



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1607 OF 2014

(Before Hon. Justice Mathews N. Nduma)

SAMUEL MWANGI KARIUKI.....CLAIMANT

VERSUS

ROBERT NDERITU T/A NAIROBI MILLENNIUM FAST FOOD.....RESPONDENT

J U D G M E N T

1. By a Statement of Claim filed on 12th September, 2014, the Claimant seeks compensation for unlawful and unfair dismissal and payment of terminal benefits including service gratuity for six years served calculated at 21 days salary for each completed year of service and payment in lieu of one month salary.
2. The facts of the Claim are that the Claimant was employed as a chef by one Peter Irungu Macharia and Terry Wanjiru Irungu operating as partners in a hotel known as Nairobi Millennium Fast Food. The hotel was situated along Moi avenue.
3. The Claimant was paid a monthly salary of Kshs.13,000. He worked continuously until 18th December, 2013.
4. That on or about early December 2013, the Respondent Robert Nderitu took over the hotel and continued to trade as Nairobi Millennium Fast Food.
5. That Mr. Nderitu called a staff meeting and introduced himself as the new owner of the hotel. The Claimant queried whether the new owner would carry over the responsibilities of previous owners with regard to the employees. The following day he was stopped from entering the hotel and his services were terminated without payment of any terminal benefits.
6. The Claimant reported the dispute to the Ministry of Labour and KUDHEIHA Union. The Union sent letter of demand to the Respondent which went unanswered hence the suit.
7. The Claimant testified under oath in support of the particulars and relies on a witness statement dated 9th August, 2014, Demand letter to the previous owner dated 19th December, 2013, a report of the dispute to the Ministry of Labour dated 21st January, 2014, Demand letter to the Respondent dated 17th April, 2014 and an employee card issued to the Claimant on 24th July, 2008.
8. The Claimant prays for the reliefs set out in the statement of claim.

Defence

9. The Claimant denied the claim vide a Memorandum of Response filed on 14th January, 2015 in which the Respondent denies, ever having employed the Claimant; ever running a business in the name and style of Nairobi Millennium Fast Food or having taken over the business from one Peter Irungu Macharia and Terry Wanjiru Irungu. The Respondent states he is a Director of Golden eye Enterprises Limited which operates a Restaurant registered on 7th February, 2013, and concluded a lease agreement for a shop premises No.12 on the ground floor of Mithoo House on Moi Avenue, Nairobi.
10. The Respondent denies having known the Claimant at all or having dismissed him from employment and puts the Claimant to strict proof thereof.
11. The Respondent testified as RW1 in support of the aforesaid particulars. He was subjected to very close cross examination by Advocate Kuloba Simiyu for the Claimant. The Respondent was represented by Mr. Henia, Advocate. The Respondent prays that the suit be dismissed with costs.

Determination

12. The issues for determination are:-

- i. Whether the Claimant was ever employed and dismissed by the Respondent.
- ii. Whether the Claimant is entitled to the reliefs sought.

Issue 1

13. The versions told by the Claimant and that by the Respondent are potentially self-destructive. However, the court has considered the veracity and consistency of the contradictory versions and has also considered the respective credibility of the Claimant and that by the Respondent.

14. From the analysis, it is clear that the Respondent is operating a restaurant albeit under a different name currently on the exact location the Claimant had worked from the year 2007 to December, 2008.

15. It is clear that the new hotel was started on or about early December, 2013 and around the same time the Claimant was apparently dismissed from employment by the new owner of the hotel. The Claimant positively identified the Respondent as the new owner.

16. The Claimant put a very credible and consistent set of facts on how take over took place, the new owner called them to a meeting, that the claimant raised pertinent questions about his and colleagues future employment to the new owner and that he was summarily dismissed from employment when he reported to work the following day for no reason given; without any notice or notice to show cause; without a chance to explain why he ought not to lose his employment and without payment of any terminal benefits.

17. The version by the Respondent was hollow and amounted to bare denial. It was not sufficient to rebut the credible set of facts placed before court by the Claimant.

18. The Claimant has proved his case on a balance of probabilities and has satisfied the dictates of section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya as read with sections 41, 43, 45 and 47(5) of the Employment Act, 2007.

19. Accordingly, the court finds that the Claimant was unlawfully, and unfairly dismissed from employment of the Respondent on 18th December, 2013. That he had served the restaurant for about six (6) years. That for the period, he was not registered with NSSF and the Respondent did not make contributions on his behalf. That the Claimant was not given notice nor paid in lieu of notice and that the Claimant is entitled to compensation in terms of section 49 (1)(c) and 49(4) of the Employment Act, 2007.

20. Accordingly, and in answer to issue no. (ii), the Claimant is entitled to the following reliefs:-

- i. One month salary in lieu of notice in the sum of Kshs.13,000.
- ii. Service Gratuity calculated at 21 days salary for each completed year of service for six years in the sum of Kshs.54,600.
- iii. Compensation assessed according to the dictates of section 49(1)(c) and 49(4). In this regard, the Claimant had served the Respondent and its precursor for a period of six years. The Respondent was bound in law and fact to take over the financial liabilities of the previous employer with regard to its employees but did not. The Respondent was not candid and was deceitful in denying ever having taken over the restaurant; ever having employed or seen the Claimant and ever having dismissed the Claimant from his employ. These are all aggravating circumstances. The Claimant did not contribute to the loss of employment. He was not compensated for the abrupt loss of job and means of livelihood. The Claimant desired to continue working as a chef and was punished for daring to ask pertinent questions to the new employer. The Claimant suffered loss and damage and the court finds this appropriate case to award the Claimant equivalent of ten (10) months' salary in compensation for the unlawful and unfair dismissal.

21. In the final analysis, judgment is entered in favour of the Claimant as against the Respondent as follows:-

- a. Kshs.13,000 in lieu of one month notice.
- b. Kshs.54,600 service gratuity.
- c. Kshs.130,000 in compensation for the unlawful and unfair dismissal.

Total award Kshs.197,600.

d. Interest at court rates from date of filing suit with respect to (a) & (b) above and with effect from date of judgment in respect of (c) above till payment in full.

e. The Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 12th day of October, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 2nd day of November, 2018

Maureen Onyango

Judge

Appearances

Mr. Kuloba Simiyu for Claimant

Mr. Henia for Respondent

Daniel Ngumbi – Court Clerk