



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1245 OF 2015

THOMAS MBULO NZOLA.....CLAIMANT

VERSUS

COMTECH INTERNATIONAL LIMITED.....1ST RESPONDENT

ANDREW SOLOMON.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 17.07.2015 through S.K. Opiyo & Company Advocates. The claimant's case is that the respondents verbally employed him as a waiter from 01.03.2013 until 21.05.2015 when he was terminated from employment without notice and without terminal dues. His further case is that he was underpaid at a gross of Kshs.14, 000.00 (less by Kshs.2, 100.00 house allowance) instead of Kshs.16, 100.00 per month. The claimant prayed for:

- a) Payment of a sum of Kshs. 541, 667.00 being:
 - i. 12 months compensation $Kshs.14, 000.00 \times 12 = Kshs.168, 000.00$.
 - ii. A month's pay in lieu of notice $Kshs.14, 000.00$.
 - iii. Prorate one year leave 24 days $\times 539 = Kshs.11, 310.00$.
 - iv. House allowance at 15 % of 14, 000 = $Kshs.2100 \times 24 = Kshs.50, 400.00$.
 - v. Severance pay for 2 years 30days $\times 539 = Kshs.28, 028.00$.
 - vi. Public holidays for 2 years $\times 26 \text{ days} \times 2 \times 539 = Kshs.28,028.00$.
 - vii. Overtime week days 4hrs $\times 1,5 \times 6 \times 24 \times 70 = Kshs.241, 920.00$.
 - viii. May 2015 salary $Kshs.14, 000.00$.
- b) Interest at 12% per annum from the date of filing the suit until payment in full.
- c) Any other award or benefit the Honourable Court deems fit to grant in the circumstances of the case.
- d) Costs of the suit.

The memorandum of reply to claim was filed on 08.09.2015 through Kittony Waiyaki Advocates. The 1st respondent admitted that it employed the claimant from 01.03.2013 to 21.05.2015. The 1st respondent pleaded that the claimant was summarily dismissed by letter and effective 21.05.2015 on account of several cases of incompetence on various occasions and groupings with other waiters as he chatted while on duty. That he had been verbally warned on previous occasions without improvement and one such case and which was witnessed by the manager was on 21.05.2015 in the evening in which a guest was seeking the claimant's attention but the claimant and his colleagues could not notice because they were busy chatting. The client complained because she could not be noticed and she felt neglected. Thus, the claimant was summarily dismissed on account of that gross misconduct.

The **1st issue** is whether the dismissal was unfair and entitling the claimant to 12 months' salaries in compensation as prayed for. The claimant testified that on the afternoon of 21.05.2015 he was on duty and he was assigned to share things in the menu with waiters who were not familiar with some items. Calvin Oyoo was the Manager and the claimant testified that he acted as assigned. Thereafter Oyoo approached the claimant and told him that he was chatting with the waiters who were casuals. The manager asked the claimant to remove the uniform and asked the guards to escort him out of the premises. On 22.05.2015 the claimant went back and he was given an envelope; the letter of summary dismissal. The claimant testified that he had not been given a warning to stop chatting with other waiters. In cross-examination he contradicted himself and stated that he went back on 23.05.2015 and not 22.05.2015 because he was told to go back in 2 days.

The respondent's witness (RW) was the Manager Calvin Osimbo Onyango. He met the claimant when the 1st respondent had a function, engaged him as a casual and later absorbed him in the 1st respondent's establishment as a waiter. The claimant worked for around 2 years until 21.05.2015. On 21.05.2015 about 2.00pm there was a table occupied by 4 customers. The morning shift waiter handed over to the claimant with his team of 3 casual waiters. The claimant and the 3 casuals were standing a few metres on RW's right hand. The claimant gathered the 3 casual waiters and was chatting about politics for some minutes. Something suddenly went wrong because the customers wanted service and the claimant was engaged and engrossed in the chatting with the 3 casuals and without attending to the customers. The customer used a folk and glass to ring for attention and RW walked to the claimant and 3 casuals - the claimant was leading in the chatting. The customer became annoyed and refused to order for more drinks. The customer paid the bill and lamented that the restaurant was empty yet the waiters were busy chatting without serving the only customers present. RW testified that he had given the claimant verbal warnings previously and this time round he was summarily dismissed by letter. He disappeared that afternoon because maybe he did not want to receive the dismissal letter.

The Court has carefully considered the evidence. The claimant does not deny the events of 21.05.2015 leading to his dismissal. He only laments that he was not given a notice. There is no reason to doubt the evidence of RW on account of the events of the afternoon of 21.05.2015. The Court finds that the claimant engaged and engrossed in chatting and failed to attend to the customers. That was in presence of RW, the manager. Whereas a notice and a hearing under section 41 of the Employment Act, 2007 is mandatory, in the instant case the respondents have proved that the gross misconduct was in the presence of RW and the Court finds that the omission of a notice and a hearing did not result in any manifest injustice because the reason for termination was apparent and was proved before Court. The Court finds that the dismissal of the claimant was not unfair and even if it was for want of a notice and a hearing, the respondents have established that the claimant fully contributed to his dismissal when he failed to attend to the customers as his core role.

The **2nd issue** is whether the claimant is entitled to the remedies as prayed for. The Court returns that the claimant is not entitled to compensation because the termination was not unfair or he fully contributed to the dismissal. The prayer for one month pay in lieu of notice will similarly fail. The parties agreed on consolidated pay of Kshs.14, 000.00 per section 31(2) (a) of the Employment Act, 2007 and the prayer for house allowance or underpayment will collapse. The prayer for annual leave will succeed and the Court awards the claimant **Kshs.11, 310.00** as prayed for. The severance pay under section 40 of the Act will fail as it was not a redundancy case. He is awarded 21 days worked **Kshs.9, 800.00** and as admitted for the respondents. RW testified that he did not know if the claimant worked on public holidays and if he was paid. The Court has considered no leave was given and in view of the respondent's enterprise, on a balance of probability the claimant would be entitled to pay on public holidays but the memorandum of claim gave no particulars of the days and the prayer will fail. The position that if he worked he was paid as per RW will prevail in that regard. Similarly the prayer for overtime on weekdays will fail as the claimant was paid agreed salary for hours worked and there was no evidence of a grievance on house allowance, overtime pay and pay on public holidays prior to the dismissal. The Court has considered the parties' margins of success and the claimant is awarded part of the costs fixed at **Kshs.15, 000.00**.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) Payment of **Kshs.36, 110.00** by 01.12.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- b) Decree to issue accordingly.

Signed, dated and delivered in court at **Nairobi** this **Friday, 25th October, 2019**.

BYRAM ONGAYA

JUDGE