



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC CAUSE NO. 349 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 2nd April, 2019)

JOHN KAMWERE MWANGI.....CLAIMANT

VERSUS

REGISTERED TRUSTEES OF

NAIROBI GYMKHANA SPORTS CLUB.....RESPONDENT

JUDGMENT

1. On 7th March 2014, the Claimant filed his Statement of Claim through his Advocates Nyabena Nyakundi & Company Advocates, against the unlawful and unfair termination of his employment. He seeks the following reliefs:-

- a. A declaration that the Claimant is entitled to payment of terminal dues.*
- b. The Claimant be paid his terminal dues in the sum of KShs. 1,531,727.00 as set out and particularized below:-*
 - a) Five months' pay in lieu of notice for KShs. 161,685.00.*
 - b) Leave balance for KShs. 17,337.00.*
 - c) Leave travelling allowance for KShs. 6,000.00.*
 - d) Salary underpayment for the year 2008 for KShs. 56,808.00.*
 - e) Salary underpayment for the year 2009 for KShs. 47,496.00.*
 - f) Salary underpayment for the year 2010 for KShs. 26,088.00.*
 - g) Salary underpayment for the year 2011 for KShs. 57,300.00.*
 - h) Salary underpayment for the year 2012 for KShs. 63,120.00.*
 - i) Salary underpayment for the year 2013 for KShs. 42,080.00.*
 - j) House allowance for the year 2009 for KShs. 600.00.*
 - k) House allowance for the year 2010 for KShs. 600.00.*
 - l) House allowance for the year 2011 for KShs. 15,000.00.*
 - m) House allowance for the year 2012 for KShs. 13,750.00.*
 - n) House allowance as at 12th December 2013 for KShs. 18,000.00.*

- o) 20 days service gratuity for each year completed, for KShs. 549,729.00.***
- p) Long service award for the period between 2007 and 2008 for KShs. 6,386.00.***
- q) Long service award for the period between 2009 and 2010 for KShs. 8,302.00.***
- r) Long service award for the period between 2011 and 2012 for KShs. 8,302.00.***
- s) Long service award for the year 2013 for KShs. 4,500.00.***
- t) 12 months compensation in the sum of KShs. 388,044.00.***
- u) The Claimant be issued with a certificate of service.***
- v) The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.***
- w) The Respondent to pay the costs of this claim.***
- x) Interest on the above at court rates.***

2. The Claimant avers that he was employed by the Respondent on 1st January 1996 as a waiter and promoted to a snooker attendant in 2008. The Claimant worked diligently and faithfully for the Respondent until 31st August 2013 when his employment was terminated.

3. Upon termination, the Claimant informed his union. Thereafter his union wrote to the Respondent seeking clarification on why they were not informed of the termination. The Respondent replied stating that the Claimant had been paid his dues in December 2007 and was on a yearly contract, which expired on 31st August 2013.

4. It is the Claimant's position that the Collective Bargaining Agreement signed between his union and the Respondent required parties to observe the terms and conditions set therein.

5. It is also the Claimant's case that his employment was terminated without the issuance of notice or the payment of his terminal dues and contrary to Section 41 of the Employment Act 2007 and the principles on natural justice. His terminal dues remain outstanding to date.

6. On 14th April 2014, the Respondent through the firm of Nyaencha Waichari and Company Advocates, filed its Defence praying for the dismissal of the claim with costs.

7. The Respondent avers that the Claimant voluntarily terminated his employment in 2007 and was paid his dues. At his request, the Claimant and the Respondent entered into a periodic term employment, which lapsed on 31st August 2013. The Respondent opted not to renew the same.

8. It is the Respondent's case that the Claimant had knowledge of the contract period and was duly notified of the same. As such, a notice of lapse of the contract was not necessary.

9. The Respondent avers that the Claimant was paid his dues in December 2007.

10. On 2nd June 2015, the suit was heard *ex parte* due to the Respondent absence despite being served with a hearing notice. The Claimant filed his written submissions dated 8th June 2015 and judgment was entered for the Claimant on 21st July 2015.

11. The Respondent through its Advocates on record, filed a Notice of Motion Application dated 5th August 2015, seeking to set aside the said judgment and to have the cause herein proceed for *inter partes* hearing. The Application was supported by the Affidavit of Lucy Kabura Nyaencha.

12. On 2nd December 2015, the Court delivered a Ruling granting the Respondent's prayers subject to her depositing the entire decretal sum in a joint interest earning account held in the joint names of Counsels on record, within 30 days from the date of Ruling.

13. Thereafter, the case was partly heard on 13th February 2017. However, 12th July 2018, the Claimant's case was dismissed with costs to the Respondent due to non-appearance of the Claimant or his Counsel. The Claimant filed the Notice of Motion Application dated 13th July 2018, seeking to have his suit reinstated and the suit set down for hearing. The Application was supported by the Affidavit of John Kamwere Mwangi. In its ruling delivered on 23rd July 2018, the Court set aside the orders issued on 12th July 2018 and the suit was reinstated for hearing on merit.

14. The case was heard on 21st January 2019, where CW1 and the Claimant in this case, testified that he was initially employed as a waiter earning a salary of KShs. 5,000.00 and a house allowance of KShs. 1,000.00. However, in 2012, he was earning a monthly salary of KShs. 21,079.00 and a house allowance of KShs. 5,250.00.

15. It is his position that the Respondent paid him below the salary stipulated in the CBA, which was KShs. 33,039.00. He had asked for a pay rise but the request was never responded to. It was also his position that he was never issued with an appointment letter, neither did he sign a contract.

16. The Claimant sought to adopt his witness statement dated 23rd October 2018 as his evidence. The averments contained therein are the same as those contained in the Memorandum of Claim.

17. Upon cross-examination by Counsel for Respondent, the Claimant denied ever being issued with the appointment letter dated 8th March 2006. He contested the signature on the job profile at page 5 of the Respondent's documents. He also denied being issued with the termination letter dated 30th August 2007.

18. He admitted that the loan he took in the sum of KShs. 150,000.00, was never deducted from his dues. He also admitted to being paid KShs. 129,695.00 on 31st August 2007. He conceded that he applied for a job at the Respondent club once again.

19. CW1 denied ever seeing the appointment letter dated 1st September 2009 which contracted his services as barman. However, he conceded that he had been working as a barman. It was his testimony that in 2007, he was earning a salary of about KShs. 20,000.00.

20. The Claimant denied stealing any money from the Respondent but admitted that some money was lost. The amount lost was recovered by the Respondent by deducting his salary. After this, he was taken as a waiter but received the salary of a barman. It was the Claimant's testimony that he requested for a loan but the request was denied. It was also his testimony that he wrote a letter of resignation to the union.

21. He stated that the Respondent paid him a salary exceeding what had been stipulated in the CBA. However, it was his position that the contract was forced on him.

22. During re-examination, the Claimant asserted that he was not on contract and insisted that he worked as a snooker and stated that he did not have evidence to prove that he worked as a barman. It was his evidence that he had requested for a loan in the sum of KShs. 150,000.00 and was granted a loan of KShs. 129,685.00. According to him, it was not paid to him as settlement for his terminal dues. He testified that the alleged theft was not the reason his permanent employment was terminated.

23. RW1, Lydia Aquino, testified on behalf of the Respondent.

24. During cross-examination, RW1 testified that the Claimant's permanent employment was terminated in 2007 and he was then hired on contract basis. It was her testimony that there was no provision in the 2008 CBA regarding terminating an employee's services and re-hiring them on contract. She stated that the Claimant wrote a letter to management informing them that he was leaving the union.

25. It was her testimony that the Claimant resigned from his position. However, she acknowledged that the document at page 6 of the Respondent's bundle of documents was a termination letter dated 30th August 2007, which was acknowledged by the Claimant. RW1 insisted that the Claimant worked as a barman and not a snooker attendant. It was her testimony that there was no evidence that the Claimant was paid gratuity for 2008 and posited that the Claimant was not entitled to long service award.

26. Upon re-examination, she clarified that the Claimant worked as a waiter but would back up as barman. It was her position that the Respondent did not give individual loans. She insisted that the Claimant was issued with a letter of appointment, took leave days and received salary increments.

Submissions by the Parties

27. In his submissions dated 15th February 2019, the Claimant submits that his employment termination was unfair. To reinforce this argument, the Claimant argues that he was not issued any warning letters or a notice to show cause, neither was he accorded a hearing before his termination. Consequently, his employment was terminated contrary to the principles of natural justice.

28. It is the Claimant's position that the Respondent has not issued a valid reason for terminating his employment. In his opinion, the reason given that his employment lapsed, does not suffice because there was a CBA in place governing the relationship between the Respondent and his employees. There was no provision under the CBA requiring the Respondent to place his employees under contract. The CBA provided a model letter of appointment, which the Respondent was supposed to issue to his employees. It ought to have incorporated the provisions of the CBA in respect of an employee's terms and conditions of service. He relies on the case of ***East African Portland Cement Company Limited vs. Kenya Chemical & Allied Workers Union [2017] eKLR*** where the Court of Appeal held that the terms of a negotiated and registered CBA cannot be defeated by the individual terms of a contract of employment.

29. The Claimant submits that failure by the Respondent to adhere to substantive and procedural justice prior to the termination, amounted to his wrongful, unfair and unprocedural termination.

30. On the issue of prayers, the Claimant submits that the house allowance payable to him was lower than the minimum wage allowed by the terms and conditions of service. It is further submitted that he was paid salary below the minimum wage provided by the law in the years 2008, 2009, 2010, 2011, 2012 and 2013.

31. The Claimant submits that he was not paid his service gratuity as required under Section 35 (5) of the Employment Act 2007 and clause 19 of the CBA which provides that an employee is entitled to 26 days gratuity for each completed year of service. It is his submission that he was not paid his 5 months' salary in lieu of notice nor issued with a certificate of service. He claims his leave balance and leave travelling

allowance.

32. The Claimant submits that he is entitled for 12 months compensation for unfair termination as he has demonstrated that his termination was wrongful.
33. The Claimant submits that his prayers for costs and interest are well grounded since this cause was filed as a result of the Respondent's actions and that the Respondent never made serious attempts to have this matter settled despite the Claimant's attempts. The Claimant relies on the case of *Morgan Air Cargo Limited vs. Enrest Enterprises Limited [2014] eKLR* where it was held that the circumstances at hand warranted for the award of interest to be computed on the basis of compound interest.
34. In their submissions filed on 20th February 2019, the Respondent submits that the Claimant's employment was not terminated unfairly, his contract of employment lapsed. As such, there was no obligation on the Respondent to renew the contract thus no requirement for subjecting the Claimant to a hearing.
35. The Respondent submits that the Claimant was employed as a waiter and issued with a letter of appointment dated 8th March 2006. In 2007, the Claimant requested to convert his employment from permanent to contract so that he could receive his service pay. The Respondent agreed to this and his employment was terminated and the Claimant employed on a contractual basis, which contract was renewed yearly until 2013 when his last contract lapsed.
36. It is further submitted that the Claimant was only employed as a barman and a waiter and never as a snooker attendant. As such, the Claimant's allegation that he was a snooker attendant is a conscious and convenient falsehood manufactured to mislead this Court.
37. The Respondent submits that the Claimant resigned from the union because he wanted to join management on the condition that his salary would be increased by KShs. 2,000.00, a condition the Respondent met.
38. On the issue of house allowance, the Claimant submits that the Claimant's house allowance was more than the minimum statutory allowance an employer is required to pay an employee. The Claimant's calculations were wrong. The Respondent gave the example of the Claimant's calculation for 2009 where he computes his house allowance as KShs. 4,050.00. This would mean that his gross salary was KShs. 27,000.00. It is the Respondent's submissions that the Claimant's salary for that period was KShs. 14,805.00 whose house allowance was KShs. 2,220.00.
39. The Respondent submits that the Claimant is not entitled to his claim for underpayment of salary since the Respondent always paid contract employees above the statutory minimum wage and unionisable employees in accordance with the provisions for the CBA. The Respondent relies on Section 35 (6) (d) to submit that the Claimant is not entitled to service gratuity because NSSF was being remitted. Further, the Claimant was paid service pay for the period 1996 to 2007 and he would be paid service pay arrears at the end of each contract.
40. It is the Respondent's submission that the Claimant is not entitled to 5 months' salary in lieu of notice since he had resigned from the union. Further, his employment was not terminated, the employment contract lapsed and the Claimant issued with a months' notice regarding the same. The notice also informed the Claimant that he was to proceed on leave, which he did hence he is not entitled to the leave balance claimed. The Respondent submits that the Claimant is not entitled to the claim of leave travelling allowance since for his failure to justify it.
41. It is submitted that the Claimant is not entitled to compensation for loss of earnings since his contract was for a fixed term which contract lapsed and there was no legitimate expectation of renewal of contract. It is the Respondent's position that this claim should be limited to the notice period an employee was entitled to instead of the contract remainder period.
42. The Respondent submits that the Claimant is not entitled to a long service award because he was not a unionisable employee. Further, if he was entitled to it then it would be in the sum of KShs. 4,151.00 as provided under the CBA for the 17 years he had worked.
43. It is submitted that condemning them to pay costs would be an injustice and the Claimant should bear the costs instead. They argue that the Claimant's demand letter was responded to in good time and they have been co-operative during the subsistence of the proceedings and were justified in failing to renew the Claimant's contract.
44. I have examined the evidence and submissions of the Parties. From the evidence of the Claimant, he was never issued with any appointment letter when he was employed in 1996. He denied he was ever issued with the letter submitted by the Respondent as an appointment letter dated 8/3/2006 nor the letter dated 30/8/2009 which terminated his services then.
45. He however admitted he re-applied for a job of a barman on 3/8/2007 but denied he was serving on contract from 2008 to 2013. His position is that he remained working from 2008 and was never sacked over any alleged theft.
46. The Respondent as an employer had a responsibility to issue the Claimant with an appointment letter as provided for under Section 9 (1) (2) of Employment Act which states as follows:-

