



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 11 OF 2017

KATANA LEWA.....CLAIMANT

VS

ANNA BAHATI T/A MEMORIES GUEST HOUSE.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 9th May 2017 and filed in court on 16th May 2017, the Claimant has sued the Respondent for unlawful termination of employment and failure to pay terminal dues. The Respondent filed a Reply on 4th July 2017.
2. When the matter came up for hearing each party testified on their own behalf. Both parties subsequently filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent on 1st May 2014, in the position of Room Steward. He also worked as Receptionist and Cleaner in addition to performing stocktaking duties. He earned a monthly salary of Kshs. 5,000. The Claimant avers that he was not issued with a written employment contract nor a pay slip.
4. On 31st January 2016, the Claimant was involved in a road accident while on his way to work. Having sustained bruises, the Claimant sought medical attention and informed the Respondent accordingly. He was unable to make it to work on that day. He states that his employment was unlawfully and unfairly terminated on 15th February 2016.
5. After his termination, the Claimant went to the Labour Office in Malindi to seek redress. He was given a letter dated 3rd March 2016 addressed to the Respondent, which he duly delivered. However, the Respondent did not respond. The Respondent was further served with a demand letter dated 7th March 2016 which she ignored.

6. The Claimant’s Claim is as follows:

- a) Two months’ salary in lieu of notice.....Kshs. 10,107
- b) Leave.....20,214
- c) Two years of service.....10,107
- d) Holidays.....10,500
- e) 2 years underpayment.....122,568
- f) General damages for unlawful termination
- g) Certificate of service
- h) Costs plus interest

The Respondent's Case

7. In her Reply dated 3rd July 2017 and filed in court on 4th July 2017, the Respondent denies having employed the Claimant as pleaded in the Memorandum of Claim. The Respondent further denies any knowledge of a road accident involving the Claimant.

8. The Respondent states that she is not the sole owner of Memories Guest House and the Claimant ought to have laid his claim against all the partners of the business enterprise.

Findings and Determination

9. From the pleadings filed and evidence adduced in Court, the following issues emerge for determination before the Court:

- a) Whether there was an employment relationship between the parties capable of enforcement by the Court;
- b) Whether the termination of the Claimant's employment was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

Employment Relationship

10. In her Reply to the Memorandum of Claim, the Respondent denies having employed the Claimant and challenged him to produce a letter of appointment. In her testimony before the Court, she states that the Claimant worked as a casual employee.

11. The law places the responsibility of documenting the employment relationship on the employer and where an employer fails to discharge this responsibility, the Court is empowered under Section 10(7) of the Employment Act, 2007 to adopt the testimony of the employee with regard to the terms of employment.

12. It is therefore not enough for an employer to state that an employee was a casual employee. They must prove as much by producing documentary evidence such as a muster roll, attendance or payment forms. In this case no such evidence was produced before the Court and the Respondent assertion that the Claimant was a casual employee is therefore rejected.

The Termination

13. The Claimant told the Court that his employment was terminated after he was involved in an accident. The Respondent on the other hand, accused the Claimant of leaking customer information to third parties. This accusation falls within the realm of misconduct.

14. There was however no evidence that such a charge was put to the Claimant at the shop floor. The charge was therefore untested and unproved as required under Section 43 of the Employment Act. Moreover, the Claimant was not subjected to the mandatory procedural fairness requirements established under Section 41 of the Act.

Remedies

15. In light of the foregoing, I find that the termination of the Claimant's employment was substantively and procedurally unfair and award him six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's length of service and the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

16. The Respondent did not produce any leave records to counter the Claimant's claim for leave pay which therefore succeeds and is allowed. The Respondent herself stated that the Claimant was not a contributing member of the National Social Security Fund (NSSF). The claim for service pay is therefore merited and is allowed.

17. The claims for holidays and underpayment were not proved and are consequently dismissed.

18. In the end, I enter judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 30,000
 - b) 1 month's salary in lieu of notice.....5,000
 - c) Leave pay for 1 year (5,000/30x21).....3,500
 - d) Prorata leave for 8 months (5,000/30x1.75x8).....2,333
 - e) Service pay for 1 year (5,000/30x15).....2,500
- Total.....43,333**

19. This amount will attract interest at court rates from the date of judgment until payment in full.

20. The Claimant is also entitled to a certificate of service plus costs of the case.

21. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF JUNE 2018

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JUDGE

Appearance:

Miss Ochangu for the Claimant

Anna Bahati (the Respondent in person)