



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 65 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

**JOHN OMOM ONYANGO.....CLAIMANT**

**VERSUS**

**POLYVIEW HOTEL LIMITED.....RESPONDENT**

**JUDGMENT**

1. The suit was filed on 25<sup>th</sup> February 2015 by the claimant who was employed by the respondent as an accountant by a letter dated 1<sup>st</sup> June 2006.
2. The claimant worked continuously for the respondent until his employment was terminated by the respondent by a letter dated 1<sup>st</sup> September 2014 due to issues of lack of ethics and incompetence.
3. It is not disputed by RW1, Nicholas Ogwenyo Nyasoro, the Managing Director of the respondent's company that the respondent did not serve the claimant with a notice to show cause to explain the alleged lack of ethics and incompetence. RW1 also admitted in his testimony that the claimant was not called to a disciplinary hearing to explain the allegations made against him.
4. RW1 also admitted that the claimant was entitled upon termination of employment to payment of gratuity calculated at the equivalent of one month salary for each completed year of service. RW1 testified that the claimant had served the respondent for eight (8) years.
5. RW1 further testified that the letter of appointment provided for three months' notice before termination of employment or one month's pay in lieu of termination notice.
6. RW1 further admitted that no Audit report was made or produced in respect of alleged lack of ethics and incompetence. RW1 further admitted that the alleged lack of ethics and incompetence was not explained in the letter of termination.
7. RW1 also admitted that the claimant was not granted leave stating that any leave not taken was forfeited. It is necessary to set out at the outset the admissions made by RW1 in respect of the case by the claimant who testified that his employment was terminated for no valid reason and that the respondent did not follow a fair procedure in terminating his employment. The claimant prays for the equivalent of 12 months' salary in compensation for the unlawful and unfair termination of employment; payment in lieu of three months' notice; gratuity calculated at one months' salary for each completed year of service; payment in lieu of leave days not taken for 8 years; one day salary for 15<sup>th</sup> September 2014 and overtime allowance in the sum of Kshs. 100,000.
8. The claimant further seeks provision of certificate of service which was not granted to him.
9. It is not in dispute that the claimant earned Kshs. 13,000 per month in terms of the letter of termination.

**Determination**

10. The issues for determination in this suit are:

- (a) Whether the employment of the claimant was terminated for a valid reason following a fair procedure.

(b) Whether the claimant is entitled to the reliefs sought.

**Issue (a)**

11. The court outlined at the outset the admissions made by RW1 to curtail depth of evidential analysis and evaluation in the judgment on matters which have not been placed in dispute by the respondent.

12. From the testimony by the claimant and the admissions made by RW1, the claimant has established on a balance of probabilities that he served the respondent diligently in the position of an accountant for a period of eight (8) years. That on 1<sup>st</sup> September 2014, the claimant received a letter of termination which was not preceded by a notice to show cause nor holding of a disciplinary hearing in violation of *Section 41 of the Employment Act 2007*.

13. That the respondent did not provide a precise valid reason for the termination of employment. That the termination was without notice and the claimant was not paid in lieu of notice upon termination. The claimant was not paid terminal benefits which RW1 readily admitted the respondent owes him. The claimant was not given a certificate of service to enable him to seek alternative employment.

14. The court finds that the termination of the employment of the claimant was in blatant violation of *Sections 36, 41, 43 and 45 of the employment Act 2007*. The termination was unlawful and unfair and the claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Employment Act*.

15. In this regard, the court finds several aggravating circumstances in this case including that the claimant did not contribute to the termination; the respondent did not notify the claimant before terminating his employment. The claimant had served the respondent diligently for a period of 8 years. The claimant was not provided a certificate of service to enable him to move on with his life.

16. The claimant was not paid any terminal benefits which RW1 admitted it owed the claimant. The claimant lost career advancement and suffered loss and damage.

17. The claimant held position of company accountant and was paid a meagre salary of Kshs. 13,000 per month.

18. The court finds this an appropriate case to award the claimant the equivalent of 12 months' salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs. 156,000.

**Terminal benefits**

19. The court further finds that the claimant is entitled to and has proved the following claims on a balance of probabilities.

(a) Three (3) months' salary in lieu of notice. The letter of appointment clearly provided for the giving of three (3) months' salary in lieu of notice before terminating the employment of the claimant. The claimant was not given any termination notice. The court awards the claimant the equivalent of three months' salary in lieu of notice in the sum of Kshs. 39,000.

**Arrear salary**

20. The claimant was not paid salary of one day worked on 15<sup>th</sup> September 2014 in the sum of Kshs. 433.33 and the court awards him accordingly.

**Gratuity**

21. RW1 admitted that it owed the claimant gratuity calculated at the rate of one month salary for the 8 years worked by the claimant. The court awards the claimant Kshs. 110,000 in respect thereof.

**Untaken leave days**

22. RW1 admitted that it never granted the claimant leave for the entire period he worked for 8 years. The court finds that the claimant is entitled to payment in lieu of leave days not taken in the sum of Kshs. 110,000.

**Overtime allowance**

23. The claim for overtime allowance has not been proved and is dismissed.

**Certificate of service**

24. The respondent is admonished for failure to provide the claimant with a certificate of service and is directed to provide the certificate of service to the claimant within 14 days of the judgment.

25. In the final analysis, judgment is entered in favour of the claimant against the respondent in the sum of Kshs. 415,433.33

26. Interest at court rates from date of filing suit till payment in full.
27. Costs of the suit
28. Certificate of service be provided to the claimant within 14 days of this judgment.

**Judgment Dated, Signed and delivered this 18<sup>th</sup> day of September, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Kowino for claimant

M/S Oluoch for respondent

Chrispo – Court Clerk