



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1775 OF 2014

(Before D. K. N. Marete)

JAMES MAUNDU KASINGILI.....CLAIMANT

VERSUS

HAANDI RESTAURANT LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by a Memorandum of Claim dated 8th October, 2014. The issue in dispute is therein cited as;

Unlawful termination of employment, dues and refusal to pay terminal benefits.

The respondent in a Respondent's Response to claim dated 5th November, 2014 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was contractually employed by the respondent on 1st September, 2009 as a waiter at a salary of Kshs.10,000.00. He performed his duties well, with diligence, enthusiasm, resourcefulness and reliability and honesty for about six (6) years at a gross pa of Kshs.10,600.00 as basic salary. He was issued with all his monthly pay advice slips.

The claimant's further case is that on 4th June, 2014, the respondent maliciously and without any justifiable cause accused the claimant of being disrespectful to the chef and senior staff thus contravening his contract of employment. He was thereafter summarily dismissed by the respondent without any justifiable reasons and or explanation. This was to take effect on 31st May, 2014. He was not afforded an opportunity to defend himself.

He claims as follows;

7. The claimant avers that his dismissal was unlawful, unfair, inhumane and callous that amounted to bad labour practices and tainted with illegality. The claimant therefore seeks maximum twelve (12) months compensation, terminal benefits and seeks damage for loss of reputation, pain, loss of amenities and suffering made up as follows:-

8. Rest days – the claimant was entitled to one (1) rest day per week being (4) four days per month and claims payment in lieu, therefore the period of 50 months worked, adds up as follows:-

8.1 50 months x 4 days = 200 days

8.2 Earning per day Kshs.407.69

Amount in lieu (Kshs.407.69 x 200)=Kshs.81,538/=

9. Public Holidays – The claimant is entitled to double pay for Public Holidays worked being Easter (2) days, New Year, Labour day, Mashujaa, Jamhuri Idi UI Fitri and Christmas Holiday (2) days. All totaling to 9 days per year for 6 years worked;

9.1 2008 – 4 days, 2010 – 2013 (9 x 4=36 days), 2014-4 days =44 days,

9.2 Amount (Kshs.407.69 x 66 days x 4 days=Kshs.17,938.36/=

10. Annual leave – period of 6 years worked

10.1 2009 and 2014-4 months each – 18 days

10.2 2010-2013-4 years-21 daysx4= 48 days

(Kshs.407.69 x 66 days) = Kshs.26,907.54/=

11. Three Months Salary in lieu of Notice

Kshs.10,600 x 3 = 31,800/=

12. Service pay at half month's salary for the number of years worked.

(½ x Kshs.10,600 x 6=)Kshs.31,800/=

13. Therefore the above dues add up as follows;

- a) Rest days Kshs.81,538.00
- b) Public Holidays Kshs.17,938.36
- c) Annual Leave Kshs.26,907.54
- d) Three months in lieu of Notice Kshs.31,800.00
- e) Service pay Kshs.31,800.00
- f) 12 Months Maximum Compensation Kshs.127,200.00

He prays as follows;

- a) The sum of Kenya shilling Three Hundred and Seventeen Thousand, One Hundred and Eighty Three only (Kshs.317,183,90/=) in accordance to paragraph 13 of this memorandum;
- b) Interests and costs incidental to this suit
- c) General damages for loss of reputation, pain, loss of amenities and suffering
- d) Certificate of service
- e) Any such other of further relief as this Honourable Court may deem fit and just to grant

The respondent's case is that the claim is fatally defective, incompetent, misconceived, bad in law and not meritorial.

The respondent's further case is that the claimant failed to perform his duties with diligence and honesty as alleged or at all and was severally guilty of gross misconduct as illustrated in the respondent's case. She contends that the summary dismissal was justified on grounds of gross insubordination and gross inefficiency and is therefore not entitled to any terminal dues as claimed, or at all.

