



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.15 2017

CONCOLIDATED WITH

CAUSE NO.16 OF 2017

AND

CAUSE NO.17 OF 2017

OMAR ALI DUBA.....CLAIMANT

OSMAN OTIENO.....CLAIMANT

LUCY WAIRIMU MAINA.....CLAIMANT

VERSUS

FUATANA HOTEL.....RESPONDENT

JUDGEMENT

The suits herein were consolidated for hearing and determination – Cause No.15 of 2017 together with Causes No.16 and 17 of 2017.

The claimants filed the Memorandum of Suit of 27th February, 2017 and served the respondent and returns filed through Affidavit of Service by Herman G Mwangi. The respondent did not enter appearance or file defence.

The claimants were heard under the provisions of Rule 15 and 23 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The claims were prosecuted by Omar Ali Duba (Omar).

The claimants were all employed by the respondent, a hotel business based at Nakuru. On 1st August, 2015 the respondent informed the claimants that due to misunderstanding with the landlord, the respondent business would close temporarily pending the finding of another place to rent out for the business.

Omar was employed by the respondent as a Casual employee on 1st January, 2014 and at a daily wage of Ksh.500.00. On 5th May, 2016 he was recalled back in the same position and terms. On 24th May, 2016 the claimant fell sick and got permission from the respondent to go to hospital for treatment. He reported back to work on 26th May, 2016 but his employment was terminated and such was without due cause, reasons or a hearing. The claimant case is that he was owed salary arrears for May, 2016, leave pay, off days, overtime pay, work during public holidays, and notice. The claimant s seeking the following;

- a) Notice pay Ksh.15,000.00;
- b) Salary arrears Ksh.10,000;
- c) Off days allowances Ksh.40,000.00;
- d) Overtime pay Ksh.221,538.46;
- e) Leave allowance Ksh.17,250.00;

f) Work during public holidays Ksh.13, 000.

Osman Otieno was employed as a Casual employee on 6th August, 2014 at a daily wage of Ksh.600.00. The claimant was informed by the respondent that the business would close due to misunderstanding with the landlord. He was not issued with notice or paid his terminal dues and is seeking the following;

- a) Notice pay Ksh.21,000.00;
- b) Unpaid off days Ksh.34,000.00;
- c) Unpaid overtime Ksh.238,152.90;
- d) Unpaid leave Ksh.24, 150.00.

Lucy Wairimu Maina was employed as a Casual employee on 17th March, 2013 at a daily wage of Ksh.300.00. Upon being laid off on 1st August, 2015 she was recalled back on 1st April, 2016 on similar terms and position. On 13th June, 2016 the claimant was dismissed from her employment on the grounds of alleged association with other former employees of the respondent. Such was not a fair reason to justify termination of employment; there was no notice or a fair chance to give a defence. The claimant was not paid her terminal dues. The claimant is seeking the following;

- a) Notice pay Ksh.9,000.00;
- b) Salary arrears Ksh.3,900.00;
- c) Off days allowances Ksh.21,600.00;
- d) Overtime pay Ksh.119,630.00;
- e) House allowance Ksh.10,350.00;
- f) Pay for public holidays Ksh.6, 600.00.

The claimants are also seeking pay in compensation for unfair termination of employment.

Omar testified that he was employed a chef for the day and Osman Otieno was the other chef for the night while Lucy Wairimu was a cleaner. Work stopped due to the respondent having problems with the landlord. The claimants were recalled back but he got sick and took time off and when he returned he was dismissed without any lawful cause. Osman and Lucy were also dismissed without any reasonable cause.

The claimants reported the matter to the labour officer who summoned the respondent but failed to attend.

The failure by the respondent to attend and defend the claims has left the court with the claimant's pleadings and evidence only. The claims are not challenged. The court shall assess the claims based on the pleadings, evidence and the applicable law.

The claimants pleaded that they were all employed and then laid off by the respondent on 1st august, 2015. Omar and Lucy pleaded that they were called back on 1st April, 2016. Osman did not clarify this fact but claimed for his terminal dues.

