



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.189 OF 2016

WILSON MURIMI MUNENE.....CLAIMANT

VERSUS

CASTLE FOREST LODGE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th May, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 08.09.2016 through Rakoro & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment by the respondent was unfair and unlawful.
- b) The respondent to pay the claimant a sum of Kshs.3, 048, 566.60 being maximum compensation for unfair termination Kshs. 254, 559.00, and, Kshs. 2,794,007.00 being Kshs.10, 606.65 for 15 days' salary in July 2016; a month's pay in lieu of termination notice Kshs.21, 213.30; severance pay at 15 days for each 4 years of service Kshs.42, 424.60; 21 days leave allowance for 5 years Kshs.74, 246.55; underpayment for 60 months Kshs. 540, 798.00; pay for public holidays worked in 5 years Kshs.20, 933.00; and overnight or night shift pay due Kshs. 2, 083, 785.00.

The respondent filed the statement of response and counterclaim on 27.10.2016 through C.M. King'ori & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs and judgment be entered for the respondent on the counterclaim for:

- a) General damages for breach of the employment contract and interference with business relations.
- b) Costs and interests.

It is not disputed between the parties that the respondent employed the claimant. The court finds that he was employed in January 2012 and confirmed in employment on 01.11.2014 as a caretaker for the respondent's Upper Kamweti Bushhut at a basic salary of Kshs. 12, 200.00 per month plus housing accommodation which was provided by the respondent for use by the claimant. While making that finding and as submitted for the claimant, at paragraph 2 of the response, the respondent admitted that it employed the claimant as averred in the claim; and further, the court has taken into account the termination letter which stated that the claimant was employed in September 2011. The respondent having given contradictory evidence in that regard, including by RW that prior to 27.11.2014 there was no employment relationship, the court finds the same incredible and there is no reason to doubt the claimant's account about the time of commencement of the employment relationship.

The letter on the contract of employment dated 27.11.2014 enumerated the claimant's 8 duties ranging from caretaker of the Bushhut, and the work of a guard, cook and gardener. Despite the numerous assignments, there is no dispute between the parties that the claimant was designated as a caretaker.

The letter of termination was dated 15.07.2016 and was signed by the respondent's Director one Melia van Laar, also the respondent's witness in the case (RW). The letter stated that the claimant was employed as a caretaker of the respondent's Upper Kamweti Bushhut from September 2011 to July 2016; and, the claimant would protect and keep clean the house and the compound and from time to time take care of the visitors staying at the hut. The letter further stated that the respondent could no longer continue keeping the house due to lack of clientele and therefore, the claimant's job was terminated. The letter wished the claimant success in his future employment.

The **1st issue** for determination is whether the termination was unfair and unlawful. The reason given in the termination letter is that there were no customers to the house. Thus, the court returns that the reason for the termination was redundancy. The procedure applicable was as provided in section 40 of the Employment Act, 2007. The court returns that the respondent failed to serve the one month redundancy notice as prescribed in the section. In that sense, the termination would be unfair for want of due process as envisaged in section 40 of the Act. RW testified that the termination was on account of the claimant's poor performance and misconduct and in particular, the claimant never treated the customers properly. In that event, the respondent would be obligated to serve a notice and afford the claimant a hearing per section 41 of the Act for termination on such grounds of misconduct and poor performance to be lawful. The court finds that the communicated reason being in the nature of redundancy due to lack of customers was misleading and was not a valid reason for termination as at the time of termination as per section 43 of the Act. Thus, the court returns that the termination was unfair for want of due process and for want of a valid reason as at the time of the termination.

The court has considered the period served. The letter of 27.11.2014 confirmed the claimant into employment as agreed and signed on 01.12.2014. The court finds that the confirmation must have elicited the claimant's high expectations to continue in employment for a considerable period of time. The court has revisited the record and evidence and there is no material to establish that the claimant had no desire to continue in employment. However, the parties have not established the terms of service prior to the letter of 27.11.2014 save for the belated vouchers under which RW exhibited on her affidavit filed on 11.05.2017 confirming employment relationship prior to 27.11.2014. The court has considered the parties' circumstances in their rather wavy employment relationship prior to 27.11.2014. The court has considered and finds that by RW's evidence, there were warnings made against the claimant's otherwise poor performance. Towards balancing justice in the case the court will therefore award the claimant 3 months' salaries being compensation for unfair termination at Kshs.21, 213.30 being the last due monthly statutory wage making **Kshs.63, 639.90**.

The **2nd issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a) The court finds that a termination notice was not served and the claimant is awarded **Kshs. 21, 213.30** in lieu of termination notice as prayed for.
- b) The respondent alleged termination on account of redundancy and the claimant is awarded severance pay under section 40 of the Act and as prayed for making **Kshs. 42, 424.60**.
- c) There was no evidence that the claimant was accorded annual leave and the court returns that he is entitled to **Kshs. 74, 246.00** being pay in lieu of annual leave as prayed for.
- d) The contract is clear that parties agreed upon 26 working days per month when the claimant was expected to be available at the Bushhut. The claimant was bound by that agreement and the court returns that there was no basis for the claims and prayers with respect to pay for public holidays and for overtime or night shift. Thus, the prayers in that regard will fail.

e) The claimant provided no evidence as to his pay prior to the letter of 27.11.2014 under which, as agreed on 01.12.2014, the claimant's pay would be Kshs.12, 200.00, effective 01.11.2014. Termination was on 15.07.2016 making 20.5 months of underpayment times Kshs. 9, 013.30(amount not paid per month as a result of the underpayment) making **Kshs.184, 772.65** for underpayment. The same is awarded accordingly.

f) The claimant is awarded **Kshs. 10, 606.65** being statutory minimum pay for 15 days worked in July 2016 and as prayed for.

The **3rd issue** for determination is whether the respondent is entitled to prayers per the counterclaim. RW testified that the claimant failed in his duties and made the Bushhut business to get completely diminished as the customers ceased to come to the hut or house. The respondent therefore claimed and prayed for damages for breach of the employment contract and interference with business relations. The evidence and the pleadings did not provide computation of such loss that may have occurred and the extent it was attributable to the claimant. RW stated in her evidence that she wanted the claimant to pay for the lost business but she assigned no monetary value to the alleged loss. The claimant testified that any poor service to the customers was due to the failures of the respondent to provide support such as provision of fresh food for the visitors' consumption. There was no material on record to establish that the visitors to the hut indeed declined. Most important, the respondent was entitled to institute disciplinary proceedings by way of a notice and a hearing under section 41 of the Act to establish the misconduct and poor performance as was alleged against the claimant but that was never done on the part of the respondent. The respondent's submissions made no guidance about the prayer and the claim. Thus, the court finds that the respondent must have abandoned the same. Accordingly, the court returns that the counterclaim will fail with costs.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the contract of employment between the parties was unfair and unlawful.
- b) The respondent to pay the claimant **Kshs.396, 903.10** by 01.08.2017 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- c) The counterclaim is dismissed.
- d) The respondent to pay the claimant's costs of the suit including the counterclaim.

Signed, dated and delivered in court at Nyeri this Friday, 19th May, 2017.

BYRAM ONGAYA

JUDGE