



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 397 OF 2014

SAMMY NZIOKA BITA.....1ST CLAIMANT
MUTO GEORGE MUTIO.....2ND CLAIMANT
SYLVESTER OTIENO.....3RD CLAIMANT
VICTOR OCHIENG4TH CLAIMANT

VERSUS

CASABLANCA RESTAURANT CLUB1ST RESPONDENT
VICTOR WAUDI T/A CASABLANCA RESTAURANT CLUB.....2ND RESPONDENT
CASABLANCA HOLDINGS LIMITED3RD RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimants' contract of service by the respondent on 25/7/2014. It is the claimants' case that they were terminated without any prior notice for agitating for better terms and conditions of service after the respondents persisted in unfair labour practices. The first respondent has denied ever employing the claimants or dismissing them in any manner. She has further denied having any legal personality capable of being sued and as such prayed for the suit to be dismissed with costs. The second and third respondents have denied ever employing the claimants or dismissing them on 25/7/2014 without any just cause. Although the second respondent admits being director of the third respondent, he has denied that the third respondent is the proprietor of the first respondent.

2. The suit was heard on 16/2/2016 when the claimants testified as CW1-CW4 but the respondents called no witnesses. Thereafter the parties filed written submissions which have carefully considered herein together with the evidence adduced.

CLAIMANTS CASE

3. CW1, Mr. Mutio George Mutio, is the second claimant herein. He testified that he was employed by

the late Joseph Okoth Waudi at the first respondent in 1995, where he started as a Waiter but rose to become the Head Waiter. He confirmed that the rest of the claimants found him there when they were employed as waiter and bouncers (security guards) respectively. He was never given any written contract but only an employment card. His salary was ksh.9450 per month but it was paid on weekly basis. He was never issued with any payslip.

4. CW1 further stated that the third respondent was formed by Mr. Okoth Waudi who also told them in 2010 during a staff meeting that all his employees were absorbed by the third respondent henceforth. That he also introduced the second respondent as the Director to take over from him because he was sick. Thereafter Mr. Okoth Waudi died and CW1 continued to work together with the other claimants but with some difficulties. CW1 and his colleagues therefore wrote a letter to the second respondent on 4/6/2014 requesting for a meeting to discuss their terms and conditions of service but he never responded. They wrote a reminder on 8/7/2015 and again he never responded prompting them to serve a demand letter through their lawyer on 23/7/2015.

5. On 25/7/2015, the manager Mr. Tonny Kenga called him to his office and told him that the second respondent had instructed him to tell him that he could not continue working at the club because he was writing letters to demand salary increase. CW1 tried to see the second respondent on 26/7/2014 but he refused and left his office through the back door. CW1 maintained that he was unfairly dismissed from employment without notice and for agitating for his better terms of service including leave, public holiday and overtime.

6. CW2, Sammy Nzioka Bitu, is the first claimant herein. He testified that he was employed by the respondent on 8/1/1996 as a waiter and later got promoted to a barman earning ksh.10500 per month. He was hired verbally but later he was given a confirmation letter dated 12/4/1999. CW2 worked for the first respondent until 2008 and in 2009 the proprietor Mr. Waudi told him and the other employees that the business had been taken over by the third respondent. During the life time of Mr. Waudi, CW2, was being issued with payslips but after his death, the second respondent changed the mode of payment from monthly salary to weekly and some times daily pay with no payslips being given.

7. On 4/6/2014 and 8/7/2014, CW2 and his colleagues wrote to the respondent seeking audience to discuss better terms of service including regular payments. On 23/7/2014, they served demand letter through their lawyer but on 25/7/2014, he was told by Mr. Justus Odhiambo that the director had terminated his service. CW2 sought to see the director on 26/7/2014 but he refused to see him. He therefore maintains that the termination was unfair because he was not served with any prior notice. He produced business permits for 2014 to prove that the third respondent had taken over the first respondent and the second respondent was managing it.

8. CW3, Mr. Silvester Otieno is the third claimant herein. He testified that he was employed by the first respondent from June 1997 as a Security Bouncer and later became a supervisor for waiters at the Club Rio and the first respondent in rotation. The two clubs are owned by the third respondent since 2009 and the second respondent is one of the directors of the third respondent founded by the late Waudi. CW3 was earning ksh.20000 per month divided into ksh.5000 per week by the second respondent. He produced his employment card as an exhibit.

9. On 4/6/2014 and 8/7/2014 CW3 and his colleagues wrote to the respondent seeking audience to discuss better terms of service but the request was declined. Thereafter they served a demand letter through their lawyer and likewise it was ignored. On 25/7/2014 the manager Mr. Tonny Kenga told him that the director had terminated his services. CW3 then together with other claimants went to see the second respondent the following day but he refused to see them and left through the back door. He contended that the termination was unfair because he was not served with any prior notice.

10. CW4, Mr. Victor Ochieng Oluoch is the fourth claimant herein. He testified that he was employed by the respondent from September 2008 as a car park attendant and later rose to become the Head of Security. He was never given any written contract but his salary was ksh.500 per day. He confirmed by certificate of incorporation that the third respondent was registered on 16/6/2008. He further contended

that the second respondent was a director of the third respondent because his father the late Waudi had introduced him to the staff, as such, before his death. That the late Waudi also told the staff that the first respondent had been taken over by the third respondent and that the second respondent was to be the director.

11. In June 2014, CW4 and other workers started agitating for better pay and on 8/7/2014 they wrote a reminder. On 25/7/2014, he reported to work at 7pm as usual but the manager Mr. Tonny Kenga told him that his services had been terminated by the director for demanding higher pay. CW4 contended that the termination was unfair because the reason for the termination was agitation for better pay and no prior notice was served. Just like all the other claimants, he was not going for his annual leave or public holiday and worked overtime without pay.

ANALYSIS AND DETERMINATION

12. There is no dispute that the claimants were initially employed by the first respondent before it was taken over by the third respondent on 2009. There is also no dispute that the second respondent was a director of the third respondent. There is further no dispute that the claimants were all dismissed from work on 25/7/2014. The issues for determination are:

- a. Whether the suit against the first respondent is incompetent.
- b. Whether the claimant's employment contract were unfairly terminated.
- c. Whether claimants are entitled to the reliefs sought.

INCOMPETENT SUIT

13. The first respondent raised objection to the suit on ground that the suit against her is incompetent because she lacks legal capacity to be sued. The said objection has not been contested by the claimants and I therefore uphold it. The first respondent being a mere business name cannot be sued in its name and as such the suit against her is struck out for being incompetent in law.

UNFAIR TERMINATION

14. The claimants contended that they were dismissed for agitating for better terms and conditions of service. That the camel's back broke when they served a demand letter through their lawyers with intention to commence suit in court. The said demand did not go down well with the second and third respondent and they dismissed the claimants without any prior notice and without according them any hearing. The respondents did not give any evidence to rebut the evidence by the claimants herein. I therefore find that the claimants have proved on a balance of probability that they were unfairly terminated. It is clear from the claimants' evidence that the reason for their dismissal was because they had initiated or proposed to initiate legal proceedings against their employer contrary to Section 46 of the Act. In addition, I find and hold that the second and third respondents have failed to discharge their burden of proving and justifying the reasons for dismissing the claimants, and that they followed a fair procedure as required under Section 45 read with Section 35,40,41,43 and 47(5) of the Act.

RELIEFS

15. Under Section 49 of the Act an unfairly terminated employee is entitled to salary in lieu of notice plus compensation of upto 12 month gross salary. In this case I award each claimant one month salary in lieu of notice. I will also award each claimant 12 month gross salary as compensation for the unfair termination considering their long service and the fact that they never contributed to the termination through misconduct.

16. Each claimant is entitled to annual leave from the period they served under the second and third respondent that is from 2009 to 2015. The said claim is based on a continuous breach which ended on

25/7/2014 when the claimants were dismissed. The suit having been commenced on 26/8/2014, less than 12 months after the cessation of the breach, the claim for leave cannot be deemed time barred under Section 90 of the Act as submitted by the defence. The claim for leave is however lacking in material particulars. The claimants assumed that the value of leave for the whole period was the same yet salary must have differed over the years.

17. The claims for overtime and public holidays served are dismissed for want of particulars and evidence. Likewise I dismiss the claim for house allowance for want of proper particulars and evidence. The claimants alleged that they were paid daily wages which they never proved to be exclusive of house allowance.

18. The award for each claimant is summarized bellows.

FIRST CLAIMANT [SAMMY NZIOKA BITA]

Noticeksh.9100

Compensationksh.109200

118300

SECOND CLAIMANT [MUTIO GEORGE MUTIO]

Noticeksh.9450

CompensationKsh. 113400

Ksh.122850

THIRD CLAIMANT [SYLVESTER OTIENO]

Noticeksh.20000

Compensationksh 240000

Ksh.260000

FORTH CLAIMANT [VICTOR OCHIENG]

Noticeksh.13000

Compensationksh.156000

Ksh.169000

DISPOSTION

19. For the reason that the claimants were dismissed for commencing legal proceedings against their employer I enter judgment for them against the second and third respondent declaring their termination unfair and awarding them the aggregate sum of ksh. 670150 plus costs and interest. The reason for entering the judgment against the second respondent is because under Section 2 of the Employment Act, employer includes a manager or an agent of a corporation.

Dated, signed and delivered this 28th April 2017

O.N. Makau

Judge