The recall back to work of Omar and Lucy and the filing of the claim on 27th February, 2017 place them within the requisite timelines to claim for all their terminal dues. Osman as well, where he was laid off on 1st August, 2015 and filed the claim on the same day with the other claimants is within the time period to file his claims.

Starting with Osman Otieno, the fact of being laid off from work by the respondent not challenged. The respondent was faced with business challenge after a misunderstanding with the landlord. That put into account, with lay off of employee being regulated under section 40 of the Employment Act, 2007 the respondent should have paid out all dues owing as of such date. The claimant is therefore entitled to pay for off days earned and not taken, overtime pay for over hours worked and for leave days not taken.

The claimant opted to rely on the single evidence from Omar. From the pleadings, it is clear as to the off days tabulated by the claimants. With regard to the claim for overtime pay, the claimant pleads that he worked every day from 6am to 3 pm and then from 5pm to 10pm. In his evidence for the claimants, Omar testified that he was the day chef and Oman was the night chef. This obviously contradicts the entire evidence. Without clarification and the option to call a single witness compromises this claim.

There is no defence to challenge the claim for leave days. Such is due under section 28 of the Employment Act, 2007.

Osman Otieno is therefore awarded the following;

- a) Unpaid off days Ksh.34,000.00;

- b) Unpaid leave Ksh.24, 150.00.

With regard to Omar and Lucy Wairimu, the dues owing upon being laid off are due. However, the claims for overtime pay are premised on the same template which went contrary to the oral evidence submitted in court. The claimants pleaded that they worked for 6 days with overtime. They also plead to working on Sunday without then clarifying which 6 days are in issue and whether the Sunday was over and above the 6 days or that Sunday was part of the 6 days at work. Through the evidence of Omar, he had a chance to clarify how the overtime pay arose. This was not done. Despite the defence not being offered, such claims must fail.

Both Omar and Lucy were recalled back to work on 1st April, 2016 and each dismissed soon thereafter. There is no defence to challenge the circumstances leading to termination of employment save for the evidence submitted by the claimants that there was no notice and terminal dues were not paid.

Whatever misconduct the claimants committed and which warranted summary action against them, section 44 of the Employment which allows for summary dismissal should be read together with section 41(2) of the Act which requires the employer to issue notice and hear the employee. Without any notice or proof that the claimants were given a hearing, such resulted in unfair termination of employment.

In this regard, Omar is awarded the following;

- a) Notice pay Ksh.15,000;
- b) Salary arrears Ksh.10,000.00;
- c) Pay for off days due Ksh.40,000.00;
- d) Pay for work during public holidays Ksh.13, 000.00.

Lucy Wairimu is awarded the following;

- a) Notice pay Ksh.9,000.00;
- b) Salary arrears Ksh.3,900.00;
- c) House allowance due Ksh.10,350.00;
- d) Off days due Ksh.21,600.00;
- e) Pay for public holidays Ksh.6, 600.00.

With the payment of what is due and owing to the claimant in terminal dues such is sufficient compensation for their time at work with the respondent.

Accordingly, judgement is hereby entered for the claimants against the respondent in the following terms;

Omar Ali Duba;

- a) Notice pay Ksh.15,000;**
- b) Salary arrears Ksh.10,000.00;**
- c) Pay for off days due Ksh.40,000.00;**
- d) Pay for work during public holidays Ksh.13, 000.00.**

Osman Otieno;

- a) Unpaid off days Ksh.34,000.00;**
- b) Unpaid leave Ksh.24, 150.00.**

Lucy Wairimu;

- a) Notice pay Ksh.9,000.00;**
- b) Salary arrears Ksh.3,900.00;**

c) House allowance due Ksh.10,350.00;

d) Off days due Ksh.21,600.00;

e) Pay for public holidays Ksh.6, 600.00.

The claimants shall be issued with Certificates of Service.

Dated and delivered at Nakuru this 6th day of December, 2018.

M. MBARU JUDGE

In the presence of: