



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 853 OF 2017

RAJAB CHARO KATHENGE.....CLAIMANT

VERSUS

IBRAHIM SHEIKH T/A GULSHAM RESTAURANT.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Rajab Charo Kathenge against Ibrahim Sheikh trading in the name of Gulsham Restaurant. The claim is documented by a memorandum of Claim dated 10th November 2017 and filed in court on 13th November 2017. The Respondent filed a Response on 27th March 2018.

2. The matter came up for hearing on 18th March 2019, when the parties testified presented their evidence. They subsequently filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a cleaner from 6th January 2004 until 16th July 2017. He earned a daily wage of Kshs. 500.

4. The Claimant avers that on 16th July 2017, the Respondent’s Manager, Abdul Hakim told him not to report work on allegations that 2kgs of maize flour had gone missing from the Restaurant. He states that he was not given an opportunity to respond to the allegations.

5. The Claimant accuses the Respondent of unlawful and unfair termination of employment. The Claimant further states that for the entire period of his employment with the Respondent, he never went on leave and was not paid house allowance.

6. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 15,000
- b) Leave allowance for 3 years.....45,000
- c) House allowance for 163 months.....366,750
- d) Public holidays (137).....137,000
- e) Overtime.....628,125
- f) 12 months’ salary in compensation.....180,000
- g) Certificate of service
- h) Costs plus interest

The Respondent’s Case

7. In his Response dated 23rd March 2018 and filed in court on 27th March 2018, the Respondent states that the Claimant started working for him as a casual labourer in April 2012 and not January 2004.

8. The Respondent denies terminating the Claimant's employment and adds that the Claimant disappeared on 15th July 2017, after being questioned about one bundle of maize flour that was found missing from the store.

9. The Respondent avers that Abdulhakim who the Claimant mentions as having terminated his employment is an employee of Hass Petroleum (K) Ltd in Nairobi and not a Manager of the Respondent. The said Abdulhakim therefore had no authority or power to hire or fire any of the Respondent's workers.

10. The Respondent explains that he continued remitting the Claimant's National Social Security Fund (NSSF) dues up to the month October 2017 because he was not aware that the Claimant was not reporting to work.

Findings and Determination

11. 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?

12. Section 47(5) of the Employment Act, 2007 provides as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

13. In *Omar Ndaro Zuma v Modern Coast Express [2019] eKLR* this Court held the following:

“The import of Section 47(5) of the Employment Act is that an employee alleging unfair termination or wrongful dismissal must lay before the Court the actual circumstances leading to his exit from employment. It is not enough for an employee to simply say “my employment was unfairly terminated”. They must prove ingredients of the unfair termination or wrongful dismissal.”

14. The Claimant testified that on 16th July 2017, he was told by the Respondent's son/Manager, Abdulhakim not to go back to work because 2kgs of maize flour had gone missing. Testifying before the Court, Abdulhakim denied ever serving as a Manager at his father's Restaurant. He told the Court that he had no authority to terminate the employment of the Claimant who was his father's employee.

15. The Court observed Abdulhakim's demeanour and found no reason to disbelieve him. The converse is that the Court rejects the Claimant's account as untruthful and therefore finds that he has failed to discharge his burden under Section 47(5) of the Employment Act. The claims for compensation and notice pay therefore fail and are dismissed.

Other claims

16. Regarding the claim for leave pay, the Respondent did not produce any records to show that the Claimant actually went on leave. This claim therefore succeeds and is allowed.

17. The Claimant further claims house allowance. He however pleads that he earned a daily wage, which would ordinarily be inclusive of house allowance. The claim for house allowance therefore also fails and is dismissed.

18. The claims for overtime and public holidays were not proved and are dismissed.

19. In the end, I enter judgment in favour of the Claimant in the sum of **Kshs. 31,500** being leave pay for three (3) years.

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

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

22. Orders accordingly.

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

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JUDGE

Appearance:

Mr. Tolo for the Claimant

Mr. Odongo for the Respondent