



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 620 OF 2013

BETWEEN

ALFRED NYUNGU KIMUNGUI.....CLAIMANT

VERSUS

BOMAS OF KENYA LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Muriungi & Company Advocates for the Claimant

Federation of Kenya Employers for the Respondent

JUDGMENT

1. Reason wherefore, the Claimant prays the Respondent [sic] for:

- a) An order compelling the Respondent/Servant Agent and/or Employee to reinstate the Claimant herein.
 - b) In the alternative, the Respondent/Servant, Agent and/or Employee to pay the Claimant for the loss of service of:
 - i. Salary for the remainder of the contract period is Kshs. 1,130,800.
 - ii. House allowance at Kshs. 440,000.
 - iii. Leave days [21] days at Kshs. 41,515.
 - iv. Extra days worked [52] at Kshs. 102,800.
 - v. Withheld salary for February, March and April 2013 at Kshs. 102,800.
- Total...Kshs. 1,869,315
- vi. Costs.
 - vii. Interest.

2. These are the unclear prayers made by the Claimant, against his former Employer, which is described as a corporate body, wholly owned Subsidiary of Kenya Tourist Development Corporation, in the Statement of Claim filed on 3rd May 2013.

3. The Claimant avers he was employed by the Respondent as a Food and Beverage Manager, on 3rd January 2012. He was interdicted by the Respondent through a letter received by the Claimant on 22nd February 2013. It was alleged that the Claimant allowed some Employees of the Respondent to handle food, in contravention of the Public Health Act.

4. The Employees were alleged by the Respondent not to have Certificates of Medical Examination. The Claimant avers the concerned Employees actually had the Medical Certificates. He exhibited copies before the Court. He replied to the letter interdicting him, which letter also required him to show cause why, his services should not be terminated. He was later told to collect a letter from the Human Resource Officer, which turned out to be a letter of dismissal. His contract was to run for 3 years. He prays the Court to find that termination was unfair, and grant to him the orders above.

5. The Respondent filed its Statement of Response on 15th July 2013. Its position is that the Ministry of Public Health, conducted medical examination for all staff of the Respondent on 11th February 2013. Medical Certificates issued on 15th February 2013. The Respondent instructed the Claimant not to allow Employees Dickson Muli, Catherine Mueni, and Joshua Omuwudo, handle food. The Claimant did not heed instructions, and allowed the 3 Employees to continue handling food. Some Employees who ate food handled by the 3 Employees were consequently taken ill.

6. The Claimant was interdicted and required to show cause. He replied, abusing his Superiors, rather than answer the specific allegation of allowing the 3 Employees to handle food contrary to the instructions of the Respondent. On 24th April 2013, Respondent's Advisory Committee convened and deliberated on the issue. Upon review of the Claimant's answer to the letter to show cause, it was decided that Claimant's contract is terminated. Termination took effect on 22nd April 2013.

7. The Claimant initially gave evidence on 17th February 2014. The file was kept in abeyance after the transfer of the Trial Judge to Mombasa, until 16th April 2018, when it was fixed for hearing during the Court's service week. It is not clear from the record why the dispute should not have been heard and concluded before another Judge based at Nairobi.

8. The Claimant testified, as did Respondent's Human Resource In-Charge, Jimmy Okidiang'i. Hearing took place and closed on 19th April 2018. The file was to be forwarded to the Court in Mombasa for preparation of Judgment, upon the Parties confirming filing of Submissions. It was only forwarded on 19th February 2019, almost 1 year after closure of the hearing. This ineptitude in transmission of the file, defeats the very purpose of having service weeks, and must be deprecated.

9. The Claimant repeated the averments of his Pleadings, in his oral evidence. He stated he initiated management reforms at Bomas of Kenya. Some were resisted, and earned him enemies. He used to arrange for Employees' medical examination. After one such exercise, he was summoned by the General Manager and asked to take leave. The Claimant was strict on controls. He advised the General Manager to give him the instruction on leave in writing. The General Manager did not. The Claimant was interdicted after this. There was no communication after interdiction. He had overseen medical examination of Employees on 6th February 2013, not 11th February 2013 as alleged by the Respondent. He had worked for 1 year and 3 months by the time he left employment.

10. Cross-examined, the Claimant told the Court that he was always a team-player. He wrote a letter dated 10th October 2012 to the General Manager complaining about challenges he was facing. He did not complain that certain managerial controls had been removed from his docket. He was not abusive when he wrote to the Respondent, alluding to the Respondent's state of mind. He was not remorseful for his language. He received the letter of termination. His monthly consolidated salary was Kshs. 70,100. Redirected, the Claimant told the Court that his relationship with his Colleagues was good. He was not rude. He did not receive instructions on any medically unexamined Employee.