The respondent denies malice on her part or even injury to the claimant's reputation. She puts it thus;

PARTICULARS OF ACTS OF GROSS MISCONDUCT AND LACK OF DILIGENCE

1. On 6th May 2012 whilst on duty the Claimant carelessly and without any reason mixed up the credit card of a customer causing considerable embarrassment and inconvenience to the Management of the Respondent and who had to apologise to the consumer concerned.
2. On 21st May, 2013 whilst the Claimant was on duty at a party at Simba Union, the Claimant was found consuming alcohol and entered into an unpleasant and embarrassing argument with the host of the evening.
3. On 29th October, 2013 whilst the Claimant was on duty at the Terrace Area in the Haandi Restaurant he retained the cash tip given to him by a customer on Table 27 and in contravention of the Company regulations as regard handling of tips. The customer

complained to the Manager on duty with regards to this incident.

4. On 1st June, 2014 the Claimant whilst on duty was not in the designated area for his duty and when the issue was raised by his supervisor engaged himself in an embarrassing argument with the head chef as a consequence whereof on 4th June, 2014 the Claimant was issued with a termination notice for insubordination and gross misconduct.

5. Without prejudice to the foregoing the Respondent states that without being liable so to do the Respondent did compile termination dues amounting to Kshs.37,524/- and offered the same to the Claimant who declined to accept the same.

She in the penultimate comes out as follows;

1. In the circumstances under the provisions of the Employment Act No.11 of 2007 ("the Act") this suit is bad in law and ought to be dismissed as inter alia:

a) The Claimant has failed to prove (on the requisite burden of preponderance of evidence) that he was entitled to the claimed amounts which are inherently illegal, spurious and unlawful.

The matter came to court variously until the 19th October, 2018 when it was heard it was heard *inter partes* with the parties testifying in reiteration of her respective cases.

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 whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant did not file any written submissions in support of his case.

The respondent in his written submissions dated 14th November, 2018 recounts and submits his case of lawful termination of employment. The respondent answers that the claimant was terminated due to various cases of misconduct for which he apologized in writing. That the claimant was forced to apologize is not truthful and a lie to court. He admitted having been issued with a warning letter dated 4th July, 2014. She puts it thus;

The other documents include warning letters which the claimant was receiving including the letter dated 23rd May 2013 when he was clearly found taking alcohol whilst on alcohol.

The respondent list of documents dated 5th November, 2014 comprises the following;

1. *Letter of appointment.*
2. *Incident Report 6th May, 2012;*
3. *Warning Letter 8th May, 2012;*
4. *Incident Report 22nd May, 2013;*
5. *Letter from Claimant to Respondent 23rd May, 2013;*
6. *Letter from Claimant to Respondent 28th May, 2013;*
7. *Warning Letter 28th May, 2013;*
8. *Warning Letter 30th October, 2013;*
9. *Incident Report 28th October, 2013;*
10. *Incident Report 1st June, 2014;*
11. *Letter of termination dated 4th June, 2014;*
12. *Computation of dues dated 10th June, 2014;*

13. ...

She also annexes a witness statement in a Respondent's List of Documents dated 21st December, 2015.

Even in the absence of evidence of disciplinary proceedings, this case is clear cut. The respondent, in her lists of documents, displays evidence of a plethora of cases of gross misconduct on the part of the claimant, which cases were ably managed at the work place. In these instances the claimant was involved in the interrogation of the cases, admitted and apologized for the misconduct. A case of unlawful termination of employment would not therefore ensue in the circumstances.

The matter tilts in favour of the respondent. The respondent has adduced overwhelming evidence of misconduct on the part of the claimant. He cannot be heard to reap from his own wrong doing. 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 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Okao holding brief for Patel instructed by Pramod Patel Advocate for the claimant.
2. Mr. Agwata holding brief for Ntabo instructed by Eric Ntabo & Company Advocates for the respondent.