



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 566 OF 2015

JOSEPH MWERO KILIMBO.....CLAIMANT

v

M. MANJI t/a AMERICAN DELIGHTS.....RESPONDENT

JUDGMENT

1. In a *Statement of Claim* lodged in Court on 10 April 2015, Joseph Mwero Kilimbo (Claimant) stated the Issues in Dispute as Unfair and unlawful termination of the Claimant, Joseph Mwero Kilimbo from his employment and refusal to pay him his terminal benefits.
2. M. Manji t/a American Delights (Respondent) filed a *Response and Counterclaim* on 29 May 2015. He denied therein that there was unfair termination of employment by contending therein that the Claimant deserted work after getting sick-leave.
3. The Respondent counterclaimed for 1 month salary in lieu of notice.
4. The Claimant filed *Proposed List of Issues* on 7 June 2018, and the Respondent filed its *Proposed List of Issues* on 21 December 2018.
5. The Cause was heard on 28 January 2019 and on 27 June 2019. The Claimant testified on his own behalf while the Respondent called two witnesses.
6. The Claimant filed his submissions on 24 July 2019 while the Respondent filed its submissions on 16 September 2019.
7. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

8. The Claimant testified that the Respondent's Managing Director terminated his employment on 22 November 2014 without notice or a hearing after he fell ill and sought for sick leave but was denied.
9. He produced medical records.
10. When cross-examined, the Claimant denied that he deserted work but admitted that one Patrick Lutsaria was his former colleague. He also admitted that the said Patrick called him on phone when he did not appear at work. The Claimant, however, denied having secured alternative work at a barbeque restaurant at Skymill during the time he was alleged to have deserted/been ill.
11. The Respondent's Managing Director on his part stated that the Claimant called in sick on 22 November 2014 and he granted him permission to be away and that after 3 days, he asked another cook, Patrick Lutsaria to establish where the Claimant was.
12. According to the witness, Lutsaria told him that the Claimant had indicated he would not report back to work and that the next thing he received was a demand letter from the Claimant's advocates.
13. The witness denied that he terminated the Claimant's contract.
14. The Respondent's second witness was Patrick Lutsaria. He stated that he was a cook and worked with the Claimant in the kitchen.

15. The witness testified that the Claimant left to seek medical attention and that when he did not report back, the Respondent's Director asked him to establish the Claimant's whereabouts.

16. Upon calling the Claimant, the witness stated that the Claimant told him he would not report back to work. He also stated that he found the Claimant working at another restaurant.

17. The Claimant did not suggest that there was any bad blood between him and Patrick Lutsaria. He did not challenge Lutsaria's testimony that he informed him that he would not report back to work or that he was working at another restaurant when he was supposed to be recovering after securing sick leave.

18. The Court is, therefore, unable to agree with the Claimant that his employment was unfairly terminated as there is evidence that the Claimant voluntarily left employment.

19. Compensation and pay in lieu of notice are therefore not available as remedies.

Breach of contract

Days worked

20. The Claimant sought Kshs 12,694/- being earned wages. The Claimant was entitled as of right to the earned wages, and because the Respondent did not indicate the wages were paid, the Court will find for the Claimant.

Underpayments

21. On account of underpayments, the Claimant sought Kshs 69,750/- which he pleaded covered 31 months.

22. The Claimant's gross wage was Kshs 15,000/-. He did not disclose during testimony whether that wage was below any prescribed/gazetted minimum wage. The Court finds that this head of the claim was not proved.

Leave

23. Annual leave is a statutory entitlement.

24. The Claimant did not lay any evidential foundation for this head of the claim either in the filed witness statement or during testimony. He was content with merely stating, *I never went on annual leave*.

25. Without disclosing whether he applied for annual leave and/or whether such leave was denied or the periods the leave related to, the Court finds no sufficient evidential basis for this head of claim and declines to award the relief sought.

Overtime

26. In respect of overtime pay, the Claimant sought Kshs 185,256/-.

27. Overtime pay is in the nature of special damages, and wherein an employee may not be expected to prove to the last cent the overtime hours worked and/or overtime pay due, some evidential/legal foundation is necessary.

28. The Claimant did not draw the attention of the Court either during testimony or in the submissions to the particular *Regulation of Wages Order* applicable to the sector the Respondent operated in and/or the prescribed minimum working hours in the sector.

29. The relief is therefore declined.

Gratuity

30. The Claimant sought Kshs 17,250/- as gratuity. His evidence that he was not a member/contributor to the *National Social Security Fund* was not rebutted and the Court will allow the head of claim.

Certificate of Service

31. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days.

Counterclaim

32. The Court has reached a conclusion that the Claimant voluntarily left work. He did not give notice. He is therefore liable to the Respondent for the equivalent of 1 month salary in lieu of notice in the sum of Kshs 15,000/-.

Conclusion and Orders

33. The Court finds that the Claimant failed to prove unfair termination of employment, but nevertheless awards him

(a) Gratuity Kshs 17,250/-

(b) Earned wages Kshs 12, 694/-

TOTAL **Kshs 29,944/-**

34. Judgment is also entered for the Respondent in the sum of Kshs 15,000/-.

35. After reconciliation, the Court orders the Respondent to pay the Claimant Kshs 14,944/-.

36. Respondent to issue a certificate of service within 15 days.

37. No order as to costs.

38. The Court regrets that it could not issue this judgment as scheduled on 27 September 2019 due to other official engagements.

Delivered, dated and signed in Nairobi on this 11th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr Nyabena instructed by Nyabena Nyakundi & Co. Advocates

For Respondent Mr Kisinga instructed by Mohamed Madhani & Co. Advocates

Court Assistant Lindsey