



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 119 OF 2016

JOHN OPIYO OYUGI.....CLAIMANT

VS

FLAMINGO BEACH RESORT & SPA.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 30th November 2015 and filed in court on 15th February 2016, the Claimant sued the Respondent for unlawful termination of employment and failure to pay terminal dues.
2. The Respondent filed a Response on 5th January 2017 but did not attend the hearing. The Court therefore heard the Claimant *ex parte* on 17th February 2018.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a waiter from November 2012 until 27th September 2015, when his employment was terminated. The Claimant adds that he was not issued with a letter of appointment.
4. The Claimant's case is that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) Unpaid salary for September 2015.....Kshs. 17,700
- b) Salary in lieu of notice.....17,700
- c) Unpaid leave fore 3 years.....53,100
- d) Compensation at 12 months' salary.....212,400
- e) Costs

The Respondent's Case

5. In its Response dated 4th January 2017 and filed in court on 5th January 2017, the Respondent denies any knowledge of the Claimant as its employee from November 2012 to September 2015.
6. The Respondent's case is that the Claimant was not a regular employee. Rather, the Claimant used to offer his services as a cook, whenever the need arose. The Respondent therefore states that there was no employment contract between itself and the Claimant capable of enforcement by the Court.

Findings and Determination

7. There are two issues for determination in this case:

1. Whether there was an employment contract between the parties capable of enforcement by the Court;
2. Whether the Claimant is entitled to the remedies sought.

Employment Contract?

8. The Claimant states that he was an employee of the Respondent from November 2012 until 27th September 2015 when his employment was terminated. In support of his case he produced a three (3) months' temporary employment contract running from 1st January 2014 until 31st March 2014. The Claimant also produced his pay slip for the month of March 2014.

9. The jurisdiction of this Court is anchored in Section 12 of the Employment and Labour Relations Court Act. In employment disputes such as the one before me, the first question the Court must ask itself is whether there is an employment relationship between the parties.

10. In his testimony before the Court, the Claimant stated that he was employed by the Respondent as a kitchen steward from 1st January 2014 until 27th September 2014. Yet, in his Memorandum of Claim he gave the effective date of his employment as November 2012 and his position as waiter. No explanation was offered for this apparent contradiction.

11. Further, the Claimant made no attempt to prove that he remained in the Respondent's employment beyond the expiry of his three (3) months' contract on 31st March 2014. The Claimant ought to have adduced corroborative evidence to confirm his employment history with the Respondent. Having neglected to do so, the Court finds that he failed to establish an employment relationship between himself and the Respondent upon which he could lay his claim.

12. The result is that the Claimant's entire claim against the Respondent has no leg to stand on and is dismissed with no order for costs.

13. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF FEBRUARY 2018

LINNET NDOLO

JUDGE

Appearance:

Miss Abuodha for the Claimant

No appearance for the Respondent