



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1591 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

**EDWIN ODHIAMBO SINDALA.....CLAIMANT**

**=VERSUS=**

**SAMBA ENTERPRISES LIMITED.....1<sup>ST</sup> RESPONDENT**

**SAMBA RESTAURANT & PUB LIMITED.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. The suit was commenced by a Memorandum of Claim dated 9<sup>th</sup> September, 2015 on the even date.

2. The Claimant seeks the following reliefs:-

- (a) Unpaid salary for the month of September 2012, Ksh.15,000.
- (b) Unpaid house allowance at Kshs.5,000 per month for 4 years Kshs.240,000.
- (c) Unpaid leave for 4 years calculated at 21 days salary for four years.
- (d) Payment for 36 months under suspension for September, 2012 to September, 2015 Kshs.540,000.
- (e) Payment of 11 public holidays per year worked at Kshs.500 per day for 4 years Kshs.22,000.
- (f) Service Pay calculated at 15 days salary for each completed year of service for 4 years Kshs.30,000.
- (g) Equivalent of 12 months salary in compensation for unlawful termination of employment.

3. The Memorandum of Claim and Summons to Enter Appearance were served on the Respondent on 2<sup>nd</sup> October, 2015. The Affidavit of Service dated 8<sup>th</sup> December, 2015 was filed on 14<sup>th</sup> July, 2016.

4. The Respondent did not enter appearance nor file a statement of defence.

5. On 7<sup>th</sup> September, 2016, the court directed that the matter proceed to formal proof on 1<sup>st</sup> December, 2016. The matter however was not heard until 27<sup>th</sup> September, 2017 when the Claimant testified under oath in support of the particulars of claim.

6. The Claimant testified that he was employed by the Respondent as a stock controller at a monthly salary of Kshs.15,000. That the salary was paid in cash and it did not include house allowance.

7. That on 25<sup>th</sup> September, 2012 while working in Nakuru, he was called by the manager, one Daniel Opondo and was given a letter of suspension dated 25<sup>th</sup> September, 2012.

8. The suspension was for under performance and for an indefinite period. That the Claimant inquired what the letter meant and the manager

informed him that he would be informed when to return to work.

9. That the Claimant was not recalled until he filed this suit.

10. The Claimant testified that he was not registered with NSSF and no contribution was done on his behalf. The Claimant prayed he be granted the reliefs sought in the Memorandum of Claim.

11. The Claimant stated that he was wrongly dismissed without any good reason and no fair procedure was followed. The Claimant relied on the Memorandum of Claim and the annexures thereto which he produced as exhibits.

### **Determination**

i. Whether the dismissal of the Claimant was for a valid reason and in terms of a fair procedure.

ii. Whether the Claimant is entitled to the reliefs sought.

### **Issue i**

12. The Respondent suspended the Claimant for an indefinite period by a letter dated 25<sup>th</sup> September, 2012. The letter stated that the suspension was prompted by the Claimant's under performance in the stock control department.

13. The letter further stated –

***“The management will in due course inform you of your reporting date.”***

14. The letter was by one Daniel O. Opondo, General Manager of the Respondent.

15. The term suspension is not defined under section 2 of the Employment Act, 2007. However the term suspension is defined in the Black's Law Dictionary ninth edition as follows –

***“To temporarily keep (a person) from performing a function, occupying an office, holding a job, or exercising a right or privilege.”***

16. It follows that the Claimant was to remain in employment for the entire period he was under suspension until recalled back by the Respondent. The Claimant wrote a letter of demand to the Respondent through Mwakio Kirwa & co. Advocates demanding compensation for dismissal from employment and payment of terminal benefits.

17. It is clear that the Respondent did not give a notice to show cause to the Claimant nor did they call the Claimant to a disciplinary hearing. This violated the provisions of section 41 of the Employment Act, which provides for the procedure to be followed where the Claimant is suspected of misconduct or underperformance.

18. The Claimant did not have a letter of dismissal but the conduct by the Respondent amounted to unlawful constructive dismissal. The minimum notice to be provided by an employer who intends to terminate the employment of an employee in terms of section 38 of the Employment Act, 2007 is one (1) month.

19. Accordingly, the constructive dismissal is deemed to have occurred within one month after the Respondent failed to recall the Claimant back to work. The constructive dismissal was unlawful and unfair and in violation of sections 41, 43 and 45 of the Act, for lack of a valid reason and failure to follow a fair procedure.

### **Issue ii**

20. The next issue is whether the claimant is entitled to the reliefs sought. The court will deal with the items seriatim.

#### **(a) Salary for September, 2012**

The Claimant received the letter of suspension on 25<sup>th</sup> September, 2012 and has proved that he had worked during the month of September and is entitled to payment of Ksh.15,000 arrear salary for the month which the court grants accordingly.

#### **(b) Unpaid House Allowance**

The Claimant did not provide any evidence that he was entitled to house allowance in addition to the kshs.15,000 he was paid monthly. This claim is dismissed for lack of proof.

#### **(c) Unpaid Leave for 4 Years**

The Claimant stated he was not granted leave for the four years he worked for the Respondent. An employee is entitled to a full salary while on leave and the Claimant is awarded Kshs.42,000 in lieu of unpaid leave.

**(d) Payment for 36 months salary while under Suspension.**

The court has found that the Claimant was constructively dismissed when the Respondent did not recall him upon expiry of the minimum statutory notice period under section 38 of the Employment Act which is one month. This claim therefore is reduced to payment of one month salary in lieu of notice in the sum of Kshs.15,000.

**(e) Payment for 11 Public Holidays Worked each Year for 4 Years**

The Claimant stated that he worked during all Public Holidays and was not paid double salary as is required by law. In the absence of any rebuttal from the Respondent the court finds the claim to have been proved on a balance of probabilities and the court awards the Claimant Kshs.22,000 being double payment during public holidays worked.

**(f) Service Pay at 15 days Salary for each completed year of service.**

The Claimant testified that he was not registered with NSSF and no contribution was made on his behalf by the Respondent for the four (4) years he worked. In terms of section 35(5) & (6) of the Employment Act, 2007 the Claimant is entitled to service gratuity as claimed. The court awards the Claimant Kshs.30,000 as claimed.

**Compensation**

21. The court found that the Claimant was unlawfully and unfairly constructively dismissed. In terms of section 49(1)(c) as read with sub-section 49(4) of the Employment Act, the Claimant is entitled to compensation. He kept a clean record at work and was dismissed without notice. He did not contribute to the dismissal and was not paid any terminal benefits upon termination. He suffered loss and damage. He mitigated his loss by getting alternative employment by the time the suit was heard.

22. The court awards the Claimant the equivalent of four (4) months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.60,000.

23. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-

(a) Kshs.15,000 arrear salary for September, 2012.

(b) Kshs.42,000 in lieu of unpaid leave.

(c) Kshs.22,000 for Public Holidays worked and not paid.

(d) Kshs.30,000 Service Gratuity.

(e) Kshs.60,000 in compensation.

Total award Kshs.169,000.

(f) The award in (a) to (d) above is payable with interest at court rates from date of filing suit whereas the award in (e) above is with interest at court rates from date of Judgment till payment in full.

(g) Respondent to pay costs of the suit.

**Judgment Dated, Signed in Kisumu this 15th day of March, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 6th day of April, 2018**

**Maureen Onyango**

**Judge**

**Appearances:-**

Mr. Mwangombe for Claimant

Chrispo: Court Clerk