



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 671'B' OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JOEL NYABUTI ARICHA.....CLAIMANT

VERSUS

KARIBU HOTEL.....RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant's memorandum of claim dated 17th April 2014 and filed on 25th April 2014. It is the claimant's averment in the memorandum of claim that he was employed by the respondent in the year 2012 as a waiter and general services with a starting salary of Kshs.9,000 per month which was later increased to Kshs.11,000 per month.

The Claimant avers that during the subsistence of the employer-employee relationship with the Respondent he served the Respondent with great loyalty with utmost dedication and diligence until 13th March, 2014 when the Respondent verbally terminated his services without availing to him any reason as for the termination and without notice.

The Claimant further averred that he sought reasons for the termination from the Respondent's director who referred him to the manager who had verbally terminated his services. That the Manager insisted that he leaves the Respondent's premises without availing any explanation. He further contends that despite his request for written communication or notice of termination from the Respondent none was availed to him.

The Claimant contended that during his employment with the Respondent he was never issued with any employment contract or payslips despite several promises by the Respondent to regularize the records. He further contended that he was never paid any commuter allowance or house allowance during the subsistence of his employment contract.

Aggrieved by the decision to unfairly terminate his services, the Claimant filed the instant Claim seeking the following reliefs:-

1. A declaration that the client's termination was unlawful and unfair.

2. The Claimant to be paid his terminal dues and or benefits

- a) Salary in lieu of notice.
- b) Commuter allowance.
- c) House allowances.
- d) Overtime for the months worked.
- e) Underpayment.
- f) N.H.I.F/NSSF.
- g) Leave allowances.

h) Service for the years worked.

i) Termination letter.

3. Damages to the Claimant.

4. The Respondent to be ordered to issue the certificate of service to the Claimant.

5. Costs of this suit.

6. Interest on costs.

The Respondent in its Reply to Memorandum of Claim and Counter claim dated 2nd July 2014 and filed in Court on 11th July 2014 admitted having employed the Claimant but denied that the Claimant worked with diligence during the subsistence of his employment contract.

The Respondent further denied having summoned the Claimant as alleged or verbally dismissing him without any reasonable cause or sufficient reasons. It is contended that the Claimant without any explanation absconded duty from 13th March 2014.

The Respondent denied that it terminated the Claimant's employment as alleged and contended that the Claimant is guilty of absconding duty and is therefore liable to pay for notice which the respondent claims in its counter claim. It is further contended that the Claimant's salary was inclusive of commuter and house allowance. The Respondent prayed that judgment be entered against the Claimant as follows:

1. The Respondent to be paid a one month's salary in lieu of notice.

2. Costs of the suit

The Respondent urged the Court to dismiss the Claimant's Claim with Costs and to allow its counterclaim as prayed.

The matter proceeded for hearing on 5th April 2019 with the Claimant testifying on his own behalf and the Respondent's calling one witness to testify on its behalf. Both parties thereafter filed written submissions.

Claimant's Case

The claimant testified that he was employed by the Respondent from 2nd September 2012 until 13th March 2014 when his services were terminated verbally by the Respondent's manager, one Nancy. He further testified that he did seek clarification from another Manager, one Stanley Kariuki who referred the claimant back to Nancy but he could not access her.

The claimant further testified that he subsequently went to his Advocates on record, who prepared a demand letter on 17th March 2014. He further contended that he was not issued with a termination letter at the time of separation.

He averred that he was only issued with one payslip on 5th March 2014 which confirmed that his salary was Kshs.11,000 and that there were deduction made for NSSF and NHIF. He further contended that as supported by the NSSF statement the Respondent failed to remit the said deductions to the statutory body as well as those to NHIF. He stated that the deductions were only remitted for 8 months during the period of his engagement with the Respondent herein.

The claimant further contended that he was not paid for overtime during the entire period of his employment contract with the Respondent despite working extra hours. He also contended that he did not proceed on annual leave and was equally not paid in lieu thereof.

The claimant denied that he abscond duty as alleged by the Respondent. He stated that he is therefore not liable to pay for notice as prayed in the Counter claim. He urged the Court to allow the Claim as drawn.

On cross examination the claimant stated that his salary of Kshs.11,000 was not a consolidated salary and that the Respondent had verbally promised him that it will pay him commuter allowance. That there was no agreement between himself and the Respondent that the salary would be consolidated.

On further cross-examination, the claimant insisted that his services were verbally terminated on 13th March 2014 by the Respondent's manager, one Nancy.

The claimant further insisted that the Respondent made deductions of NSSF and that the same was not remitted to the statutory body as evidenced by the statement.

