



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 622 OF 2016

BOMU RIWA BOMU.....CLAIMANT

VS

ONALLY HASSANALI GULLAMHUSSEIN

T/A ALIFIYA BAKERS & CONFECTIONERS.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Bomu Riwa Bomu against Onally Hassanali Gullamhussein trading as Alifiya Bakers & Confectioners. The claim is as documented by a Statement of Claim dated 23rd August 2016 and filed in court on 24th August 2016. The Respondent filed a Response and Counterclaim on 29th March 2017 to which the Claimant responded on 3rd April 2017.

2. When the matter came up for hearing, the parties testified on their own behalf after which they filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a baker sometimes in March 2007. He worked six (6) days per week and was paid a daily rate of Kshs. 800.

4. The Claimant avers that sometime in September 2015, the Respondent verbally terminated his employment without notice. The Claimant maintains that the termination of his employment was unlawful and unfair in that he was not given any reason for termination nor was he given an opportunity to be heard.

5. The Claimant claims that during his employment with the Respondent, he was not granted leave.

6. The Claimant's claim is as follows:

- a) 1 month's salary in lieu of notice.....Kshs. 19,200
- b) Damages for unfair termination of employment.....230,400
- c) Leave days earned but not granted (2007-2015).....153,600
- d) Certificate of service
- e) Costs plus interest

The Respondent's Case

7. In his Response and Counterclaim dated 28th March 2017 and filed in court on 29th March 2017, the Respondent admits having employed the Claimant as a baker sometime in March 2007.

8. The Respondent however states that it is the Claimant who deserted duty in the wake of power outages experienced at the Respondent's business premises. The Respondent avers that the Claimant was fully aware of the circumstances bedeviling the Respondent but chose to

sabotage the business by deserting duty and seeking employment elsewhere.

9. It is the Respondent's case that the Claimant grossly breached the terms of his employment contract and thus frustrated its specific performance. The Respondent cites the following particulars of breach by the Claimant:

- a) Deserting duty;
- b) Failing to notify the Respondent that he intended to abscond/resign from employment;
- c) Unilaterally rescinding the contract without considering the Respondent's rights;
- d) Failing to heed to several calls to resume duty;
- e) Sharing the Respondent's recipes with competitors;
- f) Failing to consider the immense training the Respondent had availed him;
- g) Failing and/or refusing to clear an outstanding loan of Kshs. 4,300 advanced to him by the Respondent.

10. The Respondent states that as a result of the Claimant's actions, he has suffered loss and damage, particulars being:

- a) Loss of business due to non-production;
- b) Competitors gaining from the Respondent's recipes;
- c) Constant searches and inquiries on the whereabouts of the Claimant;
- d) Several attempts made to plead with the Claimant to resume duty.

11. By way of counterclaim, the Respondent claims from the Claimant the sum of Kshs. 19,200 being one month's salary in lieu of notice as well as Kshs. 4,300 being loan balance due. The Respondent further claims general damages for breach of contract plus costs of the suit.

Findings and Determination

12. There are three (3) issues for determination in this case:

- a) Whether the Claimant has made out a case for unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

Unlawful Termination?

13. The Claimant states that his employment was terminated verbally sometime in September 2015. While denying this averment, the Respondent states that in the month of October 2015, there was general electric power outage in Old Town area where his business is situated. This made it impossible for the business, which relied solely on electricity, to continue. When power was restored, the Respondent called the Claimant to resume work but he failed to do so.

14. The Claimant admits that there was general power outage in the area where the Respondent's business is situated, from June 2015. He states that he was not called back after power was restored. He therefore claims that his employment was terminated in September 2015 but he could not remember the exact date.

15. The Claimant admits signing for an advance of Kshs. 1,000 on 10th October 2015, way past the supposed termination date. In the absence of any explanation on this glaring discrepancy, the Court found the Claimant's testimony regarding the circumstances of his separation from the Respondent's employment untrue and worthless.

16. Further, by letter dated 22nd October 2015 from the Respondent's Advocates, the Claimant was asked to go back to work but he declined. The Claimant testified before the Court that he was not willing to go back to work because his relationship with the Respondent had deteriorated. The Court was unconvinced. It seems to me that the Claimant walked away from his employment without cause and without notice. On this account, the Claimant came across as a dishonest and uncaring employee in pursuit of illegitimate personal gain. This Court will not aid such an employee.

17. The Claimant's claim for unlawful termination therefore fails and is dismissed. The same fate befalls the claim for one month's salary in lieu of notice.

Leave Pay

18. The Claimant claims leave pay for his entire period of service. The Respondent himself admitted that the Claimant did not go on leave. However, in light of the limitation period set under Section 90 of the Employment Act, 2007 I will only allow leave pay for the last three (3) years of service.

The Respondent's Counterclaim

19. In his Response and Counterclaim, the Respondent claims one month's salary in lieu of notice. In light of the finding that the Claimant himself walked away from his employment without notice, this limb of the Counterclaim succeeds and is allowed. The Claimant admitted owing the Respondent Kshs. 4,300 in outstanding loan balance. The claim thereon therefore also succeeds and is allowed.

20. The counterclaim for general damages for breach of contract was not proved and is dismissed.

Final Orders

21. Finally, I enter judgment in favour of the Claimant against the Respondent in the sum of Kshs. 50,400 being leave pay for 3 years.

22. I also enter judgment in favour of the Respondent against the Claimant in the sum of Kshs. 19,200 being one month's salary in lieu of notice plus Kshs. 4,300 being outstanding loan balance.

23. The net effect is that the Respondent will pay to the Claimant the sum of Kshs. 26,900.

24. Each party will bear their own costs.

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER 2018

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JUDGE

Appearance:

Mr. Lewa for the Claimant

Mr. Anaya for the Respondent