



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.189 OF 2016

JORAM KAMAU.....CLAIMANT

VERSUS

ASHNIL HOTELS LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent as Restaurant Supervisor in the respondent's Samburu Camp. The claimant has initially been employed as a Waiter on 1st June, 2010 and then appointed as supervisor.
2. In October, 2014 the claimant was transferred to Samburu Camp to act in the capacity of Restaurant Supervisor on probation and pending confirmation. There was no salary increment as agreed and despite demand, the respondent failed to pay.
3. On 5th February, 2016 the claimant resigned from his employment with the respondent. His terminal dues have not been paid since.
4. It was a term of employment that the claimant would be paid a service every 15th of the month. Such service charge remains unpaid and amounting to Kshs.1, 667.13 due as at February, 2016.
5. The claimant was underpaid and claims Kshs.536, 735.15.
6. The claimant is also seeking the payment of gratuity for 5 years in the service of the respondent all at Kshs.25, 252.50.
7. There is also a claim for general damages and costs.
8. The claimant testified that upon employment by the respondent in the year 2010 he was issued with a letter of appointment with his terms of work as a Waiter.

He completed probation and was confirmed. The claimant was based at Tsavo East and then moved to Samburu Camp vide letter dated 23rd September, 2014 where he was to be acting Supervisor on probation for 3 months.

9. While the claimant was in Samburu Camp, the manager Mr Maina introduced him as supervisor until March, 2016. One employee was attacked by the local community while outside the camp and this prompted the claimant to tender his resignation. He felt frustrated. He was not paid his acting allowance and salary was not increased. The claimant gave one month's notice in February, 2016. On 11th February, 2016 the claimant wrote again seeking to reduce his notice period.

10. The terminal dues owing were not paid. The dues owing would be paid less the 17 days of notice not served, there was a Sacco loan.

Defence

11. In response, the respondent's case is that the claimant was employed as a Waiter on 1st June, 2010 until he resigned on 5th February, 2016. The claimant requested to be transferred on 2nd July, 2014 following disagreements with his then manager, Aruba and thereafter the claimant tendered his resignation on 22nd July, 2014. He claimant then withdrew the letter of resignation.

12. The claimant was transferred to Ashnil Samburu to the position of restaurant supervisor on an acting capacity but he was never confirmed as the then unit manager was not happy with the claimant's work performance. There was a recommendation that the claimant go for an exposure at Maasai Mara before confirmation but he resigned on 5th February, 2016.

13. The claimant's resignation notice was 17 days less and therefore not entitled to pay in this regard. Efforts to reach out to the claimant for payment of his terminal dues have been fruitless. Calls to the claimant were not responded to.
14. The claimant was earning a gross salary of Kshs.13, 045.00 per month inclusive of house allowance. The claims made are not due.
15. In evidence the respondent called Wilky Ominde the human resource manager of the respondent and who testified that the claimant was a Waiter while in the employment of the respondent. He was not promoted. The transfer made was on trial terms and when the claimant resigned he was required to issue a one month notice which he failed to do. The claimant left 17 days early and should compensate the respondent.
16. The respondent computed the dues owing to the claimant all at Kshs.35, 268.00 and a cheque was done but the claimant has failed to collect it. A new cheque was sent to the claimant's advocate on 16th June, 2017.
17. The respondent had a CBA with KUDHEIHA which regulated the claimant's salaries.
18. At the close of the hearing, the parties filed written submissions.

Determination

19. By letter dated 7th June, 2010 the respondent appointed the claimant as Waiter under Grade 3. He was to be on probation for 3 months. The claimant was also entitled to a salary of Kshs.6, 900.00 per month together with Kshs.1, 960.00 in house allowances as half allowance as he would have shared accommodation within the respondent business.
20. By letter dated 23rd September, 2014 the claimant was issued with letter of inter unit transfer and which provided that;

We are pleased to inform you that you will be transferred to Ashnil Samburu Camp with effect from 2nd October, 2014. You will assume the position of a Restaurant Supervisor initially in an acting capacity and your performance will be monitored for a possible confirmation into the position.

In the meantime, your terms and conditions of employment shall remain the same. ...

