



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 632 OF 2013

CHARLES NJENGA KINYUA.....CLAIMANT

VERSUS

EDITH NG'ENDO

BERITHA WAMBUI

T/A HARIDGE INN BAR AND RESTAURANT.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Charles Njenga Kinyua against his former employers Edith Ng'endo and Beritha Wambui, trading in the name and style of Haridge Inn Bar and Restaurant. The claim is contained in a Memorandum of Claim dated 6th May 2013 and filed in court on 7th May 2013.

2. The Respondents filed a Memorandum of Defence and Counterclaim on 13th July 2013. At the trial the Claimant testified on his own behalf and Edith Ng'endo for the Respondents.

The Claimant's Case

3. The Claimant states that he was employed by the Respondents as a Barman/Cashier at an initial monthly salary of Kshs. 2,000 effective 28th December 2002. He adds that his salary was progressively increased up to Kshs. 7,000 as at the time he left employment.

4. The Claimant claims that he was underpaid over the years. He avers that he used to work for 20 hours, five days a week, as well as during public holidays, without overtime compensation.

5. The Claimant pleads that he was unfairly terminated on 9th October 2011 and now seeks the following:

- a) 9 days worked in October 2011.....Kshs. 6,814.30
- b) One month's salary in lieu of notice.....19,685.70
- c) Annual leave for 8 years & 9 months.....146,696.30
- d) Severance pay for 8 years.....79,006.15

- e) Underpayment.....1,116,107.80
- f) 38,640 overtime hours worked on weekdays.....2,826,663.00
- g) 3760 overtime hours worked on holidays.....275,058.45
- h) 12 months' salary in compensation.....236,228.40
- i) Certificate of service
- j) Costs plus interest

The Respondents' Case

6. In their Memorandum of Defence dated 1st July 2013 and filed in court on 3rd July 2013, the Respondents admit having employed the Claimant as a Barman in the month of December 2008. They however deny the claims for underpayment and state that the Claimant was housed.

7. While denying the claim for overtime compensation, the Respondents state that the Claimant worked from 9.00 am to 5.00 pm. They add that the Claimant was compensated with an extra day off, for any public holiday worked.

8. The Respondents deny the Claimant's claim for unfair termination of employment and aver that the Claimant absconded duty in the month of October 2011. The Respondents only heard of the Claimant when they received a letter from the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied (KUDHEIHA) Workers on 19th October 2011.

9. The Respondents maintain that the Claimant had no leave, salary or holiday compensation arrears. They plead that the Claimant is barred by estoppel and time limitation from making the claims contained in the Memorandum of Claim.

10. By way of counterclaim, the Respondents claim the following from the

Claimant:

- a) One month's salary in lieu of notice.....Kshs. 18,000
- b) Money lost under the Claimant's care.....8,288
- c) Damages

Findings and Determination

11. The following are the issues for determination in this case:

- a) The effective date of the Claimant's employment with the Respondents;
- b) Whether the Claimant deserted duty or was unlawfully terminated;
- c) Whether the Claimant is entitled to the remedies sought;
- d) Whether the Respondents have made out a proper counterclaim against the Claimant.

Effective Date of Employment

12. The date when the Claimant began working for the Respondents is in contention. The Claimant gives 28th December 2002 as the effective date of his employment but the Respondents plead December 2008 as the correct date.

13. The law places the responsibility of documenting the employment relationship on the employer. The Respondents having failed to discharge this responsibility left the Court with no alternative but to adopt the Claimant's testimony regarding the effective date of his employment. This is as provided under Section 10 (7) of the Employment Act, 2007.

Desertion of Duty or Unlawful Termination?

14. The Claimant states that the Respondents terminated his employment on 9th October 2011, without justifiable cause and in violation of due procedure. In their defence, the Respondents state that the Claimant deserted duty in June 2011.

15. Desertion is a valid reason for termination of employment but it must be proved. In his final submissions, the Claimant made reference to the decision in *Richard Kiplimo Koech v Yako Supermarket Ltd [2015] eKLR* where it was held that an employer who alleges desertion of duty by an employee must demonstrate attempts made to reach the employee, with a view to seeking an explanation for the desertion. I agree with this position and add that at the very least, the employer is expected to put the deserting employee on notice that termination of employment is being considered.

16. The Respondents did not make any effort to reach the Claimant and the Court therefore rejects their line of defence that the Claimant deserted duty.

The corollary is that the Claimant's plea that he was unlawfully terminated is admitted.

Remedies

17. In light of the finding that the Claimant's employment was unlawfully terminated I award him nine (9) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondents' conduct in the termination process. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for nine (9) days worked in October 2011.

18. Regarding the claim for leave pay, the Claimant testified that he took leave in the year 2005 only but gave no explanation as to what happened to his leave for the preceding years. On a balance of probability, the Court assumes that the Claimant took his leave up to the year 2005 and therefore allows the claim for leave pay for the succeeding years up to the date of termination.

19. In the final submissions filed on behalf of the Respondents, it was submitted that the claim for leave pay was a continuing wrong within the meaning of Section 90 of the Employment Act, 2007. I do not agree. The law as I understand it is that all pending leave is to be paid in cash at the time of termination of employment. This is in line with the holding by the Court of Appeal in *Mary Kitsao Ngowa & 36 others v Krystalline Limited [2015] eKLR* that claims arising from a termination of employment cannot be termed as continuing injury.

20. The claim for severance pay was abandoned in the course of the trial. The claims for underpayment and overtime compensation were not proved and are dismissed.

21. In tabulating the Claimant's claim, the Court will adopt the figure of Kshs. 18,000 pleaded by the Respondents in their counterclaim as the Claimant's monthly salary.

The Respondents' Counterclaim

22. In light of the finding that the Claimant did not desert duty, the Respondents' counterclaim for Kshs.

18,000 being one month's salary in lieu of notice fails and is dismissed. The Claimant however admitted having incurred a shortage of Kshs. 8,000 which is recoverable from his award.

Final Orders

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

a) 9 months' salary in compensation.....	Kshs. 162,000
b) 1 month's salary in lieu of notice.....	18,000
c) Salary for 9 days in October 2011 (18,000/30x9).....	5,400
d) Leave pay for 5 years: 2006-2010 (18,000/30x21x5).....	63,000
e) Prorata leave for 2011: 9 months (18,000/30x1.75x9).....	9,450
Total.....	257,850
Less shortage incurred by the Claimant.....	(8,000)
Amount payable to the Claimant.....	249,850

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

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

26. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI

THIS 9TH DAY OF FEBRUARY, 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Okemwa for the Claimant

Miss Njoroge for the Respondent