11. Okidiang'i told the Court that the Claimant worked under a 3- year contract. His letter of appointment is dated 3rd January 2012. On 11th February 2013, 3 Employees were found to be medically unfit. Officers from the Public Health Ministry informed Respondent's nurse, that the specific Employees should not handle food. This was due to severity of salmonella, found in the 3 Employees' blood. The Claimant ignored the instructions and continued to deploy the 3 Employees. He was supposed to have allowed the 3 Employees sick off. Other Employees who ate food handled by their 3 Colleagues were infected. The Claimant conceded in his reply to the letter of interdiction, that he had received information from Respondent's nurse about the 3 Employees. The Claimant appeared before the Advisory Committee and was heard. His conduct led to Employees getting sick. Members of the Public as well were infected, upon eating food served by infected Employees. The instructions from the nurse took precedence over other medical reports in the hand of the Claimant. The Claimant never disputed that People fell sick.

12. Cross-examined, Okidiang'i told the Court that departments communicated through memos. There was no memo from the nurse to the Claimant. The Claimant was called before the Advisory Committee. He turned up and refused to subject himself to the Committee. He said he could not subject himself to juniors. Redirected, Okidiang'i told the Court it was never in dispute that the Claimant received the communication from the nurse. This was after the medical certificates dated 6th February 2013. Infection could have taken place, even after certificates exhibited by the Claimant issued. The Respondent has computed Claimant's terminal dues. The Claimant is free to collect the same.

The Court Finds:-

13. The Claimant was employed as Food and Beverage Manager of the Respondent, on 1st January 2012. His basic salary was Kshs. 51,400 monthly. There was provision for house allowance at Kshs. 20,000 monthly.

14. He was interdicted on 22nd February 2013 for allowing Employees infected with salmonella to continue serving food and beverages to their fellow Employees and Members of the Public, contrary to the instructions of the facility nurse. The nurse had received the instructions from Public Health Authorities.

15. Consequently Employees and Members of the Public were infected with salmonella. In response to the interdiction letter, the Claimant concedes he had been informed by the nurse to restrict the 3 Employees from serving food and beverages. He sarcastically complained in a long windy reply, that the nurse was the only person he knew, who had the privilege of accessing confidential medical information of

Employees. Rather than explain his disregard of instructions, the Claimant went into a rant, telling his boss, the General Manager that, "anyone in their right mind, can tell that if you have your way, I wouldn't be here."

16. The Court is convinced termination was based on valid ground. The issue was not whether the Claimant had medical certificates for the 3 Employees, giving them a clean bill of health on 6th February 2013. The issue was whether subsequently, there was an outbreak of salmonella; whether Public Health Officials confirmed the 3 Employees to be infected; whether the Claimant was advised by the nurse, upon the instructions of the Public Health Officials, to restrict the 3 Employees from handling food and beverages; whether the Claimant followed the instructions; and whether as a consequence of his disregard, other Employees and Members of the Public became infected after being served food and beverages by the 3 Employees.

17. Quite convincingly, the Claimant is shown to have acted in a manner that placed other Employees and Members of the Public, at risk. He was a Manager, with responsibility over other Employees and Respondent's Customers. His conduct was not consonant with the high responsibility demanded of his office. He did not discharge his role properly and with care, and was disobedient and insulting to his General Manager. There were various offences under Section 44 [4] of the Employment Act, committed by the Claimant, which would justify a decision to summarily dismiss him. There was valid ground to terminate his contract before it matured.

18. The minimum statutory standards of fairness were observed as required under Section 41 and 45 of the Employment Act. The Claimant was presented with specific charges, which he opted not to answer with specificity, but with insults on the General Manager, and denigration of his nursing mate. He was interdicted. He was called before the Advisory Committee. Okidiang'i told the Court that the Claimant turned up, but true to character, declined to subject himself to the disciplinary hearing, alleging the convenors were his juniors. The Respondent cannot in the circumstances, have been expected to postpone hearing and avail to the Claimant an alternative forum made up of persons the Claimant felt were his peers.

19. The Claimant was offered terminal dues, which for unknown reasons, he did not accept.

20. Termination was based on valid reason and procedure under Sections 41, 43 and 45 of the Employment Act.

IT IS ORDERED:-

a) *The Claim is declined.*

b) *Costs to the Respondent.*

Dated and signed at Mombasa this 22nd day of February 2019.

James Rika

Judge

Dated, signed and delivered at Nairobi this 1st day of March 2019.

Maureen Onyango

Principal Judge