



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RE COURT OF KENYA AT NAIROBI**

**CAUSE NO. 17 OF 2016**

*(Before D. K. N. Marete)*

**DEUS ONYANGO OTIENO.....CLAIMANT**

**VERSUS**

**DECASA HOTEL LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Statement of Claim dated 8th January, 2016. The issue in dispute is therein cited as;

*THAT the Respondent has without any color of right terminated the claimant’s employment contract unfairly and unlawfully by failing to give any reasons and without any notice or payment in lieu thereof.*

The respondent in a Memorandum of Reply to Claim dated 29th October, 2018 denies the claim and prays that it be dismissed with costs.

The claimant’s case is that or nor about the month of January, 2015, he was offered employment as a kitchen steward by the respondent at a salary of Kshs.10,000.00 per month exclusive of house allowance and also below the minimum wage. This employment contract was oral and was never reduced into writing per section 9 of the Employment Act, 2007.

The claimant’s further case is that he served with due diligence and faithfulness when on or about 26th October, 2016 the respondent without any color of right terminated the claimant’s employment unfairly and unlawfully on grounds of breaking into one of the hotel rooms. This was investigated by the police and

found to be baseless.

The claimant further avers that the termination of his employment was illegal and unlawful for contravention of procedural and substantive fairness under section 40 and 41 of the Employment Act, 2007. He was not even issued with a notice to show cause as to why he should not be terminated from employment. The respondent has also refused to pay salary arrears and other dues, an action which is unlawful *in toto*.

He claims for payment of his terminal dues as follows;

- i) *One month’s salary in lieu of notice.....Kshs.10,000/=*
  - ii) *12 months compensation for unfair termination.....Kshs.120,000/=*
  - iii) *Certificate of service*
- TOTAL      Kshs.130,000**

He prays as follows;

- i) *A declaration that the Claimant’s dismissal from his employment was unfair and unlawful.*
- ii) *The Claimant be paid his terminal benefits as set out in paragraph 7 herein above totaling Ksh.130,00/=*
- iii) *The Respondent do pay the cost of this claim.*

iv) *The Respondent be ordered to compensate the Claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary.*

v) *This Honorable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.*

vi) *Interest on (ii) and (iii) above at court rates.*

vii) *The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of Section 51 of the Employment Act.*

The respondent's case is a denial of the claim.

It her further case that the claimant was hired in January, 2015 as a casual labourer and would work on a casual basis from day to day. He was paid at the end of the week and would show up for work on a need basis. The salary voucher marked appendix 1 is not a document originating from the respondent. It's signature is unknown and it is not a standard salary voucher for the respondent.

The respondent's other case is a denial of unlawful termination of employment or even the need for notice in the event of termination. This was not necessary in view of the claimant's nature of employment. She did not make any contribution to the NSSF on behalf of the claimant and the allegation is only a fabrication by the claimant.

The respondent's further case is that the claimant was suspected to have broken into one of the customers rooms and stolen several items which have not been recovered to date. This was the basis for his summary dismissal.

The matter came to court variously until 17th October, 2018 when the court ordered various on the way forward towards a determination of the issues in dispute.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 23rd October, 2018 submits that the claimant was an employee of the respondent by virtue of an oral contract made on 4th August, 2008 and variously varied throughout his stint of service.

The respondent in her written submissions dated 9th November, 2018 reiterates his case of no termination of the employment of the claimant because in the first place, no employment existed *inter partes*. It is her case that the claimant was merely relieved of his duties as a casual employee due to his misconduct of breaking into a hotel room and stealing from the customer. This was unsustainable and portrayed a bad picture of the respondent and therefore the necessity of removing the claimant's presence from the precincts of the respondent, if only to save the business. She seeks to rely on the authority of section 45 (2) (b) (i) of the Employment Act, 2007 as follows;

*(i) related to the employees conduct, capacity or compatibility..."*

This matter tilts in favour of the respondent. The respondent's case overwhelms that of the claimant. This is because the claimant not only fails to demonstrate a case of unlawful termination of employment but also fails to contradict the more convincing case of termination on grounds of gross misconduct on his part.

On a test of balance of probability and preponderance of evidence, the matter sways in favour of the respondent. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought he is not. Having lost on a case of unlawful termination of employment, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

**Dated and signed this 29<sup>th</sup> day of November 2018.**

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 3<sup>rd</sup> day of December 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Kenyatta instructed by Adera & Kenyatta Advocates for the claimant.
2. Mr. Kimani instructed by Horeria Kamau & Company Advocates for the respondent.