



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 753 OF 2015

BETWEEN

LAWRENCE NGULA KAKUNGI.....CLAIMANT

VERSUS

BOBS SANDWICH BAR LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munyithia, Mutugi, Umara & Muzna Co. Advocates for the Claimant

V.N. Okata & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 7th October 2015. He states he was employed by the Respondent Company in September 2001, as a Supervisor. He worked Night Shift, on a monthly basic salary of Kshs. 45,823. He worked from 4.00 p.m. until 1.00 a.m. except on Monday, Friday and Saturday when he left at 7.00 a.m.

2. He was irregularly deducted Kshs. 13,860 from his monthly salary, effective from October 2014. The Respondent did not remit N.S.S.F deductions for 18 months. Around June 2015, the Respondent terminated Claimant's contract on the ground of redundancy. He was advised to wait for terminal dues for 4 months.

3. The Claimant avers that termination was unfair and unlawful on the grounds that he was not given notice; there was no genuine redundancy situation; he was not heard; redundancy law was disregarded; and he was compelled to wait for 4 months to receive terminal dues.

4. His Claim against the Respondent is for:-

- a) 1 month salary in lieu of notice at Kshs. 45,823.
- b) Pending annual leave for the year 2015 at Kshs. 37,011.
- c) Unpaid salary for May 2015 and 17 days worked in June 2015 at Kshs. 75,784.
- d) Unlawful salary deduction for 8 months at Kshs. 13,860 per month from October 2014, to June 2015 at Kshs. 110,880.
- e) Unremitted N.S.S.F deductions for 18 months at Kshs. 39,655.
- f) Severance pay at 15 days' salary for every complete year of service [13 years] at Kshs. 343,673.
- g) Unpaid overtime at Kshs. 1,583,643.

h) Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 549,876.

Total...Kshs. 2,786,345

i) Declaration that termination was unfair.

j) Costs.

k) Interest from the date of filing the Claim, till payment is made in full.

5. The Respondent filed its Statement of Response, and Counterclaim, on 18th December 2015. It is conceded that the Claimant worked for the Respondent as a Supervisor/ Duty Manager. He was not diligent. He disconnected CCTV cameras, compromising Respondent's security; he illegally sold beer procured from Armed Forces; he sold adulterated beer; he sold beer on credit to customers without authorization; he illegally used power in collusion with KP&L Co. staff; he employed Casuals without authorization from the Respondent; and irregularly charged customers parking fees. He was served warning letters. The Respondent suffered financially and was unable to meet staff obligations due to Claimant's neglect of duty and dishonesty. The Claimant's contract was terminated on account of redundancy. Termination was fair. His position, and those of 15 other Employees, became redundant. The Respondent carried out forensic audit and established that the Claimant misappropriated, or caused the Respondent to lose, Kshs. 4,020,780. The Respondent counterclaims from the Claimant the sum of Kshs. 4,020,780. The Respondent prays for costs and interest. The Claim should be dismissed and Counterclaim allowed.

6. The Claimant gave evidence on 7th March 2018. He testified that he was employed by the Respondent, initially as a Waiter, in September 2002. He became Supervisor in 2006 and Duty Manager in 2010. The Respondent was owed huge debts by customers as shown in Respondent's exhibited books of account. One of the debtors, named Ngacha, was a cousin of Director Arthur Mwai. Another one named Bakran would leave his bills to the Directors. Staff would not accept to be left a bill of Kshs. 216,300 as indicated to have owed from Bakran. These were debts incurred over a period of time by customers who were in one way or the other connected with the Directors. The Claimant took all the necessary steps to collect debt as shown in Respondent's Black Book.

7. The Claimant confirmed his contract was terminated by the Respondent as shown in the letter of termination. His salary was slashed without notice. He worked overtime without compensation for excess hours worked. The Counterclaim has no merit. The Claimant was not an Accountant. The only document he prepared was the Black Book.

8. He stated on cross-examination that termination letter cited economic reasons in justifying termination. The Claimant indicated at page 108 of Respondent's documents, that business was very low. Business was affected by poor flow of customers. There was no clocking system at the workplace. There was an attendance register which was later withdrawn. He did not have evidence of excess hours worked. His Colleagues would support the prayer for overtime. He did not know if other Employees' salaries were slashed. Redirected, the Claimant told the Court he did not sign any contract to have reduced salary. He was the longest serving Employee by 2015.

9. The Respondent's case was scheduled to be heard on 12th June 2018. The Respondent asked the Court to adopt its Witness Statement as its evidence, and that the Respondent is allowed to close its case upon such adoption. The Court rejected this Application, and ordered the Respondent to decide, within 7 days, whether to close its case without calling any Witness. On 27th September 2018, the Respondent reported to the Court it did not have a Witness and closed its case. Parties confirmed the filing of their Closing Submissions at the last mention before the Court on 27th September 2018.

