the underpayment and failure by the respondent to pay housing and commuter allowances. However even if the intranet was blocked, the claimant never demanded the production of the emails he said was in the respondent's custody. Further, it is unbelievable that throughout the service the claimant condoned the serious underpayment without a formal grievance being initiated before the area labour officer or the Court. The Court has also considered the undisputed leave application forms signed by the claimant and exhibited by the respondent. The claimant has signed the leave application forms on 17.06.2013; 11.06.2013; 14.03.2013; 01.04.2013; and 05.10.2012. In all of them the claimant has indicated the date engaged as 04.11.2011 except the in one instance. The dates are inconsistent with the alleged letter of appointment dated 20.11.2011 and allegedly signed by the claimant on 22.11.2011.

Thus on a balance of probability the Court returns that the alleged letter of appointment relied upon by the claimant did not apply and the claimant's terms of service were oral and as set out by RW's testimony. While making that finding the Court finds that the claimant is bound when at paragraph 4 of the amended statement of claim it is stated, "**4. That the claimant served the respondent diligently and faithfully and as of 30th April 2013 the claimant's salary stood at Kenya Shillings Forty nine thousand one hundred and twenty only (Kshs.49, 120.00) see annexure No. 4 pay slip for April 2013.**" The Court returns that the payslips are the genuine testimony to the true remuneration the parties had agreed upon.

To answer the 1st issue for termination the Court returns that the purported letter of appointment did not apply to the claimant's service and the Court upholds RW's evidence that the contract of service was oral.

The 2nd issue for determination is whether the termination of the claimant's employment was unfair. The claimant's case is that on 18.07.2013 he reported at work after his examination leave only to be told verbally to go home for two weeks and never to set foot at the respondent's premises for that period until he met the respondent's director one Abdi Duale. The claimant's further case was that he was not given a reason for the action taken against him and the Hotel Manager one Yusuf who conveyed the decision orally told the claimant that the same was a directive from the respondent's director one Abdi Duale. The claimant wrote emails to the director who promised to resolve the issue but the matter was not resolved. The last exhibited email was for 09.09.2013 when the claimant asked for the decision, if any.

The respondent's case and evidence was that the claimant abandoned his duties without any proper explanation contrary to the terms of his employment. The respondent says that it was about 18.06.2013 and he showed up on 13.07.2013 which left the respondent with no option but to terminate the contract of service. The letter of termination exhibited for the respondent is dated 04.07.2013 and it states that the employment was terminated effective 04.07.2013 and the reason is stated as being absent from work without valid reasons and without leave

from the management occasioning serious loss to the respondent. The claimant denied receiving the letter.

The Court returns that there was no evidence that the letter was delivered to the claimant. The Court further finds that the letter is inconsistent with the respondent's pleading that the claimant showed up on 13.07.2013 whereas the letter is dated 04.07.2013 long before the claimant allegedly showed up.

The Court finds that the account by the claimant of the circumstances of the termination is credible and the termination took place when the said Abdi Duale failed to recall him as had been promised. The termination was unfair for want of a valid reason as per section 43 of the Employment Act, 2007 and if there was misconduct or poor performance as was alleged for the respondent, it was clear that the due process of a notice and hearing under section 41 of the Act had not been invoked.

The **3rd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- 1) The claimant was entitled to consider himself terminated after the last email showing that the matter would not be resolved and is awarded unpaid salary for July and August 2013 **Kshs.98, 240.00** as prayed for.
- 2) The underpayment for November, December 2011 and January, May and June 2012 Kshs.102, 212.67 will fail because as continuing injuries the 12 months of limitation of action under section 90 of the Employment Act, 2007 had lapsed on or about June 2013 and the suit was filed on 23.09.2013.
- 3) Unpaid housing, commuter and leave allowance Kshs.356, 667.00 will fail as they were based on the letter of appointment but the Court has found that on a balance of probability, the letter did not apply as the valid contract of service.
- 4) The claimant prayed for 9 leave days not taken (Paternity and annual) Kshs.67, 364.58. He testified that for the period served he took 18 days of leave. The claimant did not particularise or give details of the leave days as claimed. The respondent filed some leave forms showing that the claimant applied for leave which was approved. On a balance of probability the Court returns that the claimant has failed to establish the claim.
- 5) The claimant did not give the basis for the claim for severance-pay Kshs. 40, 933.33 and the prayer will fail.
- 6) The claimant prays for notice period Kshs.147, 360.00. The Court finds that the termination was without due notice as per section 35 of the Act and the claimant is awarded one month pay in lieu of the termination notice at **Kshs. 49, 120.00**. While making that finding, the Court considers that the claimant was honest in stating that the respondent unilaterally reduced the monthly pay and is awarded accordingly at the agreed monthly pay.
- 7) The claimant prayed for overtime and public holidays worked Kshs.327, 267.01. The claimant offered no particulars and evidence of the overtime and public holidays worked. Further the claim was based on alleged rates in the purported letter of appointment the Court has found not to apply. The Court returns that the prayer will fail.
- 8) Payment of medical expenses incurred between 04.11.2011 and 30.06.2013 in the sum of Kshs.404, 901.45 less medical expenses paid by the respondent Kshs.80, 000.00 making a balance of 324, 901.45 was a claim based on the purported letter of appointment the Court has found not to apply. Further the evidence was that the claimant was a member of NHIF and no reason was advanced why the claimant had not used the NHIF cover. The prayer will fail. In any event there was no evidence on the terms of the medical cover. Similarly the prayer on medical expenses that may be incurred before conclusion of the suit was speculative and hopeful without evidence in that regard. The same will fail.
- 9) The claimant prayed for 12 months compensation for unfair dismissal. The Court has considered the material on record. The claimant desired to continue in employment. The Court has considered the term so far served and returns 5 months' salaries in compensation for the unfair termination will meet the ends of justice at Kshs. 49, 120.00 per month making **Kshs.245, 600.00**.
- 10) The claimant was a member of NSSF whose statement is available per applicable statutory provisions and the claimant is not entitled to disclosure and payment of the amount due as pension.
- 11) Lifting of unlawful termination and re-engagement of the claimant or lawful termination will not issue because the parties' relationship is clearly broken down and irreparably so.
- 12) The claimant is entitled to issuance of the certificate of service as a statutory right.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) Payment of **Kshs.392, 960.00** by 01.05.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- b) Delivery of a certificate of service by 01.04.2019.
- c) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 15th March, 2019.

BYRAM ONGAYA

JUDGE