



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1045 OF 2015

AGGREY TUKUNYA ALUVANZE.....CLAIMANT

v

MAIKE POTGIETER.....1st RESPONDENT

EXCELENT AND TASTE LTD t/a

LE-RUSTIQUE RESTAURANT.....2nd RESPONDENT

JUDGMENT

1. On 24 October 2017, the Court directed that this Cause proceed as an undefended Cause because the Respondents had failed to file a *Response* despite filing a Memorandum of Appearance.

2. Aggrey Tukunya Aluvanze (Claimant) gave sworn testimony but his submissions were not on file by 17 November 2018 as had been ordered.

Unfair termination of employment

3. The Claimant was employed by the Respondents on 5 December 2002 as an Office Assistant and by the time of separation on 24 January 2010 he had risen to the position of Senior Manager.

4. The Claimant's testimony was that the termination of his employment by the 1st Respondent, a director of the 2nd Respondent was unfair because he was not afforded an opportunity to be heard on or before the dismissal from employment.

5. The Claimant also produced copy of judgment in Kibera Criminal Case No.661 of 2010 wherein he was acquitted of the charge of stealing by servant.

6. In terms of section 41 of the Employment Act, 2007, affording an employee an opportunity to be heard is a mandatory requirement, and the Court therefore finds that the termination of the Claimant's employment was unfair.

Breach of contract/statute

Unpaid salary

7. The Claimant pleaded and sought unpaid salary and allowances of Kshs 57,675/- . During testimony, he stated that he was not paid salary for December 2009.

8. The Claimant's pay slip for January 2010 indicate a gross salary of Kshs 27,117/-.

9. Without a proper evidential basis how the December 2009 salary could have been Kshs 57,675/- (double the January 2010 salary), the Court finds this head of claim not proved.

60 days accumulated leave

10. The Claimant sought Kshs 118,174/- on account of 60 accumulated leave days but did not disclose in evidence to which periods the accumulated leave related.

11. With the insufficient factual background, the Court declines to find that the Claimant had the accumulated leave days by time of separation.

3 months' pay in lieu of notice

12. The Claimant was paid by the month and without a contractual agreement to give 3 months' notice and in consideration of section 35(1) (c) of the Employment Act, 2007, the Court finds that the Claimant is entitled to the equivalent of 1 month pay in lieu of notice.

Compensation

13. The Claimant served the Respondent for about 8 years, and in consideration of the length of service, the Court considers the equivalent of 8 months gross wages as fair (gross salary in January 2010 was Kshs 27,117/-).

Unpaid compensation for additional work

14. No evidence was led in furtherance of this head of claim and it is declined by the Court.

National Social Security Fund contributions

15. Under this head, the Claimant sought Kshs 7,200/- but he did not state the months in respect of which the contributions were not remitted or produce a statement from the *National Social Security Fund*.

16. Consequently he should utilise the provisions of the National Social Security Fund provisions to follow up on any unremitted contributions.

Conclusion and Orders

17. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him

(a) 1 month pay in lieu of notice Kshs 20,140/-

(b) Compensation Kshs 216,936/-

TOTAL **Kshs 237,076/-**

18. Claimant to have costs on half scale.

Delivered, dated and signed in Nairobi on this 23rd day of November 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ondieki instructed by David Okoyo Ondieki & Associates

For Respondents KTK Advocates

Court Assistant Mambo