1) "A contract of service:-

a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more;
or

b. which provides for the performance of any specified work which could not reasonably be expected to be completed

within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

47. There is no indication that the Claimant was issued with any appointment letter in 1996 and even the alleged letter of appointment dated 8/3/2006 is not signed by the Claimant and Claimant denied its receipt. He even denied the contracts on pages 14.

48. Allowing the denial by the Claimant that he was ever issued with any appointment, the Respondent had a duty to confirm they were issued and this the Respondent failed to do.

49. Section 10(7) of Employment Act obliges the employer to prove particulars in an appointment contract if they fail to produce a written contract. It is therefore imperative that the Respondent prove what they allege were the terms of the employment relationship between them and the Claimant. The Respondent have failed to do this.

50. The Respondent also averred that the Claimant chose to leave his job on his own volition in 2007. They never submitted any letter indicating the resignation by the Claimant from employment.

51. From 2008, the Claimant also continued in the employment of the Respondent as evidenced from the communication between the Claimant and the Respondent. The payslip for 2013 is even annexed to these proceedings. The nature of the employment relationship between the Claimant and Respondent is also not clear because no appointment letter or contracts have been annexed by the Respondent to indicate the terms of this engagement.

52. In the absence of these crucial documents indicating the terms of condition of employment between the Claimant and Respondent, it is apparent that the claim by the Claimant that he never worked on contract and that he was terminated carries the day.

53. The Respondent aver that they wrote to the Claimant on 27/7/2013 indicating that they were not renewing his contract to the Claimant, there existed no such contract.

54. He considered this letter (Appendix 3) as a termination of employment. The Claimant took it up with the union who wrote to the Respondent and in the reply by the Respondent (Appendix 5) they indicated that the Claimant had terminated his employment in 2007 and was therefore not entitled to terminal dues. This is far from the truth because if indeed the Claimant had terminated his employment in 2007 the Respondent would not have terminated his services in 2013. That being the position I find the Respondent terminated services of the Claimant without a valid reason. There is no indication that they took the Claimant through any due process.

55. Section 45(2) of Employment Act 2007 states as follows:-

(2) "A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

56. Since the Respondent never cited any proper reason for terminating the Claimant and given that no due process was followed, I find the Claimant's termination unfair and unjustified and I declare it so.

57. In terms of remedies, I note that the Respondents had a Collective Bargaining Agreement with the Kenya Hotels and Allied Workers Union which Collective Bargaining Agreement was signed on 17/12/2013 but was effective from 1/1/2013 and was to remain in force for 2 years and expire on 31/12/2014. At the time the Claimant's 'contract' purportedly expired, the Collective Bargaining Agreement was in force and the Claimants' services were covered by this Collective Bargaining Agreement.

58. Clause 19 of the Collective Bargaining Agreement provides that employment of a worker who had served over 10 years would be terminated after giving 5 months notice or pay in lieu. In any case, an employee who is terminated before attaining the appropriate retirement age shall be entitled to gratuity equal to 26 years for each completed year of service.

59. It is not clear how the contract of Claimant changed from permanent and pensionable to contract. The allegation by Respondent remains a mere allegation.

60. The manner of terminating an employment after giving 4 days notice was in bad taste and without following rules of natural justice. This was also contrary to the provisions of Clause 19 of the Collective Bargaining Agreement.

61. It is therefore the finding of this Court that the Claimant was unfairly terminated. I therefore find for the Claimant as follows:-

i. 5 months salary in lieu of notice = $30,327 \times 5 = 151,635/=$

ii. Gratuity equivalent to 26 days for 17 years worked

= $26/30 \times 30,327 \times 17 = 446,817/=$

iii. Long service award as per the Collective Bargaining Agreement = Kshs.4,500/=

iv. 6 months salary as compensation for unlawful termination = $6 \times 30,327 = 181,962/=$

TOTAL = 784,914/=

v. The Claimant shall be issued with a Certificate of Service.

vi. The Respondent will pay costs of this suit.

Dated and delivered in open Court this 2nd day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties