



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1585 OF 2012

PIUS NJOROGI GICHUHI..... CLAIMANT

- VERSUS -

HENKAM LIMITED T/A PRINCESS HOTEL..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

JUDGMENT

The claimant filed the amended memorandum of claim on 12.05.2016 through Ombati Otieno & Opondo Advocates. The amended memorandum of claim was deemed duly filed per the Court order of 14.06.2016. The suit was initially filed by the claimant's trade union, Kenya Hotels and Allied Workers Union, by the memorandum of claim filed on 07.09.2012. In the amended memorandum of claim the claimant has prayed for orders:

- a) That the respondent to pay the sums of money tabulated in prayer (c) below.
- b) That the costs of the suit be met by the respondent.
- c) That alternatively, The Honourable Court deem fit to find that the action of the Respondent is unfair and issue a mandatory order compelling the respondent to pay the claimant all his terminal dues plus 12 months' salary compensation for unfair loss of employment as follows:
 - 1) Pay in lieu of notice Kshs. 19, 360.00 basic salary plus 15% house allowance Kshs.2, 940.00.
 - 2) Severances pay half monthly salary for 16 years Kshs.154, 880.00.
 - 3) 12 days worked in June 2012 Kshs. 8, 906.00.
 - 4) Annual leave pay Kshs.22, 798.00.
 - 5) Leave travelling allowance Kshs.60, 000.00.
 - 6) Underpayment Kshs.351, 504.00.
 - 7) 12 months' salary compensation Kshs.267, 168.00.
 - 8) Overtime 148 hours a week for 3 years Kshs.1, 115, 136.00.
 - 9) Total claimed Kshs.1, 930, 656.00.

The response to the memorandum of claim was filed on 08.10.2012 through Munyao, Muthama & Kashindi Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent further counterclaimed for judgment against the claimant for payment of Kshs. 50,000.00 being money lost due to the claimant's careless performance of duty and conversion, and, costs of the suit.

It is not in dispute that the respondent employed the claimant as a glass washer effective 01.01.1996. The claimant's monthly salary and house allowance increases over the years of service. The claimant's case is that as at termination he had been promoted to the position of a cashier at a monthly basic pay of Kshs.12, 500.00 instead of Kshs.19, 350.00 plus 15% of the same as house allowance. The respondent's case is that the claimant was never promoted as alleged but that throughout the service he was retained as a glass washer.

The claimant's evidence was that he gave the respondent's secretary some Kshs.82, 863.00 to bank as was the practice. However, she failed to bank because when she came back from the bank she reported that she had no bank slips. The claimant decided to accompany her to the bank and the bank manager confirmed that she had failed to bank the cash. The secretary then told the claimant that she was going to settle the issue with the employer, the respondent. The respondent required the claimant to write about the incident and the claimant complied. The claimant's explanation is by his letter of 16.09.2011. The claimant testified that a week after the incident, on 22.09.2012, the respondent's management locked him out – so that he stood terminated. His last monthly consolidated pay had been Kshs.12, 500.00. He later received the termination letter dated 09.09.2012. The letter addressed to the claimant and delivered by registered post stated as follows:

“Dear Sir,

Subject: Summary Dismissal

This is to refer to the incident that occurred in June when a sum of Kshs.9, 000.00 (nine thousand shillings) shortage was noted in your cash collection. On 13th June 2012, the undersigned requested you to give an explanation which you did vide your letter received on or about 13th June 2012. Thereafter you have not reported to the place proper and appointed for the performance of your duties, save only to collect the salary for 13 days worked in June.

Failing to report to the place proper and appointed for your duties is an act of gross misconduct punishable by summary dismissal within the meaning of section 44(a) of the Employment Act 2007. You are accordingly so dismissed retroactive to June 13th your last date at work.

Kindly please arrange to do your clearance, return all the company issues in your possession, and the management will calculate your final dues and advise you and the Area Labour Officer by separate letter as per the Law.

Wishing you the best of luck in your future endeavours.

Yours faithfully,

Signed

John Kahigu

For: Henkam Limited

C.c. Area Labour Officer – Nairobi”

The respondent's case is that the claimant failed to surrender revenue he collected from customers on 13.06.2012 and thereafter he disappeared from work as he feared that he would be arrested on a charge of theft. The claimant's undated letter of 13.06.2012 shows that he had taken the respondent's money to pay a doctor's bill and to buy some medicine for his wife who was unwell.

The 1st issue for determination is whether the termination of the claimant's employment was unfair. The evidence is clear. During cross examination the claimant admitted that his last day at work was 13.06.2012 and not September 2012 as per his evidence in chief. He admitted writing the undated letter of 13.06.2012 received by the respondent on 14.06.2012 and admitted that the respondent's cash that got lost and which was in issue was Kshs.92, 863.00. He also admitted signing a letter on how money got lost on 12.09.2011. He also admitted that he took the respondent's money meant for change and he apologised to the respondent in that regard. Finally, the claimant testified that he was paid up to 22.06.2012 – and that evidence was contradictory to his evidence in chief that his last day at work was on 22.09.2012 when he was locked out. The claimant was obviously an incredible witness.

The respondent's account as pleaded is found credible. The claimant disappeared from work on 13.06.2012 for fear of arrest after taking the respondent's money. Accordingly, the reason for termination as given in the termination letter is found valid as envisaged in section 43 of the Employment Act, 2007. Further, the claimant having admitted his misconduct and apologised to the respondent, it cannot be said that due process was not followed because the need for a notice and a hearing as envisaged in section 41 of the Act towards establishing the ground for termination was thereby rendered superfluous. The termination is found not to have been unfair.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court returns as follows:

- a) As termination was not unfair and the claimant engaged in gross misconduct, the prayer for one month pay in lieu of the termination notice will fail.
- b) Section 35(6) of the Act applies and the claimant is not entitled to severance or service pay.
- c) The claimant was paid salary for June 2012 and prayer for 12 days' pay will fail.
- d) The prayer for leave travel allowance was not justified by way of relevant contractual or policy provision.
- e) The evidence was that the claimant served as a glass washer throughout the service. The prayer for underpayment on account of promotion to a cashier or other basis was not justified. It will therefore fail.

f) As the termination was not unfair, the 12 months' pay in compensation purportedly for unfair termination will fail.

g) The respondent offered no evidence or submissions on the counterclaim and the same is deemed to have been abandoned.

In conclusion, judgment is hereby entered for the parties with orders as follows:

1) The claimant's suit is dismissed.

2) The counterclaim is deemed abandoned.

3) Each party to bear own costs of the proceedings.

Signed, dated and delivered in court at Nairobi this Friday 22nd June, 2018.

BYRAM ONGAYA

JUDGE