Respondent's Case

The Respondent called one witness, JOSEPH KARICHU GACHINE, RW1, an Assistant Supervisor who reiterated the averments made in the Reply to Memorandum of Claim and Counter claim filed herein. He testified that on 13th March 2014 the Claimant was called by the Respondent's Manager inquiring on a missing ETR machine. That the Claimant failed to report to work on the next day as he was informed

that he would pay for the lost ETR machine.

RW1 further testified that the Claimant is not owed any monies as alleged in his Claim and urged this Court to dismiss the same with costs.

On cross-examination, RW1 confirmed that the Claimant's manager/supervisor was one Nancy and that at the time of his employment the Claimant was not issued with a letter of appointment.

RW1 further confirmed that the issue of the lost ETR machine was not mentioned in the Respondent's Reply to the Memorandum of Claim but insisted that the same is not fabricated.

RW1 also confirmed having not been present when the Claimant was allegedly asked to leave work by Nancy. He further confirmed that at no point is the Respondent closed and that members of staff work on shifts.

On further cross-examination RW1 confirmed that the Respondent through its accountant paid the Claimant's NSSF and NHIF deductions to the requisite statutory bodies

On re-examination, RW1 confirmed that the Claimant's NSSF and NHIF were duly remitted as required by law and that it was the Claimant's duty to follow up with the statutory bodies to confirm the same.

RW1 further stated that the Respondent learnt of the Claimant's termination from his demand letter.

Submissions by the Parties

In his submissions the Claimant argued that he did not abscond duty as alleged by the Respondent. He submitted that his services were unfairly and unlawfully verbally terminated by the Respondent's Manager one Nancy without notice or reason for such termination.

The Claimant further submitted that he did not at any time abscond duty and thus the Respondent is not entitled to the counter claim of one month's salary in lieu of notice.

The Claimant urged the Court to allow his Claim as drawn.

Respondent's Submissions

The Respondent on the other hand submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim having absconded duty on 14th March 2014 after he was confronted over a lost E.T.R machine.

The Respondent further submitted that the Claimant has failed to meet the threshold for proving unfair termination as provided under Section 47(5) of the Employment Act, 2007. To buttress this argument the Respondent cited and relied on the cases of *BWK Vs EK & Another (2017) eKLR* and *John Odhiambo Mbeja Vs Fast Track Management Consultants Limited (2018) eKLR*.

The Respondent further submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim and therefore urged the Court to dismiss the same with costs.

The Respondent further contended that it is entitled to payment of one month notice the Claimant having absconded duties on 14th March 2014.

Analysis and Determination

There is no dispute that the Claimant was employed by the respondent from 2nd September 2012 until 13th March 2014 when he alleged to have been verbally terminated from his employment. The issues for determination therefore are:

1. Whether the termination of the Claimant's employment was valid both procedurally and substantively
2. Whether the reliefs sought should be granted
3. Whether the Respondent is entitled to the counter claim

Unfair Termination

Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair where his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employee's conduct, capacity or compatibility and that while arriving at the decision to terminate the services of such an employee fair procedure was followed.

The statutory burden for proof of a complaint of unfair termination of employment or wrongful dismissal is contained in section 47(5) of the Employment Act. The section provides that –

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.

An employee therefore has the burden of proving that an unfair termination of employment has occurred while the employer's burden is to justify the reasons such termination.

The Claimant contended that his services were verbally terminated by the Respondent's Manager, one Nancy on 13th March 2014. He further contended that no reason for the termination was given despite requesting for the same even from the Respondent's Manager by the name Stanley Kariuki.

The Respondent on the other hand averred that the Claimant absconded duties from 14th March 2014 after he had been questioned over a lost E.T.R machine. RW1 went on to state in evidence that the Claimant was asked to pay for the lost E.T.R machine. No evidence was availed by the Respondent to show that it had tried to contact the Claimant after it was alleged that he had absconded duty.

RW1 admitted in his evidence that he was not present when the claimant is alleged to have been verbally dismissed by one Nancy whom he admitted worked for the respondent. His evidence that the claimant absconded duty because he was asked to pay for a lost E.T.R machine does not appear anywhere in the pleadings, of the respondent or in the witness statement of RW1. There is no evidence at all to corroborate the averments of RW1.

Under Section 10(6) as read with 16(7) of the Employment Act, it is the burden of the respondent to disprove the averments of the claimant where it has not produced prescribed records.

Under both Section 10 and Section 74(1) an employer is obliged to keep records of warning letters or other evidence of misconduct of an employee.

Having failed to do so, the court has no option but to accept the claimant's version of events leading to the termination of his employment.

I thus find on the evidence on record that the claimant's employment was terminated verbally without valid reason and without being given an opportunity to defend himself.

In the case of *Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR* the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

In Francis Mbugua Boro –Vs- *Smartchip Dynamics Ltd (2017) eKLR* it was held:

“...It was mandatory for the respondent to conduct a hearing (either through correspondence or face to face) as part of procedural fairness in terms of Section 41(2) of the Employment Act 2007 AND Missing that essential ingredient and a hearing the court teaches the conclusion that the summary dismissal of the claimant was procedurally unfair.”

For the foregoing reasons, I find the termination of the claimant's employment unfair.

Having found that the Claimant's termination was unfair both procedurally and substantively, the Claimant is entitled to the following reliefs:

Salary in lieu of notice

The Claimant is entitled to this relief by dint of Section 36 of the Employment Act, 2007.

Payment for 13 days worked in March 2014

The Claimant in his evidence stated that he worked until 13th March 2014 when his services were verbally terminated. He further stated that he was not paid his salary for the days worked in the month of March 2014.

The Respondent did not dispute this fact. No evidence was tendered indicating payment of the Claimant's salary for days worked in March 2014. I therefore find that the Claimant is entitled to the same.

Compensation for unfair termination – Kshs. 132,000

Having found that the Claimant's termination was unfair he is entitled to compensation under this head. Given the length of service and the fact that he did not contribute by his conduct to his termination and taking into account all the circumstances under which he was terminated, it is my opinion that three month's salary is reasonable compensation and I award him the same

Service Pay for 2 years

This is not payable as the Claimant was a member of NSSF and deductions were made to the statutory body. The Claimant admitted having been a member of NSSF. This is by virtue of the provision of Section 35(6) of the Employment Act, 2007.

The Respondent is further directed to issue the Claimant with a certificate of service as provided under Section 51 of the Employment Act, 2007.

The Claims for commuter allowances and overtime for the months

worked are however dismissed for lack of evidence.

On underpayments, the claimant testified that he was paid Kshs.9,000 which was later increased to Kshs.11,000. The statutory minimum wage for a waiter in September 2012 was Kshs.9,266.30 while in 2013, it was Kshs.10,563.60 excluding house allowance. With house allowance the claimant's salary should have been Kshs.10,656.20 for 2012 and Kshs.12,148.10 in 2013. He was thus underpaid and is entitled to underpayments as follows–

September 2012 to April 2013 at (10,656.20 – 9,000) = 1,656.20	
1,656.20 x 8 months.....	Kshs.13,250.00
May 2013 to March 2014 at (12,148 – 11,000) = 1,656.20	
1,148 x 11 months.....	<u>Kshs.12,629.00</u>
Total	Kshs.25,879.00

Counterclaim

The counterclaim was not accompanied by a Verifying Affidavit to verify the correctness of the averments therein as required under Order 7 Rule 5(a) of the Civil Procedure Rules, 2010. In the circumstances, the counterclaim is fatally defective and ought to be dismissed. In the case of *Bridge-Up Container Services Ltd vs. C.F.C. Stanbic Bank Ltd [2011] eKLR*, it was held that:

“A counterclaim being the document initiating the counter suit against the plaintiff, must of necessity be accompanied by the verifying affidavit, verifying the correctness of the averments contained in the counter-claim. Order 7 Rule 5 (a) of the Civil Procedure Rules 2010 has only reinforced this position by specifically providing for a verifying affidavit. Therefore the filing of the counterclaim without a verifying affidavit renders the defendant’s counterclaim defective.”

Further, in the case of *Priska Onyango Ojuang’ & Another vs. Henry Ojwang Nyabende [2018] eKLR* it was held that:

“where a claim of is commenced through a plaint or counterclaim filed without an accompanying verifying affidavit in accordance with Order 4 Rule 1(2) of Civil Procedure Rules, then such a claim is improperly before the court and is liable to be struck out on the court’s own motion, or on being moved by a party to the proceedings.”

In any event the counterclaim was not proved. The counterclaim is thus dismissed with costs.

In conclusion, the Claimant is awarded the following:

a) Salary in lieu of notice	Kshs.12,148.10
b) Payment for 13 days worked in March 2014	Kshs.6,074. 00
c) Underpayments	Kshs.25,879.00
d) 3 months’ salary compensation	<u>Kshs. 36,444.30</u>
Total	Kshs.80,545.40
e) Certificate of Service	

The amounts shall be subject to statutory deductions.

The Claimant is awarded costs of this suit and interest shall accrue at court rates from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE