



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 130 OF 2015

MARTIN MUSIEGA CHAGALI.....CLAIMANT

VERSUS

ALHASHMI RESTAURANT LTD.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 11th March 2015 and amended on 21st September 2015, the Claimant sued the Respondent for compensation for unlawful termination of employment and payment of terminal dues. The Respondent filed a Statement of Defence on 30th March 2015.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called Sayed Abid Ali Hashmi. Both parties further filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent in August 2014, in the position of Accountant/Supervisor. He earned a monthly salary of Kshs. 18,000. He claims that after one month, he was assigned additional duties, including customer care and stock control.
4. On 15th February 2015, the Claimant was allowed to go off duty and upon his return on 22nd February 2015, he was told to go for a further one week. On 24th February 2015, his employment was terminated.
5. 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. 18,000
- b) Overtime compensation.....126,000
- c) Public holidays worked and not paid.....7,200
- d) Compensation for unlawful termination.....216,000
- e) Costs

The Respondent’s Case

6. In its Statement of Defence dated 30th March 2015 and filed in court on even date, the Respondent states that the Claimant was employed on 15th November 2014, on a daily wage of Kshs. 400 plus overtime of Kshs. 200.
7. The Respondent further states that the Claimant disappeared from work on 15th February 2015 and stayed away for one week without permission, excuse or notice. The Respondent therefore decided to employ someone else to replace the Claimant.

Findings and Determination

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

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

9. The Claimant states that his employment was terminated on 24th February 2015, soon after his return from authorised off duty.

10. In his witness statement dated 30th March 2015, the Respondent’s witness, Sayed Abid Ali Hashmi states that the Claimant was replaced after he disappeared from duty without permission on 15th February 2015. Hashmi further testified that by the time the Claimant reported back on 22nd February 2015, someone else had been employed in his place.

11. Taking the evidence on record in its totality, it seems evident that the Claimant took some days off but reported back, only to find his job taken by someone else. Assuming that the Claimant’s absence was not authorised, the Respondent ought to have notified him that he would be replaced if he did not report back to work.

12. In the absence of any such notice, the only conclusion is that the Respondent terminated the Claimant’s employment without justifiable cause as required under Section 43 of the Employment Act and in violation of the mandatory due procedure established under Section 41 of the Act.

13. Consequently, the Court finds and holds that the termination of the Claimant’s employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

14. Pursuant to the foregoing findings, I award the Claimant three (3) 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 process.

15. I further award the Claimant one (1) month’s salary in lieu of notice.

16. The claims for overtime compensation and public holidays worked were not proved and are dismissed.

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

- a) 3 months’ salary in compensation.....Kshs. 54,000
- b) 1 month’s salary in lieu of notice.....18,000
- Total.....72,000**

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

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

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2019

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JUDGE

Appearance:

Mr. Gekonde for the Claimant

Mr. Okanga for the Respondent