



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 690 OF 2017

FREDRICK OSEWE ACHIEGO.....CLAIMANT

VERSUS

ISINYA RESORTS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Fredrick Osewe Achiego and Isinya Resorts Limited. The Claimant's claim is by way of Memorandum of Claim dated 25th August 2017 and filed in court on 29th August 2017. The Respondent's defence is contained in a Response dated 20th September 2017 and filed in court on the same date.

2. At the trial, the Claimant testified on his own behalf. The Respondent called its Human Resource Manager, Lucas Otieno Oningu and Financial Controller, Peter Mutuku Kiilu. The parties further filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in the position of Chief Accountant from 20th March 2017 until 5th July 2017, when his employment was terminated. He earned a monthly salary of Kshs. 135,949.

4. The Claimant avers that the termination of his employment was unlawful and unfair in that there was no valid reason for it and he was not allowed an opportunity to be heard.

5. The Claimant therefore claims the following:

- a) Notice pay.....Kshs. 135,949
- b) Leave pay for 6 days.....27,189
- c) Salary for 11 days worked in July 2017.....49,847
- d) 12 months' salary in compensation.....1,631,388
- e) Costs plus interest

The Respondent's Case

6. In its Response dated 20th September 2017 and filed in court on the same date, the Respondent admits that the Claimant was its employee from 20th March 2017 until 5th July 2017, holding the position of Chief Accountant.

7. The Respondent states that during his employment, the Claimant committed acts of misconduct for which he was reprimanded by the management. The Respondent points out that the Claimant failed to submit daily reports as instructed by the Director.

8. The Respondent's case is that the Claimant's claim is not properly before the Court because at the time of termination, he was serving

probation. In pursuing this point, the Respondent relies on Sections 45(3) and 47(6) of the Employment Act.

9. The Respondent goes on to state that the Claimant refused to acknowledge receipt of a warning letter issued to him by management.

10. The Respondent adds that prior to his dismissal, the Claimant was subjected to due disciplinary process commencing with an offence sheet and show cause letter. He was subsequently issued with a warning letter and a dismissal letter. The Claimant's appeal was considered on 15th July 2017 and the dismissal upheld.

11. The Respondent states that it is willing to pay the Claimant 15 days' pay in lieu of notice and to issue him with a certificate of service.

Findings and Determination

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

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

The Termination

13. On 4th July 2017, the Respondent wrote to the Claimant as follows:

"Dear Sir,

SUMMARY DISMISSAL

Our Ref: IRs/HR/002i/SH.C/17 to you dated 4th July 2017 and our follow up mail refers (sic). You failed and/or refused to sign a Warning Letter issued to you by the employer even after having been allowed sufficient time to re-evaluate your position. You declared in your letter a confirmation that you refused to sign the letter; reference to your signed letter titled "RE: WARNING LETTER" dated 30th May 2017, in the introductory paragraph and we quote "...I decline to accept your decision to reprimand me...." Subsequently, on 4th July 2017, you acted disrespectfully to a person placed in authority over you by the employer and in a manner construed to undermine the position of the Hotel Manager.

*Your above commission and/or omission cannot be tolerated. For the short period of about **only three (3) months** service with us, we regret to note various misconducts from you. Your services are therefore dismissed (sic) with immediate effect for the following reasons:*

1. Refusal to sign a Warning Letter issued to you by the employer

2. Insubordination

Please clear with your department and the Hotel to enable the Finance Department to prepare your final dues which you will be advised on when to be paid thereafter. You will be entitled to the following:

(a) Days worked up to and including 5th July 2017

(b) Pro-rata leave earned but not taken up to 5th July 2017

(c) Certificate of service

Kindly note: from the date of receiving this letter, you will be entitled to appeal to the undersigned within five (5) days.

Yours faithfully,

for: ISINYA RESORTS LTD

(Signed)

OTIENO O. LUCAS

Group Human Resources Manager"

14. By this letter, the Respondent accuses the Claimant of refusal to sign a warning letter and insubordination. The Claimant admitted having failed to sign the warning letter dated 29th May 2017, because he did not agree with the accusations made against him in the said letter. By

his letter dated 30th May 2017 addressed to the Respondent, the Claimant explained why he did not sign the warning letter.

15. In his testimony before the Court, the Respondent's Group Human Resource Manager, Lucas Otieno Oningu affirmed that had the Claimant signed the warning letter, he would have admitted the accusations made against him therein. The Respondent's second witness, Peter Mutuku Kiilu who had been issued with a similar warning letter told the Court that although he signed his own letter, he was not happy with its contents.

16. A warning letter is itself a summative disciplinary action which must be issued pursuant to due disciplinary process. Apart from an unsigned Offence Sheet dated 24th May 2017, the Respondent did not present any proof of any due process followed before issuance of the subject warning letter to the Claimant.

17. Consequently, the action of issuing the warning letter was itself unlawful and unfair. Further, the charge of failure to sign the warning letter was not presented to the Claimant for response at the shop floor as required under Section 41 of the Employment Act.

18. Ultimately, the Court finds and holds that the termination of the Claimant's employment was unlawful and unfair and he is entitled to compensation.

Remedies

19. Before making the final award in this matter, I need to deal with the question whether at the time the Claimant's employment was terminated, he was serving probation, which would disentitle him from bringing his claim by virtue of Section 47(6) of the Employment Act. Clause 2 of the Claimant's employment contract dated 20th March 2017 clearly stipulated that he would serve probation for a period of 30 days, which had lapsed at the time of termination.

20. Regarding Section 45(3) of the Act which appears to lock out employees who have not served for at least 13 months from the procedural fairness requirements of Section 41, the only thing I will say is that I am persuaded by the decision by **Lenaola J** (as he then was) in **Samuel G. Momany v Attorney General & another [2012] eKLR** where the said provision was declared unconstitutional.

21. I therefore find that the Claimant's claim is properly before the Court and award him two (2) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's short stint in employment as well as the Respondent's conduct in the termination transaction.

22. I also award the Claimant one (1) month's salary in lieu of notice. The claims for prorata leave pay and salary for days worked in July 2017 are admitted and are payable.

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

a) 2 months' salary in compensation.....	Kshs. 271,898
b) 1 month's salary in lieu of notice.....	135,734
c) 6 days' prorata leave pay (135,734/30x6).....	27,147
d) Salary for 5 days in July 2017 (135,734/30x5).....	<u>22,622</u>
Total.....	457,401

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

25. The Claimant is also entitled to a certificate of service plus costs of the case.

26. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Okanga for the Claimant

Lucas Otieno Oningu (Group HRM) for the Respondent