The Court Finds:-

10. The Counterclaim is not supported by Evidence. It was not shown that the Claimant was responsible for loss of Kshs. 4,020,780 counterclaimed by the Respondent. Details of the forensic audit said to have uncovered this loss, were not presented to the Court. The Auditor behind the exercise did not appear before the Court to show there was loss of Kshs. 4,020,780, and how this related to the Claimant.

The Counterclaim is declined.

11. It is established from the Parties' Pleadings, Documents and Evidence adduced by the Claimant, that he worked for the Respondent. He worked for 13 years. Initially he was a Waiter. He later became a Supervisor. He was a Duty Manager by the time of termination.

12. It is evident that the Claimant's contract, alongside those of 15 other Employees, was terminated on redundancy. The letter of termination, which is titled 'retrenchment' states that the Respondent took the decision due to "*the current economic situation which has affected the whole country, hardest hit being tourism and entertainment sector, which sadly our company falls under...*"

13. The Claimant confirms that the Respondent was experiencing financial doldrums. His own salary was slashed for some months preceding termination.

14. The reason for termination, the Court accepts, was redundancy. Other grounds listed by the Respondent under paragraph 4 of the Statement of Response, are irrelevant. These were not the reasons why termination decision was made. It was not because the Claimant turned off CCTV cameras or sold adulterated alcohol etc. that his contract was terminated. Termination was on account of redundancy. In issue is whether the Respondent carried out redundancy in accordance with Sections 40, 43 and 45 of the Employment Act 2007.

15. The Respondent appears not to have adhered to any provision of the law of redundancy. There was no notice issued to the Claimant, on the intention to declare his position redundant, under Section 40[1] [b] of the Employment Act. No notice of termination issued under Section 40[1] [f]. There was no salary paid in lieu of termination notice. The Labour Office was completely kept out of the process. It is not

shown that seniority in time, skill, ability and reliability of the Claimant was considered. He was simply told ‘*you have been affected by the restructuring programme, and your position in the company is no longer tenable.*’ Selection criterion was not made clear. The Claimant was the longest serving Employee, having worked for 13 years. There does not appear to have been any form of consultations involving the Claimant, the Respondent and the Labour Office. To compound these defaults, redundancy payment was to be made ‘*in the next 4 months.*’

16. Section 40 [1] of the Employment Act states that an Employer shall not terminate a contract of service on account of redundancy unless the Employer has complied with the conditions given under this law. Termination becomes effective only after the benefits described under this law have been paid. An Employer, even under Section 36 of the Act, cannot for instance defer notice pay to be paid ‘*in the next 4 months.*’ Parties become discharged of mutuality of obligations, only after terminal dues have been received by the Employee.

17. There are ample grounds as outlined above, to conclude that termination was unfair. It is clear there was a genuine redundancy reason to justify termination. The process was completely flawed, and contrary to the law.

18. ***The Claimant is granted the prayer for 1 month salary in lieu of notice at Kshs. 45,823.***

19. ***He is allowed the prayer for pending annual leave for the year 2015 at Kshs. 37,011.***

20. The Respondent slashed Claimant’s salary from October 2014 to June 2015, by an amount of Kshs. 13,860. There was no consultation or agreement to this alteration of the Claimant’s contract, as required under Section 10 [5] of the Employment Act. ***The Respondent shall pay to the Claimant salary wrongfully deducted for 8 months, at Kshs. 110,880.***

21. The Court does not normally grant prayers for refund of N.S.S.F deductions. Deductions were made lawfully. They should not revert to the Employee if unremitted. The Employee ought to pursue enforcement with the N.S.S.F under the statutory mechanism granted by the N.S.S.F Act No. 45 of 2013. The prayer for refund of N.S.S.F contributions is rejected.

22. ***The prayer for severance pay is allowed under Section 40 [1] [g] of the Employment Act, at 15 days’ salary for each completed year of service. This translates to Kshs. 343,673.***

23. Cross-examined, the Claimant had this to say on overtime: ‘*...we did not have a clocking system. There was an attendance register which was later withdrawn. I do not have evidence of overtime. My colleagues would support the claim for overtime.*’ He has not established that he worked excess hours. It was not for his colleagues to establish for the Claimant, that he worked overtime. In any case no such colleagues were availed to this Court as Witnesses. The prayer for overtime is rejected.

24. Termination having been declared to have been unfair and unlawful, the Claimant is entitled to compensation under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act. ***He is allowed compensation the equivalent of***

8 ½ months’ salary at Kshs. 389,496.

25. ***Costs to the Claimant.***

26. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

a) It is declared termination was unfair.

b) The Respondent shall pay to the Claimant: notice pay at Kshs.45,823; annual leave pay at Kshs.37,011; salary wrongfully deducted at Kshs. 110,880; severance pay at Kshs. 343,673; and equivalent of 8.5 months’ salary in compensation for unfair termination at Kshs. 389,496 – total Kshs. 926,883.

c) Costs of the Claim to the Claimant.

d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 14th day of December 2018.

James Rika

Judge