



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 196 OF 2017

STEPHEN NGUNUU MBITI.....CLAIMANT

VS

DARAD HOTEL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Stephen Ngunuu Mbiti against his former employer, Darda Hotel Limited. The claim is found in a Memorandum of Claim dated 9th March 2017 and filed in court on even date. The Respondent filed a Memorandum of Response on 31st July 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Nyae Rai. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a security guard from 6th August 2013 until March 2016 when his employment was terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 9,000.

4. The Claimant's case is that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) One month's salary in lieu of notice.....Kshs. 9,000
- b) Overtime for 30 months.....174,000
- c) 29 leave days.....8,700
- d) House allowance for 32 months.....43,200
- e) 12 months' salary in compensation.....108,000
- f) NSSF contributions.....5,200
- g) Severance pay for 2 ½ years.....11,250
- h) Shoes (2 pairs per year @ Kshs 2,000 per pair).....12,000
- i) Public holidays.....1,200
- j) Certificate of service
- k) Costs plus interest

The Respondent's Case

5. In its Memorandum of Response dated 26th July 2017 and filed in court on 31st July 2017, the Respondent admits having employed the Claimant but denies the accusations of unlawful termination.

6. The Respondent states that the Claimant's employment was lawfully terminated on account of insubordination and absconding duty without lawful excuse from 6th February 2016 until 1st March 2016. The Respondent further accuses the Claimant of sending threatening text messages to its employees.

Findings and Determination

7. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

8. The Claimant's employment was terminated by letter dated 1st March 2016 stating as follows:

"Dear MR. MBITHI

RE: TERMINATION OF SERVICE

This follows to (sic) our discussion with you regarding text messages forwarded to the security officer Mr. Nyae Rai threatening him by giving him some days to do what you want; otherwise he will have no one to blame.

You were given normal annual leave and public holidays together with other members of staff and therefore I don't understand why you behave like you have personal issues with your immediate boss.

This is insubordination and a gross misconduct referred to CAP 226 of the employment act 2007 (sic) section 44 sub section 4(d).

As a result of the above, the management has entrusted you with this responsibility and therefore your services has (sic) been terminated with effect from 1st march 2016.

Your terminal dues will be paid as follows:

- 1. One month lieu of notice – ksh 9000*
- 2. 42 days annual leave for 2 years- taken in advance*
- 3. 44 days public holidays for 2 years – taken in advance*
- 4. Less any money owed to the company*

Yours faithfully

FOR: DARAD HOTEL LIMITED

(Signed)

NYAE RAI

HUMAN RESOURCE MANAGER"

9. According to this letter, the Claimant's employment was terminated on account of gross misconduct, particulars being that he had sent threatening text messages to his superior. The exact messages were not availed to the Court and the Claimant denied sending any threatening messages.

10. Gross misconduct is recognised in law as a legitimate reason for summary dismissal but it must be proved at the shop floor. In this case, there was no any evidence of any charges of gross misconduct being presented to the Claimant for his response. What is more, on 5th March 2015, Rai issued a certificate of service to the Claimant stating as follows:

"RE: STEPHEN MBITHI ID NO. 10753680

This is to certify that Mr. Mbithi worked with Darad Hotel Ltd in Security Department from 6/08/2013 to 29/02/2016 on permanent basis as a Security Guard in our Security Department.

During his tenure with us, he proved to be a hardworking person whose dedication for duty is commendable. He is able to perform his duties with minimum supervision.

We therefore have no hesitation to recommend him to any prospective employer and who may wish to hire his services on a similar position.

Yours faithfully

(Signed)

NYAE RAI

HUMAN RESOURCE MANAGER

DARAD HOTEL LTD”

11. The Court was unable to reconcile this glowing recommendation with the accusations of gross misconduct contained in the termination letter and Rai’s testimony before the Court.

12. In the absence of any explanation for this apparent contradiction, the Court finds and holds that the Respondent had no valid reason for terminating the Claimant’s employment as required under Section 43 of the Employment Act, 2007. Additionally, in effecting the termination, the Respondent failed to observe the procedural fairness requirements set by Section 41 of the Act. The termination of the Claimant’s employment was therefore substantively and procedurally unfair and he is entitled to compensation.

Remedies

13. Pursuant to the foregoing findings I award the Claimant six (6) months’ salary in compensation. In arriving at this award I have taken into account the Claimant’s length of service and the Respondent’s conduct in the termination transaction.

14. The Claimant also claims house allowance which is an entitlement under Section 31 of the Employment Act, the only exception being where the employee is either housed by the employer or is paid a consolidated salary which includes a housing element. None of these exceptions were advanced before the Court and the Claimant is therefore entitled to house allowance at 15% of the basic salary. I further adopt the resultant figure of Kshs. 10,350 as the Claimant’s monthly salary for purposes of this claim.

15. The Respondent did not produce any leave records to counter the claim for leave pay which therefore succeeds and is allowed.

16. From the evidence on record, the Claimant was paid one month’s salary in lieu of notice. This claim is therefore misplaced.

17. Regarding the claim for NSSF contributions, the only thing to say is that any such dues are payable to the statutory body and not to the Claimant. The claims for overtime, public holidays and shoes were not proved and are dismissed. No basis was laid for the claim for severance pay which is disallowed.

18. In the end, I enter judgment in favour of the Claimant as follows:

- a) 6 months’ salary in compensation.....Kshs. 62,100
- b) House allowance for 30 months (1350x30).....40,500
- c) 29 days’ leave pay (10,350/30x29).....10,005
- Total.....112,605**

19. This amount will attract interest at court rates from the date of judgment until payment in full.

20. The Claimant will have the costs of the case.

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF APRIL 2019

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JUDGE

Appearance:

Mr. Birir for the Claimant

Mr. Muigai for the Respondent