



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 704 OF 2011

CEASAR WARUI.....CLAIMANT

VERSUS

SIRONA HOTEL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal benefits totaling to Kshs.232,254.54 made up of the following:

- a) 30 days leave for 2010.....12,000.00
- b) Service pay for 8 years worked65,454.54
- c) Service charge at Kshs.500 per month for 3 years.....18,000.00
- d) Salary arrears for April and May 2010 (Kshs.6,000 x2)..12,000.00
- e) 11 public holidays worked per year for 8 years atKshs.800 per day..... 70,400.00
- f) Salary for 16 days worked in September 20106,400.00
- g) Refund of NSSF deductions not remitted for 60 months24,000.00

2. The respondent denies that the claimant is entitled to the terminal or any other dues as prayed because he was summarily dismissed for gross misconduct. She averred that during the pendency of the claimant’s employment, he made losses or shorts on stock which he admitted in writing. She further denied the alleged non-remittance of NSSF deductions and the claim for public holidays contending that the claimant was paid Kshs.4,000 every month to cater for the public holidays and overtime worked. She therefore prayed for the suit to be dismissed with costs alleging the claimant had come to court with unclear hands.

3. The suit was heard on 9.4.2018 when the claimant testified as Cw1 but despite several adjournments thereafter the respondent called no witness to give evidence. However, after the hearing, both parties filed written submissions which I have carefully considered herein alongside the evidence tendered.

Claimant’s case

4. The claimant testified that he was employed by the respondent from 2003 to 2010 as a Barman/Cashier earning Kshs.12,000 per month. He further testified that on 16.9.2010, he received a call from the respondents manager telling him not to report to work. He however went to see the respondents Boss over the matter but the boss told him to have his dues computed. He then went to see the Manager and they computed the dues after which he was told to collect the same after 2 days.

5. Cw1 further testified that after the 2 days he went for the dues but they were not paid on allegation that there was no money. After following the dues for months without success, he instructed counsel to sue but again upto day, the dues were never paid. He prayed for the dues sought in the suit contending that he was dismissed without prior notice and without being told the reason for the termination. He produced a certificate of service issued to him by the respondent which stated that he had performed his work well and recommended him to

any employer. Cw1 contended that his NSSF deductions were not regularly remitted and prayed for refund and service pay.

6. On cross examination Cw1 stated that he was dismissed by the respondent's Director Mr. Sandri and thereafter went to see the Manager Mr. Joseph Mutisya for computation of dues. He admitted that he wrote the letter dated 7.9.2010 admitting a shortfall on sales totaling to Kshs.8,955 and accepting to pay the same through salary deduction. He also admitted writing other letters to explain other shortfalls on stock. He referred to his NSSF statement to prove that from 2007 to 2010, the employer remitted his contribution on 3 times. He clarified that he in April and May 2010 he was paid half salary being Kshs.6,000 per month to recover shortfalls on stock which were fully sorted out. He therefore contended that he letter dated 7.9.2010 talked about the shortfalls for July and August 2010.

Analysis and Determination

7. After careful consideration of the evidence and submissions, I find no dispute in the fact that the claimant was employed by the respondent between 2002 and 16.9.2010 as a Barman/ Cashier earning Kshs.12,000 per month. The only issue for determination herein is whether the claimant is entitled to the reliefs sought in his claim.

Reliefs Sought

8. The reliefs sought accrued from the claimants contract of service and Employment Act and cannot be lost just because of the claimant's gross misconduct. I therefore proceed to assess the same on merits **30 days leave for 2010**

9. In 2010, the claimant worked upto 16th September. He therefore earned leave under section 28 of the Employment Act on protata basis. An employee in Hotel and Catering industry earns 2 leave day per month according to the Regulation of Wages (Hotel and Catering Services) Order. In this case the claimant earned 17 leave days for the 8½ months worked in 2010. I therefore award him $Kshs.12,000 \times 17/26 = Kshs.7,894.15$

Service Pay

10. The claimant worked from 8 years according to the certificate of service issued by the respondent and dated 1.9.2010. He prayed for service pay on ground that the respondent failed to remit his NSSF contributions regularly. I have carefully considered the NSSF statement produced by the claimant for 1999 to 2010 and confirmed that indeed the respondent failed to remit the claimant's contributions regularly. In 2003, she remitted only in 2 months, in 2004, 9 months, in 2005 10 months, in 2006 6 months, 2007 0 months, 2008 2 months and 2010 0 months. In the circumstances, a find that the claimant has proved to on a balance of probability that he is entitled to service pay for the 8 years worked. I will base the award on the conventional rate of 15 days pay per year of service as prayed.

Hence $Kshs.12,000 \times 15/26 \times 8 = Kshs.55,384.62$

Service Charge

11. This is a charge on the sales by the employer. The claimant has not proved or demonstrated how he arrived at rate of Kshs.500 service charge per month for the 3 years sought. I therefore dismiss the claim for arrears of service charge.

Balance of salary for April and May 2010

12. The claimant admitted that he wrote the letter dated 7.9.2010 by which he admitted the shortfall on stock of Kshs.8,955 and accepted to the same being recovered from his salary for April and May. The undisputed salary due for said months as such after the deduction of the Kshs.8,955, the claimant is entitled to Kshs.3,045.

Public holidays worked

13. The claimant claimed pay for 11 public holidays per year for 8 years. The particulars of the holidays worked were not pleaded and no evidence was tendered to prove that he indeed worked in all the said holiday for the said 8 years. The claim for public holidays worked is therefore dismissed.

Salary for September 2010

14. The said claim was not disproved by the respondent. I therefore allowed as prayed being Kshs.6,400 through however than what I would have awarded being $Kshs.12,000 \times 16/26 = Kshs.7,384.60$.

Refund of Unremitted NSSF Contributions

15. The claim for refund of the unremitted NSSF contributions deducted from the claimant's salary is allowed. The claimant was deducted Kshs.200 per month for 60 months equaling to Kshs.12,000.

Conclusion and disposition

16. I have held that the dues being sought herein are not discretionary but one which accrued to the claimant as a right by dint of his contract and the statute law. Consequently, I enter judgment for him in the sum of Kshs.84,723.75 plus costs and interest from the date of filing the suit.

The sum awarded will be paid subject to statutory deductions.

Signed, dated and delivered at Nairobi this 23rd day of November, 2018.

ONESMUS N. MAKAU

JUDGE