21. The claimant was employed as a Waiter vide letter dated 7th June, 2010. He was then transferred in what was called inter unit transfer to assume the position of Restaurant Supervisor from 2nd October, 2014. The letter of inter unit transfer was conditional to the extent that the claimant would remain in an acting capacity and his performance would be monitored for possible confirmation to this position. It was also a condition that the claimant would remain on terms and conditions of his employment.
22. I take it the position of Restaurant Supervisor is senior to that of Waiter within the respondent business as otherwise the conditions set and requiring the claimant to be reviewed in his performance for confirmation would not have been necessary.
23. It is a requirement of the law where employment terms and conditions change; the same must be done in writing and in consultation with the employee. Section 10 (5) of the Employment Act, 2007 (The Act) provides that;

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
24. Section 13 of the Act also requires the employer to issue the employee with a letter of the change in terms and conditions within a month. Such is to ensure the employee is at all material times aware of any changes in his employment.
25. In the claimant's case, his new role was conditional.
26. In evidence the claimant did not address what changes were made with regard to his pre-existing duties and those of the position last held as Restaurant Supervisor. Save to claim the salary due in underpayment, there is no clarity as to what additional duties came with the new position other than the title.
27. Equally the respondent has not set out what processes were put in place to review the performance of the claimant before confirmation to the position and new role of Restaurant Supervisor. The only evidence offered by the witness Ms Ominde is that the claimant was due for an exposure visit to Maasai Mara but he resigned before this could be done.
28. Work performance, review and confirmation are the duty of the employer. Where an employee is placed on performance review, probation or appraisal for the purpose of promotion, new duties and confirmation, this is the function of the employer.
29. An employee can only be placed on review for a period not exceeding 12 months. Section 42(3) of the Act requires an employer to set out the period within which an employee should be on probation and where such probation period is not sufficient, to agree with the employee on an extension. All in the aggregate should not exceed 12 months.
30. In the case of **Lear Shighadi Sinoya versus Avtech Systems Limited [2017] eKLR** the court held as follows;

Section 42 of the Employment Act allows an employer to place an employee on probation for up to 12 months. When the period of probation is agreed upon in the employment contract, confirmation of the employee should follow upon the lapse of such period. Where the employee has not performed well during the probation period, the employer is allowed to review the performance of such an employee and with the consent of the subject employee extend the probation period. ... As such, by operation of the law, at the end of probation period on 30th July, 2015 the claimant became a permanent employee of the respondent.

31. In **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR** the court held that;

Failure by the respondent to have systems in place so as to have the claimant's employment reviewed in time and before the probation period lapsed cannot be visited upon the claimant as an employee. Where there existed a written contract of service spelling out the terms and conditions of his employment with the respondent, such cannot be negated by extraneous matters and factors beyond his control, the respondent was under a duty as the employer to observe.

32. An employer cannot keep an employee on review for period on end and at will. Such would be to engage in unfair labour practice and contrary to the tenets of the Bill of Rights under Article 41 of the Constitution. This is however not the claim herein the claimant's case relates to underpayment for the period he was employed and for the term held as Restaurant Supervisor at the respondent from October, 2014 to February, 2016 when he resigned.

33. The underpayment due to the claimant for this period is payable.

34. The claimant is seeking underpayment for the period of 2010 to 2016 when he resigned. The claimant's employment was regulated by a CBA operational between the respondent and KUDHEIHA. The claimant was under Grade 3 and in analysing the terms of the CBA, for the period of June, 2010 to September, 2014 the remuneration paid under such grade is commensurate to the CBA terms. There was no underpayment for this period.

35. With regard to the claimant's role as Restaurant Supervisor and as set out above, the respondent has not attached any records with regard to this senior position. The underpayments for the period of October, 2014 to February, 2016 are due.

The claim for of Kshs.12, 995.60 for the months of October to December, 2014 is due all at kshs.38, 986.80.

The claim for Kshs.155, 940.00 for the year 2015 is due;

The claim for Kshs.12, 995.60 for January, 2016 plus Kshs.5, 631.00 due for 13 days in February, 2016 all being Kshs.18, 626.00 is due.

36. On the claims for gratuity, the claimant has not set that this was payable to him under the CBA or under any other contract or a private treaty. From the payment statement, the claimant was registered and his statutory dues deducted and remitted. Such claims for gratuity and service charge are declined.

37. The claims for general damages are not supported by any evidence and are generally pleaded. Such are found without grounds.

Accordingly, judgement is hereby entered for the claimant against the respondent with an awarded for underpayment at kshs.213,552.40; such dues shall be paid less what the claimant has received including his payment for 17 days salary for notice period not served and subject to the provisions of section 49(2) of the Employment Act, 2007. Costs of 50% awarded to the claimant.

Dated and delivered at Nakuru this 11th day of October, 2018.

M. MBARU JUDGE

In the presence of: