



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1971 OF 2015

JAFRED A. MUKHWAKU.....CLAIMANT

- VERSUS -

AMERICAN FRIED CHIKEN LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 12th July, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 05.11.2015 in person. The amended memorandum of claim was filed on 04.07.2015 through Eshiwani Ashubwe & Company Advocates. He prayed for judgment against the respondent for:

- a. Salary in lieu of notice Kshs.10, 563.60.
- b. Salary arrears for October 2014 Kshs. 10, 000563.00.
- c. Unremitted NSSF for 28 months x Kshs.400.00, Kshs. 11, 200.00.
- d. Annual leave pay for 16 years Kshs. 169, 017.60.
- e. Work uniform footwear Kshs.192, 000.00; and trouser Kshs.48, 000.00
- f. Compensation for overtime work on holidays Kshs.101, 410.56.
- g. House allowance at 15% basic pay for period served 10, 000.00 x 15% x 194 months, Kshs. 291, 000.00.
- h. Underpayment for May 2013 to April 2014 Kshs.6, 763.20.
- i. Underpayment for May 2014 to October 2014 Kshs. 3, 381.60.
- j. Compensation for unfair termination Kshs.10, 563.60 x 12 months, Kshs. 126, 763.20.
- k. Total amount Kshs. 983, 895.04.
- l. Costs of the suit.
- m. Interest on the above prayers.
- n. Any other relief the Court may deem just.

The respondent filed the statement of defence on 29.01.2016 through Othieno & Company Advocates. The respondent prayed that the suit be dismissed with costs. The reply to amended memorandum of claim was filed on 08.11.2016. On 28.10.2016 the respondent changed its advocates to Mudeshi Muhanda & Company Advocates. The claimant filed on 22.05.2017 the response to the respondent's reply to amended memorandum of claim through Eshiwani Ashubwe & Company Advocates.

First, the suit was filed on 05.11.2015. It is not in dispute that the respondent employed the claimant as a chef on 07.08.1998. The claimant has pleaded that he was dismissed sometimes in October 2014. The claimant testified that the termination was at end October 2014. The Court returns that the claims for unremitted NSSF, house allowance, working uniform, compensation for overtime, annual leave and underpayment were all continuing injuries and the suit was filed on 05.11.2015 after the lapsing of 12 months of limitation (being 12 months from cessation of the continuing injuries) as envisaged in section 90 of the Employment Act, 2007. That being the case, the Court returns that the cause of action in respect of the continuing was time barred and the Court will not delve into the merits as they will fail accordingly.

Second, was the claimant unfairly terminated? The claimant testified that in October 2014 the boss came with a letter and told the claimant that he wanted the claimant to accept Kshs.50, 000.00 for service pay and then they separate. The claimant testified that he declined the offer and the boss told him to go away so that he stood terminated. The respondent's witness (RW) testified that the respondent sold its restaurant at Prestige Plaza to Souk East Africa Limited. Clause 3.2 of the purchase agreement stated that it was the purchaser's obligation to engage and employ, at the purchaser's sole discretion and terms, the employees of the respondent that the purchaser was desirous of employing following the termination of their employment with the respondent. RW testified that the claimant was one such employee that opted to be employed by the respondent especially that the claimant knew the recipe of the floor the respondent used in preparation of the coating for the chicken that was sold at the restaurant – and the purchaser felt it would save costs by engaging the claimant to do the floor rather than buying the same from the respondent. Thus the claimant had opted not to be paid like the other workers and he decided to work for Souk, the purchaser of the restaurant business. RW testified that a year later, the Souk terminated the claimant's service on account of alleged theft and the claimant moved to file the present suit against the respondent.

The Court has considered the parties' evidence. It is clear that the claimant has not given details of the date he was terminated and there is no explanation he has given for the lapsing of about one year prior to filing of the suit – aiding the evidence by RW that it was only after the dismissal by the purchaser of the restaurant that the claimant then sued the respondent. The evidence by RW is coherent and consistent and there is no reason why the same should be doubted. It is clear that the claimant continued to work at the same restaurant but then owned by the purchaser and the claimant had no basis to sue the respondent after he was dismissed by the purchaser of the restaurant business. The allegations of unfair termination in that regard will fail and the prayer for notice pay and compensation are found unjustified. The Court finds that the respondent transferred business and the claimant opted to move to the new employer in that circumstance along with the purchaser of the business. As for pay in the last month worked the claimant had signed confirming he had been paid all his outstanding dues from the respondent and had testified that he had no issue with NSSF contributions suggesting that all deductions and contributions had been made including up to the last month served.

In view of the margins of the parties' success including the Court's taking up of the issue of time barring of its own motion, each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the claimant's suit by way of the amended memorandum of claim with orders that each party will bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 12th July, 2019**.

BYRAM ONGAYA

JUDGE