



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2446 OF 2012**

**GEOFFREY CHUNGULI MUDANYA.....CLAIMANT**

**VERSUS**

**PANARI HOTEL LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 6.12.2012 seeking the following:

- (a) The sum of Kshs.1,583,125.00.
- (b) Interests on (a) above at Court rates.
- (c) Costs of this suit.
- (d) Any other relief that this Honourable Court may deem fit to grant.

2. The respondent filed his defence on 1.2.2013 denying the alleged unfair termination and averred that the termination was done by serving one month notice pursuant to the claimant's contract of employment. She further averred that termination was justified because despite warning from his supervisor, the claimant continued with his under performance which caused losses to the company. In addition, the respondent objected to the suit for being time barred by dint of section 90 of the Employment Act. On 1.4.2014, she filed a Notice of Preliminary objection dated even date reiterating that the suit was statute barred by dint of section 90 of the Act as it was filed after 5 years from the date when the cause of action arose instead of the required 3 years.

3. The claimant responded to the Preliminary Objection(P.O) by filing a Replying Affidavit on 16.8.2013 denying the alleged statute bar and contending that he had already lodged his complaint at the labour office as required by the law. He therefore prayed for the P.O to be dismissed for being an after thought meant to circumvent justice. On 31.10.2013, Ndolo J. directed that the P.O canvassed during the hearing. Thereafter the claimant sought leave to amend his claim and it was granted by Ndolo J. 30.10.2017 to add the claim for salary for 6 days worked in September 2008, one month salary in lieu of notice and damages for unlawful termination. The total claim was now increased to Ksh.3,361,125.

4. The suit was heard on 24.4.2017 and 26.2.2018 when the claimant testified as Cw1 but the respondent never attended or in any other way participate in the hearing. After the hearing only the claimant did file submission which I have carefully considered herein.

**Claimant's Case**

5. Cw1 testified that he was employed by the respondent on 1.7.2005 as a Banquet supervisor upto

30.3.2006 when he was promoted to be the Banqueting Manager. Due to his excellent performance saw his salary increased steadily from Kshs.38,000 then to Kshs.45,000 and finally to Kshs.65,000 per month by 23.7.2007.

6. However on 8.8.2008, he was served with termination letter dated 7.8.2008 citing poor performance and undercharging standard Chartered Group that led to the loss of Kshs.500,000 to the respondent. He denied the validity to the said reasons and contended that he was never given a chance to defend himself. He further contended that no audit was done to verify the said loss and maintained that only 240 guests from Standard Chartered were served and not 300 as alleged by the respondent. He produced an email by the respondent's Sales Account Manager Ms. Susan Senya to support the fact that the guests in dispute were indeed 240 and not 300 and that no loss was suffered.

7. Cw1 further testified that he left job same day he received the termination letter after being escorted by security guard to do handing over before even being served with the termination letter. He contended that he was not served with prior notice and not paid his terminal dues after the termination. He therefore prayed for the reliefs sought in the amended claim including accrued leave, leave travelling allowance, overtime for 2069 hours worked, severance pay for 3 years, salary in lieu of notice and compensation for unlawful termination of his contract of service.

### **Analysis and Determination**

8. After careful consideration of the evidence and submissions, the issues for determination herein are:

- (a) Whether the suit is statute barred;
- (b) Whether the claimant's contract of service was unlawfully terminated;
- (c) Whether the reliefs sought should be granted.

### **Statute barred suit**

9. The P.O by the defence on the statute bar was not prosecuted by the respondent during the hearing as directed by Ndolo J. during the pretrial mention. I however considered it because it goes to the jurisdiction of the court. The respondent contended that the suit was filed 5 years after the time when the cause of action arose instead of the 3 years provided by section 90 of the Employment Act. The claimant has however contended vide his Replying affidavit that he lodged complaint with the Labour office in November 2008 and as such his suit was not statute barred.

10. I have carefully considered the correspondences between the parties herein and the labour officer and found that the respondent admitted all the items demanded save for overtime and salary in lieu of notice. It can therefore be said that the disputed on all the agreed items was resolved and cannot be tried afresh but only enforced. However the claim for overtime was never resolved and it would have become time barred where it is not for the admission to pay by the respondent through the email by the respondent's HR Manager dated 5.4.2012. The said email breathed life in the claim for overtime and therefore the court has jurisdiction to determine the same on merits.

### **Was the claimant unlawfully discharged**

11. The claimant's undisputed evidence is that he was dismissed for poor performance and undercharging a client to the tune of Kshs.500,000. That he was dismissed without prior notice and without being accorded any fair hearing. He denied the validity of the reasons cited for the termination. Under section 45 of the Employment Act, termination of an employees contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure.

12. In this case, the respondent never tendered any evidence to prove the reasons for the termination and to prove that she accorded a fair hearing of the claimant in the presence of another employee as required

by section 41 of the Act. Consequently, I find that the termination was unfair and unlawfully done. The Court could have arrived at a different verdict had the respondent not cited the reasons for termination in the one month termination notice which brought her within the bounds of section 41 and 45 of the Act with respect to compliance with substantive and procedural fairness.

## Reliefs

13. The claimant is awarded 10 months' salary being Kshs.650,000 as compensation for the unlawful and unfair termination in consideration of the fact that he served for over 3 years in Senior Management position and it was not possible to secure an alternative job within a short time. I have also considered the fact that the claimant did not contribute to his dismissal through proven misconduct. I will however, not award salary in lieu of notice because the claimant was served with one month notice of termination and send on a terminal leave until the effective date.

## Accrued benefits

14. By the letter dated 11.9.2008, the respondent admitted the claim for salary for 6 days worked in September 2008, 6 days leave earned for 2008/2009, full leave travelling allowance for 2007/2008, prorata leave travelling allowance for 3 months completed in 2008/2009, 489 days overtime, 10 public holidays worked and 52 leave days. I therefore proceed to award the undisputed items due to lack of evidence to the contrary.

Overtime of 489 days x Kshs.65,000 = Kshs.1,222,5000

30

52 leave days x Kshs.65,000 = Kshs.130,000

26

10 public holidays x 2 = Kshs.50,000

26

Salary for 6 days worked in September 2008

(Kshs.65,000 x 6) = Kshs.15,000

26

Leave travelling allow for the full year 2007/2008 = Kshs.10,000,

Leave traveling allowance for 3 months worked in

2008/09 on prorata basis is Kshs.10,000 x 3/12 = Kshs.2,500

15. For the reasons that the discharge of the claimant was unlawful and unfair, I enter judgment for him in the sum of Kshs.2,080,000 plus costs and interest from the date hereof. The said sum shall be paid less statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018**

**ONESMUS N. MAKAU**

**JUDGE**