



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 354 OF 2015

BETWEEN

JOEL KAWAWA MWALAULO CLAIMANT

VERSUS

CAFESSERIE LIMITEDRESPONDENT

Rika J.

Court Assistant: Benjamin Kombe

Wandai Matheka & Company Advocates for the Claimant

Buyuka Obonyo Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 28th May 2015. He states he was employed by the Respondent Restaurant as a Supervisor on 14th February 2014, at a monthly salary of Kshs. 20,670. He served up to 1st July 2014 when the Respondent terminated his contract. He was advised the Respondent needed to cut down on its operational costs. He prays for orders against the Respondent as follows:-

- a. 1 month salary in lieu of notice at Kshs. 20,670.
- b. Annual leave at Kshs. 13,780.
- c. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 248,040.
- d. Refund of N.S.S.F contributions at Kshs. 600.
- e. Refund of N.H.I.F contributions at Kshs. 640.

Total... Kshs. 283,730

- f. A declaration that termination was unfair.
- g. Certificate of Service to issue.

h. Damages for wrongful termination.

i. Costs, Interest and any other suitable relief.

2. The Respondent filed its Statement of Response on the 14th October 2015. Its position is that it employed the Claimant on a contract of 6 months, beginning February 2014, expiring 31st August 2014 at a monthly gross salary of Kshs. 20,000. Kshs. 670 was only paid to the Claimant during holidays in April and May. His contract was terminated due to decline in business. The Claimant was notified in good time. Termination was fair and lawful

3. The Claimant gave evidence, and closed his case on 24th February 2017. The Respondent opted not to call evidence, and proceedings closed the same date. The dispute was last mentioned on 24th March 2017 when Parties confirmed the filing of their Submissions, and Judgment scheduled for delivery.

4. The Claimant confirmed he signed a 6 months' contract. He commenced employment on 12th February 2014. It is not true that the Respondent had economic problems. The Claimant had access to its sales reports. The Respondent is a Bar and Restaurant inside the City Mall at Mombasa. It is not a hotel, affected by the problems experienced in the tourism industry at the time. He was called by the Manager at midnight and told he has to leave because the Respondent could not manage to continue paying his salary.

The Court Finds:-

5. The Parties signed a contract on 8th April 2014. The contract was for 6 months. The Claimant would serve as a Supervisor in the Lounge. Commencement date is given as 12th February 2014, expiry date as 31st August 2014. Although the contract states Claimant's gross salary would be Kshs. 15,000, paragraph 4 of the Statement of Claim gives a figure of Kshs. 20,000 a month. A majority of pay slips show a basic salary of Kshs. 17,400 and house allowance of Kshs. 2,600, which would support the figure of Kshs. 20,000. Kshs. 670 paid in addition to the amount of Kshs. 20,000, is indicated as holiday pay, as stated by the Respondent. It was variable pay. The correct gross salary was the amount of Kshs. 20,000 stated by the Respondent.

6. The contract was for 6 months, but ended prematurely, 3 months before its due date. Termination was based on alleged redundancy. Parties were engaged for just 3 months. Businesses do not experience a downturn at the drop of a hat. It would be expected there was a gradual spiral to the bottom. At the time the Respondent employed the Claimant 3 months earlier, there would be signs of redundancy. Redundancy does not just happen abruptly. In the absence of evidence from the Respondent, the Court has no reason to find that the Respondent was compelled to scale down the number of staff to cut costs. Employers in the hospitality industry should avoid justifying wrongful termination decisions on poor business environment all the time. Even when there is an outbreak of peace and stability in the industry, termination of employment is still being justified on the allegation of low hotel bookings said to be occasioned by insecurity. Poor business environment is not static. There are highs and lows, and there should be no rush in declaring redundancies at the slightest sign of a downturn. When are the highs ever acknowledged, bonuses paid or new Employees recruited in this industry? The Court does not understand how redundancy situation happened on the scene just 3 months after the Respondent appointed the Claimant as its Lounge Supervisor. Ordinarily, there is progression leading to a redundancy situation. It is preposterous for an Employer to call an Employee at midnight announcing a sudden redundancy situation. That cannot be a genuine redundancy situation, but a colourable exercise. If an Employer cannot pay, the advice would be: do not employ in the first place. Besides, there is some persuasion in the Claimant's argument that the Respondent is a Bar and Restaurant inside a Mall, not a Hotel on the Beach depending on revenue from room occupancy.

7. The Respondent did not give a valid reason for its decision, and termination therefore was unfair.

8. ***The Claimant is granted the prayer for notice pay of 1 month, at Kshs. 20,000.***

9. He prays for compensation the equivalent of 12 months' salary. He had only served 3 months. He expected to serve another 3 months. What he seeks is double what he would have earned in his entire career with the Respondent. What he seeks is not a remedy; it is unjust enrichment. ***He is granted compensation the equivalent of 1 month salary at Kshs. 20,000 for unfair termination.***

10. The Respondent deducted his N.S.S.F and N.H.I.F contributions. Statements of Account from these bodies suggest there were no remittances made for the months of February, March and June 2014. The Court does not think however, that statutory dues should revert to the Employee. The Respondent shall forward those contributions to the respective Bodies, if it has not done so to-date. In default the Claimant is at liberty to pursue non-payment with the relevant Bodies for their actions as provided for under their Constitutive Acts of Parliament.

11. The prayer for damages for wrongful dismissal, beyond compensation granted for unfair termination, has no foundation and is rejected.

12. No order on the costs.

13. Interest granted at 14% per annum from the date of Judgment till payment is made in full.

14. Certificate of Service to issue.

IN SUM, IT IS ORDERED:-

a. It is declared termination was unfair.

b. The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 20,000 and the equivalent of 1 month salary in compensation for unfair termination at Kshs. 20,000- total Kshs. 40,000.

c. The Respondent shall remit statutory dues to the relevant Bodies, in default the Claimant to pursue compliance under the Acts of Parliament governing the respective Bodies.

d. Certificate of Service to issue.

Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 23rd day of June 2017

James Rika

Judge