



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 171 OF 2016

BETWEEN

BRYAN OMONDI JUMA CLAIMANT

VERSUS

THE FOLKS INN HOTEL LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Matete Mwelese & Company, Advocates for the Claimant

Ameli Inyangu & Partners, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 3rd March 2016. He states he was employed by the Respondent Hotel as a Consultant in Marketing, on 1st July 2015. He was later promoted to the position of Hotel Manager, earning a monthly salary of Kshs. 30,000. His contract was terminated by the Respondent through word of mouth, on 15th December 2015. He was not given notice. There was no reason given to the Claimant by the Respondent, to justify the decision. The Claimant prays for Judgment against the Respondent in the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 30,000.
- b) Unpaid pro-rata annual leave at Kshs. 15,000.
- c) 12 months' salary in compensation for unfair termination at Kshs. 360,000.
- d) Balance of July 2015 salary at Kshs. 26,000.
- e) 19 days worked in December 2015 at Kshs. 21,929.
- f) 13 off days worked at Kshs. 15,000.
- g) Unlawful deduction of salary for 6 months at Kshs. 60,000.

Total... **Kshs. 527,929.**

h) Certificate of Service.

i) Costs.

2. The Respondent filed its Statement of Response on 11th April 2016. Its position is that it employed the Claimant in August 2015. His monthly salary was Kshs. 20,000, not Kshs. 30,000. Termination was based on valid grounds. The reasons for termination were

communicated by the Respondent to the Claimant. He was given the opportunity to answer the allegations against him before termination. Termination was fair and lawful. The Claimant was paid all benefits due to him before termination. He had been warned severally before termination. The Respondent states that as of the date of termination, the Claimant was in arrears of rent owed to the Respondent, totaling Kshs. 66,000. He owed a loan amount of Kshs 10,000 and advance of Kshs. 6,500. The Respondent counterclaims a sum of Kshs. 82,500 from the Claimant. The Respondent prays the Court to reject the Claim, and allow the Counterclaim, with costs to the Respondent.

3. The Claimant testified, and rested his case, on 12th July 2017. Respondent's Director, Patrick Kimatu Kioko, testified on 21st September 2017. Respondent's Receptionist, Caren Muola, other Employees of the Respondent namely Alphany Sadiki Katana and Florence Adhiambo Awuor, testified on 27th November 2017 when hearing closed.

4. Juma told the Court he was head-hunted by the Respondent to manage the Respondent Hotel. He previously served another Hotel called Darajani, within Mombasa. The Respondent promised him a salary of Kshs. 50,000 monthly and a house. He never received the amount of Kshs. 30,000 as salary. He was paid Kshs. 20,000 and told Kshs. 10,000 was withheld as rent for the house he lived in. He did not receive full salary. He was told he would have to make deposit for rent and electricity.

5. His contract was terminated on 19th December 2015. The Director Patrick Kioko had visited the Hotel upon invitation by the Claimant. The Claimant had convened a staff meeting. The Director turned against the Claimant, accusing the Claimant of sabotaging his work. Kioko alleged that the Claimant was promoting himself online, at the expense of the Hotel. The allegations against the Claimant were never reduced into writing. He had achieved a lot for the Respondent, placing the Respondent on online booking platform. He increased Respondent's revenue base. It is not true that he harassed any Employee of the Respondent. He did not sexually harass any female Employee. Visitors, including whites, contacted the Hotel through the Claimant. He was the Marketer. He did not demean other Employees in conducting his marketing role. He never told anyone that he was the only Employee conversant in English. The Claimant did not owe the Respondent any rent as counterclaimed. The Claimant concedes he owed the Respondent Kshs. 6,500 in salary advance in December 2015. He owed a loan of Kshs. 10,000 which he paid to the Respondent's Director Kioko, through m-pesa.

6. Cross-examined, Juma told the Court he did not have anything to show he worked at Darajani. At the time of giving evidence, he worked for another Hotel called White Rhino in Mombasa. It is not true that the Claimant applied to join the Respondent on 5th July 2015. He was not offered employment on certain conditions. He was not asked for Certificate of Good Conduct. His appointment was oral. He did not supply evidence showing he had terminated his contract with Darajani.

7. Claimant's monthly salary was Kshs. 30,000. This was given by word of mouth. He worked from July to December 2015. It is not true that the Claimant first worked in August 2015. The payroll for July 2015 does not have Claimant's name. He testified he nevertheless was working at the time. The payroll for August 2015 included Claimant's name. His salary is shown as Kshs. 10,498. This was less certain advances and statutory deductions. The Claimant never received the warning letter dated 19th October 2015 from the Respondent. He did not have a staff meeting on 18th December 2015. He issued disciplinary letters to Employees. He had written to Marietta, such a letter in draft form. The Claimant was not aware of termination letter dated 21st December 2015. He was not heard at any time. He was advanced Kshs. 10,000 by the Respondent around October 2015. He received advance of Kshs. 6,500 in early December 2015. He did not have evidence showing he repaid Kshs. 10,000. He was compelled by Kioko to live in Kioko's house. He was evicted by Kioko. Kioko wrote to the Claimant empathizing with the Claimant's family. He allowed the Claimant to occupy his house, until 28th January 2016 long after the Claimant left employment. The Claimant did not complete 1 year in employment. He did not have a written contract and was therefore unable to comment on probation requirement. Redirected, he testified when he joined the Respondent, he found there were no personnel files. The Claimant introduced these. He opened his own personnel file. He was not at any time advised on probation. There was no staff meeting on 18th October 2015. There was no warning letter. He never received termination letter. He worked 18 hours a day.

8. Patrick Kioko told the Court that the Respondent is a family business. He is himself an Employee of Kenya Ports Authority. It is not clear if Employees of Kenya Ports Authority, a State Corporation, are allowed to run private businesses.

9. The Claimant applied to join the Respondent on 29th July 2015. He started working on 1st August 2015. His consolidated salary was Kshs. 20,000 monthly, not Kshs. 50,000. Kioko knew the Claimant previously when the latter worked for Darajani [Bridge Hotel]. The Claimant would frequently visit Kioko at the Folks Inn, and cajole Kioko to employ him at Folks Inn.

10. Once employed, there were several complaints by Respondent's Employees against their Manager, the Claimant herein. By October 2015, the Claimant had unfairly sacked 3 Employees. He did not have the authority to do so. Kioko convened a meeting involving the Claimant and Employees Marietta and Florence on 18th October 2015. The Claimant was issued a warning letter and his decision against fellow Employee reversed. He did not mend his ways. Employees continued to complain that he bullied and demeaned them. The Claimant wanted to engage foreigners who visited the Hotel all the time. He arranged to have Clients give feedback to the Hotel, saying the Claimant was the only Employee conversant in English. He dissuaded foreigners from engaging with the Receptionist.

11. The Hotel staff met on 19th December 2015 in the presence of Director Kioko. They threatened to leave employment as they all had issues with the Claimant. The Claimant was granted an opportunity to respond to the complaints. His answer was not accepted. Kioko terminated Claimant's services through a letter dated 21st December 2015.

12. The Claimant continued to reside in Kioko's house after termination. He was to pay rent of Kshs. 11,000 from the date of employment. He did not pay, explaining to Kioko that he would pay, on receipt of terminal dues from his previous Employer. He was paid a consolidated salary. He was loaned Kshs. 10,000 and advanced Kshs. 6,500 which he did not pay back. This forms the Counterclaim. Termination was fair. The Claimant was not entitled to annual leave. No compensation is payable. The Respondent offset Claimant's December salary against what the Claimant owed to the Respondent. The Claimant was off-duty every Monday of the week. There were no irregular deductions made on Claimant's salary. He did not seek to have his Certificate of Service from the Respondent.

13. Cross-examined, Kioko told the Court he works full-time at KPA. He works part-time for the Respondent. He knew the Claimant while the Claimant was at Darajani. The Respondent did not poach the Claimant from Darajani. The Claimant applied for the job at Folks Inn. He did not sign attendance register as he was the Manager. He was employed on probation. He opened personnel files. He ran the Hotel under Kioko's guidance. His gross salary was about Kshs. 20,000 monthly. The Hotel had 22 fully operational rooms. The Claimant would oversee 22 Customers and 15 Employees. He told Kioko he earned about Kshs. 30,000 monthly at Darajani. Employees complained about the Claimant. He was heard on 18th October 2015. He was given a warning letter. The remarks by Clients, about Claimant's ability to speak in English, were engineered by the Claimant. He ought as the Manager, to have corrected these views. Kioko did not witness the Claimant physically pull away foreigners from the Reception.

14. On 19th December 2015, the Hotel held a general meeting. Employees raised issues against the Claimant. Kioko did not dismiss the Claimant immediately. He did so later, after consulting the Claimant. The matters were grave and did not require a letter to show cause, why disciplinary action should not issue. Arrears of rent were from August 2015. Kioko made demand for payment. The tenancy agreement was an agreement between gentlemen. After statutory deductions were effected from Kshs. 20,000 payable to the Claimant, the Claimant had a net salary of about Kshs. 17,000. Rent was Kshs. 11,000. Kioko did not lure the Claimant away from Darajani with a false promise of a better salary. The Claimant was on probation of 6 months. The letter of termination does not allude to summary dismissal. The Claimant never approached the Respondent for tabulation of terminal dues and supply of Certificate of Service. Redirected, Kioko offered to release Certificate of Service to the Claimant. The letter by the Claimant applying for the job indicates he was taken in on probation. The Claimant did not have authority to terminate other Employees' contracts. It is not true that he was the only fluent speaker of English language.

15. Muola testified that the Claimant told Clients he was the only one able to speak in English. He threatened Employees. He told them he was going to sack them. Sometimes he was downright hostile. Katana agreed with Muola, that the Claimant demeaned and threatened Employees. Employees complained to the Director. Awuor associated herself fully with the evidence of her Co-Employees. She told the Court she was at one time, compelled to wash Clients' underpants by the Claimant. She declined to do so and reported the matter to Kioko. She left employment in November 2015, having had enough of the Claimant.

16. Cross-examined, the 3 Witnesses told the Court Clients came looking for the Claimant. He was the main point of reference. The Employees interacted with the Clients. The Claimant did not have control over what the Clients posted online. It was within the Claimant's job description to supervise Employees. They did not make false allegations against the Claimant. Awuor told the Court it was true, as alleged in her Witness Statement on record, that the Claimant wanted to have sex with her and Marietta. This was never reported to the Police. The Claimant did not select which Clients' personal items could be cleaned by Awuor.

The Court Finds:-

17. There is a handwritten letter from the Claimant to the Respondent, dated 5th July 2015, applying for the position of Restaurant Manager. The letter is indicated and stamped to have been received by the Respondent, on 29th July 2015. There are remarks by the Recipient, that the Claimant is offered the position with effect from 1st August 2015. He was to be placed on probation for a period of 6 months.

18. Payroll for July 2015 does not include Claimant's name. A letter from Respondent's Director to Diamond Trust Bank dated 15th August 2015, instructs the Bank to open personal accounts for 5 Employees who included the Claimant, to facilitate payment of monthly salary. The Claimant's name appears on the payroll of August 2015.

19. The documents read as a whole, persuade the Court that the Claimant was offered employment with effect from 1st August 2015, as shown in his letter applying for the job. It is believable that he was offered the job on probationary basis, as clearly stated in this letter. He was still on probation in December 2015, when he left employment.

20. Termination of his contract would fall within Section 42 of the Employment Act regulating probationary contracts. The Court agrees with the Respondent's submission that the Claimant was on probation, and therefore is not entitled to claim under unfair termination law, as was held in **Danish Jalang'o & Another v. Amicabre Travel Services Limited [2014] e-KLR**. His prayer for compensation for unfair termination is rejected.

21. Assuming the Court is wrong on the nature of the Claimant's contract, there is overwhelming evidence from Employees of the Respondent Hotel, and from its Director, that the Claimant was an incompatible Employee. Termination reason is fair, under Section 45 [2] [b] [i] if it relates to an Employee's conduct, capacity or compatibility. It was held by this Court in **Dede Esi Annie Amanor Wilks v. Actionaid International [2014] e-KLR**, that Employers are entitled to have harmonious working relationships in their Organizations. They can achieve this by weeding out trouble-makers, eccentrics and disruptive Employees from their Organizations. The Claimant was not a simple Employee, but a Manager, entrusted the running of a fairly busy Hotel with a 22-bed capacity. 15 Employees worked under him, and looked up to him for workplace harmony. He instead, acted in a manner that demeaned Employees. He humiliated them. He held himself to be the only fluent speaker of the English language at the Hotel. He threatened Employees. He sacked some unfairly, only for his decision to be reversed by the Director. He did not consult the Director before taking such adverse actions. He did not have the capacity to hire and fire. He commanded Awuor to clean Visitors' underpants. The Employees complained to the Director. Awuor in the end left employment under a cloud of mortification. These complaints were ventilated in a meeting held on 19th December 2015. The Claimant was given a letter of termination dated 21st December 2015. There was justification, if the Respondent was required to show justification, in terminating Claimant's contract.

22. He did not work for 12 consecutive months, to qualify for annual leave. He had not entered a leave-earning period at the time of termination, so as to claim pro-rata annual leave. He did not establish that any unlawful deduction was made on his salary. He was off-duty every Monday. His prayer for 13 days off duty is without foundation. The Respondent concedes that the Claimant worked for 19 days in December 2015, without pay. Kioko stated Claimant's salary offset his indebtedness to the Respondent. It is not clear why the Respondent should make a Counterclaim if this is the position.

23. The Claimant concedes he was loaned Kshs. 10,000, and advanced salary of Kshs. 6,500 in December 2015. He did not provide the Court with evidence of repayment. The Court allows the Counterclaim for the sum of Kshs. 16,500 made up as shown above.

24. There is absolutely no evidence that the Claimant was to pay rent of Kshs. 11,000 monthly to the Respondent, beginning August 2015. There is no evidence that the Respondent paid to the Claimant a consolidated salary. Employees have an obligation to provide their Employees with accommodation, at, or near the place of work. All the Respondent has shown is that it made provision for Claimant's accommodation at, or near the place, of work. It is absurd to go on and demand rent from the Employee, while the law demands that the Employer shall make provision for housing. The Counterclaim for arrears of rent is declined.

25. Salary for 19 days worked in December 2015 is Kshs. 14,615. ***The Respondent shall pay to the Claimant salary for 19 days worked in December 2015 at Kshs. 14,615.***

26. Section 42 [4] of the Employment Act 2007 entitles the Claimant to notice of 7 days, or payment of 7 days' wages in lieu of notice. ***The Claimant is granted 7 days' salary in notice pay, at Kshs. 5,378.***

27. The Respondent is entitled to Kshs. 16,500 from the Claimant, while the Claimant merits a total sum of Kshs. 19,993 from the Respondent. ***An offset of the Claim against the Counterclaim, results in a figure of Kshs. 3,493 in favour of the Claimant.***

IN SUM, IT IS ORDERED.

a) The Respondent shall pay to the Claimant Kshs. 3,493 in satisfaction of the Claim.

b) Certificate of Service to issue.

c) No order on the costs.

Dated and delivered at Mombasa this 8th day of June 2018.

James Rika

Judge