



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 1718 OF 2015

ABEDNEGO MUSYOKI WAMBUA.....CLAIMANT

VERSUS

PRIDEINN HOTELS AND INVESTMENTS LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant averred that he was employed by the respondent as a cleaner on 1st October, 2011 at a salary of Kshs 8,000/= per month exclusive of house allowance. The claimant was not issued with a letter of appointment. He further averred that he constantly worked overtime but was never paid for it.
2. On 7th July, 2015 he reported to work from his day off and was summoned by the respondent's manager Miss Natasha who asked him to explain his whereabouts for the past three days. According to the claimant, he was taken aback by the question since he had only been away for a day and it was because it was his off day. The claimant was subsequently asked to go to head office and see the Human Resource Manager Mr Ochieng who demanded to know who authorized the claimant's off-day. He informed him that the off was approved by the head chef Mr Joseph Ouma.
3. According to the claimant, on 13th July, 2015 he reported to work but the head chef refused to accompany him to the Human Resource Manager's office and insisted on going alone without the claimant. On 15th July, 2015 the claimant received a call from respondent's F & B manager who asked him to see the Human Resource Manager. When he reported to the Human Resource Manager, he was issued with a termination letter to clear from the company within a month after which his services stood terminated.
4. The respondent on its part pleaded that the claimant initially performed his duties satisfactorily but later became chronically absent from duty without leave as a result of which he s services were terminated after failing to change despite several warnings. In response to paragraph 9 of the claim, the respondent stated that the claimant reported to work after 3 days of unexplained absence. The respondent further averred that the claimant was issued with one month's notice of termination as required by the law.
5. At the trial the claimant adopted his witness statement in which he repeated the averments in the memorandum of claim. In cross-examination he stated that there was an attendance register and that all employees used to clock in and out at the gate as well. Regarding leave, he stated that they never used to fill leave forms and the leave was noted in the register by Human Resource.
6. The respondent's witness one, Nicholas Ochieng informed the court that he was the respondent's Human Resource Manager. He adopted his witness statement filed on 7th March, 2016. In cross-examination he stated that the claimant's reporting time was as shown in the biometrics report filed with memorandum of response. According to his evidence, in hotel industry employees work 9 hours and that one can do two shifts when the person relieving has not come. This is compensated for by off-days. He denied that overtime is compensated for monetarily in the hotel industry. Regarding absenteeism, it was his evidence that this was discussed through summary discussions.
7. It was his evidence that the claimant never came back after clearing with the respondent and that he never worked after he was issued with a termination letter. In his closing submissions, Mr Gomba for the claimant submitted that the termination letter dated 14th July, 2015 indicated the claimant was being dismissal due to continuous failure to communicate, respect the supervisor and lack of flexibility at work.
8. According to counsel, this was in complete variance with its Hr's statement filed on 7th March, 2016 and his testimony in court in which Mr Ochieng claimed that the claimant was absenting himself from work. Mr Gomba submitted this was contradictory and calculated to camouflage the action taken in termination on a normal notice rather than a dismissal on the basis of misconduct. According to counsel it was no wonder when the claimant was issued with a termination letter he never resumed duty.
9. Ms Achieng for the respondent submitted that a termination of employment by an employer is unfair if the employer fails to prove that the

reason for the termination is valid and that the termination was in accordance with a fair procedure. According to counsel, the reason for the termination of the claimant's contract in the circumstances could not be overemphasized. The same had been set out in the respondent's pleadings. Ms Achieng submitted that the claimant had constantly absented himself from work with no justifiable reason yet the respondent's witness Mr Ochieng stated that before employees proceeded on leave they ought to have filled a leave form yet the claimant did not adduce any leave form to support his claim.

10. Further in cross-examination the claimant acknowledged the fact that it was a policy for employees to clock in upon arrival at work and in the event the machine did not work they ought to have filled the attendance register. From the excerpts of the register and clocking time analysis, there was constant trend of absenteeism on the part of the claimant.

11. Under section 43(2) of the Employment Act, the reason or reasons for termination of a contract are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

12. The claimant herein was accused of frequent absenteeism from work without lawful cause. The respondent subsequently issued the claimant with one months' notice of termination which the claimant did not serve. He instead left employment immediately. An employee serving a notice of termination period remains as such until the notice period is served. The act of the claimant refusing to work after being served with a termination notice supports the claim by the respondent that the claimant was fond of absenting himself from work without lawful cause.

13. The respondent filed together with the statement of response herein a biometric analysis report showing various days when the claimant absented himself from work. Although the claimant contended that the times he happened to be away he was either on leave or off-duty he never produced any evidence to vouch for this.

14. To this extent the court is satisfied that there existed valid reason for terminating the claimant's service and hereby finds the claim without merit and the same is hereby dismissed with costs.

15. It is so ordered.

Dated at Nairobi this 17th day of May 2019

Abuodha J. N.

Judge

Delivered this 17th day of May 2019

Abuodha J. N.

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge