



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1456 OF 2013

DISMAS OOKO OCHIENG.....CLAIMANT

VERSUS

UPPER HILL RESTAURANT LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th June, 2018)

JUDGMENT

The statement of claim was filed on 09.09.2013 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the dismissal or termination of the claimant's employment was unlawful and unfair and that the claimant is entitled to payment of his terminal dues and compensatory damages.
- b) An order for the respondent to pay the claimant's terminal dues of Kshs. 217, 000.00 plus interest being Kshs15, 000.00 pay in lieu of termination notice; Kshs. 7, 500.00 salary for 16 days in July 2013; pay in lieu of leave for 2012 to 2013 Kshs. 15, 000.00; and 12 months' salaries for compensation Kshs.180, 000.00.
- c) Costs of the suit plus interest thereon.

The memorandum of response and counterclaim was filed on 22.09.2013 through Koceyo & Company Advocates. A reply to response was filed on 05.11.2013. The respondent prayed for dismissal of the claimant's claim with costs and counterclaim for;

- a) Pay in lieu of notice Kshs.15, 000.00.
- b) Damages for breach of contract.
- c) Costs of the suit.

The claimant was employed by the respondent as a security guard effective 11.01.2008. The claimant had lost a sister and he had to attend to the funeral arrangements. Prior to leaving his duty station he had made arrangements for work to go on effectively as per his letter dated 27.06.2013 to the respondent's human resource manager. The practice was that an employee simply notifies the absence and the arrangement for work to go on as planned prior to leaving. Thus the claimant explained that his absence was regular.

On 05.07.2013 the claimant resumed duty and he was summoned by the manager one Gacheru. He was told to go back home because he had been absent without permission. Later one of the respondent's guards delivered to him the letter dated 16.07.2013 stating that his employment had been terminated with immediate effect and he would be paid one month salary in lieu of notice.

The **1st issue** for determination is whether the termination was unfair. It is clear that the claimant was not given a hearing and a notice per section 41 of the employment Act. Further the termination letter did not state the reasons for termination as per section 43 of the Act. The court returns that the termination was unfair. The claimant desired to remain in employment. He had served for a considerable time and promoted to Head of Security. The Court has considered his contributory factors namely the previous warnings. The Court awards him 6 months' for unfair termination making **Kshs. 90, 000.00** and one month in lieu of termination notice **Kshs. 15, 000.00**.

The Court further makes findings as follows:

- 1) The claimant is entitled to **Kshs. 7, 500.00** for 16 days worked in July 2013.

2) The claimant is entitled to leave pay for one year as claimed Kshs. **15, 000.00**.

3) The claims for absconding duty as advanced for the respondent are not established and are clearly inconsistent with the letter of termination dated 16.07.2013. The counterclaim for notice pay of Kshs. 15, 000.00 will fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) The declaration that the termination of the claimant's employment by the respondent was unfair.

b) The respondent to pay the claimant **Kshs.127, 500.00** by 01.08.2018 failing interest to be paid thereon at Court rates till full payment.

c) The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 29th June, 2018**.

BYRAM ONGAYA

JUDGE