



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.269 OF 2017**

**ROBERT KIMUTAI RUTTO.....CLAIMANT**

**VERSUS**

**HOTEL CATHAY LIMITED..... RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent company trading as a hotel on 2<sup>nd</sup> November, 2009 as the IT Technician. the contract was for 6 months but the claimant continued in his service continuously until 1<sup>st</sup> March, 2017. The claimant was promoted at IT Manager.

The claimant was underpaid in his position which was similar to that of Cashier or an Accountant.

The claimant worked without taking any days off, taking leave and without a compensations therefrom.

He claimant was not paid his dues wage for February, 2017. On 1<sup>st</sup> March, 2017 when the claimant reported to work he was directed to hand over his duties without notice or being given reasons. The claimant handed over his duties as directed and was directed to go away h would be called by the manager which was not done. The claimant was then told his employment had been terminated without any explanation and refused access at the respondent premises.

The claimant is seeking the following;

- a) Notice pay Ksh.26,751.80;
- b) Underpayment Ksh.97,642.80;
- c) Off duties pay Ksh.30,539.35;
- d) Leave pay for 7 years Ksh.113,985.75;
- e) Salary for February, 2017 Ksh.26,751.80;
- f) Compensation
- g) Costs.

The claimant testified that upon employment by the respondent he worked diligently and was promoted from IT Technician to IT Manager and paid Ksh.27, 000.00 but on 27th February, 2017 he was stopped in his duties when the director refused him access at work without notice or being given any reasons for the termination of his employment.

The claimant had carried his phone at work which was necessary for the nature of his work support but the respondent noted and sent him away.

The claimant also testified that his work hours were 8am to 5pm but would at time be required to work

until late into the night without payment for the overtime hours. The respondent had a clocking system and this should have been used to compute his overtime pay which was not done.

The claimant also testified that he would be at work from Monday to Saturday and his off day was Sunday but would be at work during public holidays. Work during public holidays would be accumulated and the respondent would allocate the taking of off to compensate.

In response the defence is that the claimant was employed on contract renewable subject to good performance. the claimant was employed as an IT Technician and remained as such. the claimant was issued with warnings with respect to absenteeism and lateness at work.

The defence is also that from 16th February, 2016 the claimant absconded duty paralysing the operations systems at the respondent hotel and forcing the respondent to outsource the service to a service provider to change the entire system occasioning the respondent great loss. The claimant refused to report to work despite multiple attempts to reach him and ultimately the respondent was forced to dismiss him from employment.

The claims made are without merit and should be dismissed with costs.

Mr Alfred Kitur the respondent's Hotel manager testified that he worked with the claimant closely until 28th February, 2017 when he was summarily dismissed. That the claimant absconded duty from 16th February, 2016 and was not seen again. Efforts to trace him were fruitless. The respondent was forced to outsource his functions at great costs as the claimant was not only person with the passwords to access controls of the server. The claimant had been issued with warning letters on 6th November, 2015 for absconding duty and lateness without communication.

Mr Kitur also testified that the respondent had a duty schedule to register employees when at work. Each employee took his record at the gate upon entry at work. When on leave such was noted.

The claimant had a phone while at work and was required to show cause which he failed to address. The claimant had a history of poor work attendance and had been issued with warnings.

The respondent allocated employees off days based on nature of work and since the claimant was at the back office he took his off days on Sunday when there was less work. When there was a public holidays, this was commuted to two days off and the claimant was allocated such time off or was paid in lieu thereof.

The claimant was allowed to take his annual leave or was paid for it for the period of 2009 to 2013 and in 2014 the claimant had taken his leave days. The claimant was required to apply for his leave and when he failed to this was forfeited.

At the close of the hearing the parties filed written submissions. Such submissions are put into account together with the pleadings and the evidence on record.

The respondent filed work records and the letter of appointment issued to the claimant is to the effect that his employment was that of an IT Technician. There is no letter promoting him or changing his appointment to the office of IT manager or any other position. as the employment was regulated through the written terms, such did not change for the claimant to justify his claims that he ought to be paid as a Cashier or any other position. the claimant was last earning a wage of **Ksh.24, 500.00** which had improved over time.

The claims for underpayment on the basis that the claimant was supposed to be paid for any other position is not justified.

By letter and notice dated 28th February 2017 the respondent summarily dismissed the claimant on the grounds of absenteeism and desertion from duty and without hiding over his duties and confidential

documents of the respondent. the claimant had also been found to lack commitment on his job by leaving work to attend his own errands. The claimant was also noted to have been absent from 17th February, 2017 to the date of his dismissal.

At Paragraph 9 of the defence, it is the respondent's case that that the claimant absconded duty from 16<sup>th</sup> February 2016 and caused a paralysis of work operations and forced the respondent to outsource for his functions at great costs. In evidence, Mr Kitur testified that the claimant absconded duty from 1th February, 2017 and the duty roaster shows he was not at work from 17th February, 2017.

This evidence is at variance.

There is no corresponding warning, notice or disciplinary action taken against the claimant over such gross misconduct. there was no termination of employment until 1st March, 2017. This disparity is not explained.

Indeed the law at section 44 of the Employment Act, 2007 allow an employer to summarily dismiss an employee absent form work without approval or authority of the employer and such absence is found to be without good cause. However in the employer's exercise of such right, there must be adherence to section 41(2) of the Act. the employee must be issued with notice and given a hearing so as to defend himself and state why he was absent from work. Such requirement for a hearing is mandatory.

Even where the claimant was found to have been absent from work without good cause, reason demanded that before his summary dismissal he be given a notice and hearing. Where it was not possible to give the claimant a hearing the circumstances giving rise to such difficulty ought to be explained by the employer as held in the case of **Simon Aldridge & Another versus Kicheche Camp Limited Cause No.2529 of 2012** where an employer is not able to give the employee a hearing due to circumstances beyond the control of the employer, such circumstances must be demonstrated to the court by the employer. Where such is not the case, the resulting termination of employment devoid of due process is unfair within the meaning of section 45 of the Employment Act, 2007.

In this regard, despite the claimant having committed gross misconduct for being absent from work without good cause, the respondent failed to abide the procedural requirements of section 41(2) and resulted in the unprocedural termination of the claimant's employment. Such if held as unfair termination of employment.

Based on the findings above, the claimant does not contest that he had been issued with several warning letters while in the employment of the respondent. section 45(5) of the Act requires the court to take such into account in assessing the compensation due. in this regard and noting the serious ness of the gross misconduct facing the claimant and the reasons resulting in his employment being terminated, the claimant shall not be awarded any compensation and as held by the Court of Appeal in **Kiambaa Dairy Farmers Co-Operative Society Limited versus Rhoda Njeri & 3 others [2018] eKLR** that;

*... the compensatory damages for unfair dismissal must always be seen as first of all not mandatory or automatic meaning that they should be awarded only in deserving cases; and, even where appropriate, there must be an assessment with the range of zero to twelve months in mind. To my mind, this means, as it must, that the less the violation of an employee's rights that accompany his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and dignity of an employee who is being dismissed. Awards of the full twelve months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee jerk award for every and any case of unfair dismissal.*

On the claim for off duties, the claimant testified that his off day was on Sunday and he took such day off. The submissions that the claimant did not take his off days from October, 2016 to March, 2017 is without evidence.

The claimant pleaded that he did not take leave for 7 years and 4 months. The evidence on the due pay is varied in the pleadings, evidence and in submissions.

Allocation of annual leave to an employee is a right secured under section 28 of the Employment Act, 2007. Any work place policy negating such right is unlawful to the extent of its application and without the approval and consent of the employee. Every employer should ensure each employee is facilitated to take his annual leave when due or be compensated for not taking such annual leave.

The claimant as the IT Technician was last paid Ksh.24, 500.00 and the defence that he took the due annual leave for the year 2014 is not challenged. In this regard the claimant has due and unpaid leave for 3 years all assessed at Ksh.51, 450.00.

Salary due for the month of February, 2017 is due where not paid as employment only terminated vide letter and notice dated 28th February, 2017. The claimant is awarded the pay of Ksh.24, 500.00.

**Accordingly, judgement is hereby entered for the claimant against the respondent for the award of leave pay at Ksh.51, 450.00 and wage for February, 2017 at Ksh.24, 500.00. each party shall bear own costs.**

**Dated and delivered at Nakuru this 18th day of December, 2018.**

**M. MBARU JUDGE**

In the presence of: .....