



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

CAUSE NO. 100 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

JUSTUS MUSUMBA AMUKONGOCLAIMANT

-Versus-

THE NOBLE HOTEL AND CONFERENCE CENTRE..... RESPONDENT

J U D G E M E N T

By Memorandum of Claim dated 19th April 2016 and filed on 21st April 2016 the Claimant avers that he was unfairly terminated from employment by the Respondent. He prays for the following remedies:

a)A declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, he was not remunerated as required by law.

b)Payment of the sums of money claimed under paragraph 9 above -

1)One months pay in lieu notice Kshs. 11,330

Basic + house allowance

2)1 Year Leave dues Kshs. 11,330

Basic Salary

3)Underpayment of wages (Jan 2013 to April, 2014)

a)Legal notice No.197 of 1st May, 2013

Basic + house - current pay

$10,116 + 1517 - 7000 = 4,633.4 \times 15 \text{ months Kshs. } 69,501$

b)Legal notice No. 197 of 1st May, 2013 (May to Dec. 2014)

Basic + house allowance - current pay

$10,116 + 1517 - 9500 = 2133 \times 8 \text{ months Kshs. } 17,064$

4)Unpaid house allow for entire period

15% of basic x months worked

1699.5 x 24 months Kshs. 40,788

5)Overtime dues

12 hours x 6 days = 72 hrs - 48 hrs = 24hrs

24hrs x 4wks = 96hrs p.m

96hrs x 1.5 x 11,330/208 = 7,843

7843 x 24 months Kshs.188,232

6)Unpaid public holiday

10 days per yr x yrs wrkd x basic/30 x 2

10 days x 2yrs x 11.330/30 x 2Kshs. 15,106.67

7)Compensation for unfair termination

Gross pay x 12 months

13,029.5 x 12 months Kshs.156,354

TOTAL CLAIM Kshs.509,705.67/-

c)Costs and Interests.

d) Any other relieve the Honourable may deem fit to grant.

The Respondent filed a Defence denying the allegations of unfair termination. It is the Respondent's case that the termination of the Claimant's employment was lawful and procedural. The Respondent prays that the Claim be dismissed with costs.

The case was heard on 14th November 2016. The Claimant testified on his behalf while the Respondent's Director JANE WAMBUI NGANGA testified on its behalf. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was employed by the Respondent as a security guard on 1st January 2013. His employment was terminated on 18th December 2014. His salary was Kshs. 9500. He worked from 6am to 6pm when on day shift and from 6pm to 6am when on night shift for 6 days a week. He also worked on public holidays. He was not paid any allowances or overtime. He went on annual leave in 2013 only and was not paid in lieu of outstanding leave.

The Claimant testified that on 18th December 2014 he was told to go home and wait until he was called back to work. He was not given a hearing or issued with a letter of termination. He was not given notice.

The Claimant denied that he was negligent in the performance of his work or that he reported to work late as alleged in the Respondent's Memorandum of Defence.

The Claimant testified that was paid for 14 days after he cleared on 6th January 2015.

He prayed for judgment against the Respondent as prayed in the Memorandum of Claim.

In the written submissions filed on behalf of the Claimant it is submitted that the evidence shows that he was terminated without due process as laid down in the law and is entitled to the remedies sought.

Respondent's case

JANE WAMBUI NGANGA (RW1) testified that the Claimant's employment was terminated due to incompetence and lack of diligence. She testified that the Claimant was sacked for being drunk and sleeping while on duty. She testified that after he was found drunk on duty he was transferred to day shift where he was found to have left the gate unmanned. She testified that his salary was consolidated and that he was paid full salary after clearing in January 2015 and was issued with a letter of recommendation to enable him get another job.

She urged the court to dismiss the suit.

Under cross examination Jane stated that there was no meeting to discuss the Claimant's conduct. She stated he was not given notice or an opportunity to defend himself. She testified that the Claimant was warned severally but did not produce any evidence of the warnings. She stated that the Claimant appeared before a disciplinary committee but there were no letter inviting him for the disciplinary hearing or minutes of the hearing. She stated that according to employment records and the certificate of service Justus was a good employee.

In the written submissions filed on behalf of the Respondent it is submitted that the Claimant was lawfully terminated under section 44(c) of Employment Act due to gross misconduct and was paid terminal dues after clearing. The Respondent denies that the Claimant is entitled to any other terminal benefits.

Determination

I have carefully considered the pleadings and evidence on record. There is no dispute that the Claimant was an employee of the Respondent or that his employment contract was terminated on 18th December 2014. The only issues in dispute are therefore whether the termination was unfair and if he is entitled to the remedies sought.

The Claimant was not issued with a letter of termination of employment. There is not evidence that he was subjected to any disciplinary hearing or was informed of the reasons for termination. The Respondent's witness JANE WAMBUI NGANGA referred to a hearing but stated there were no minutes. There is also no letter inviting the Claimant for a disciplinary hearing or a letter asking the Claimant to show cause why he should not be dismissed for gross misconduct. It is also instructive that the Respondent's witness stated that she did not personally handle employment issues and was not involved in the day to day running of the Hotel. Her evidence is therefore hearsay.

I am satisfied on the evidence on record that the Claimant was not given a hearing at all. He was terminated verbally only being told to go home and wait until he was called back to work. It is therefore manifest that the termination did not comply with sections 41 and 43 of the Employment Act and is therefore unfair in terms of section 45(2) of the Act. I thus find and declare the termination of the Claimant's employment by the Respondent unfair.

Remedies

The Claimant having been unfairly terminated is entitled to pay in lieu of notice and days worked but not paid. The Respondent has stated that the Claimant was paid terminal dues but did not deny that he was paid for only 14 days instead of 18 days worked. The Claimant testified that he worked for 12 hours on both day and night shift from 6am to 6pm or 6 pm to 6am for 6 days a week, a fact that is confirmed by the Respondent's witness. He is therefore entitled to overtime pay. The maximum working hours being 52

per week, the Claimant worked an extra 20 hours per week for 12 months this being a continuing wrong.

The Claimant further prayed for underpayments. Since the Claimant worked on both day and night shift his pay should be pegged on that of night guard which is higher. The consolidated minimum wage for a night guard for 2013 was Kshs. 11,633.55. The Claimant was therefore underpaid by Kshs. 2,133.55 per month up to 18th December 2014. He was therefore underpaid by a total of Kshs. 2133.55x23 months being Kshs. 49,071.65.

The Claimant is not entitled to house allowance as the underpayments are based on consolidated wages which are inclusive of house allowance. The Claim for public holidays was not denied by the Respondent's witness. The Claimant is therefore entitled to payment for public holidays falling between March 2013 and 18th December 2014 which is a total of 20 days. Based on an hourly rate of Kshs.51.70 and double rate of pay for 12 hours a day he is entitled to Kshs. 80,652. The Claimant is also entitled to compensation for unfair termination which I award him at 2 months' salary taking into account the length of service and all other relevant circumstances.

The Claimant further prayed for annual leave. He stated that he did not take leave for 2014. The Respondent did not deny this fact. I therefore award the Claimant 21 days leave for 2014 at Kshs. 8,143.50.

Conclusion

I therefore award the Claimant the following:

- (i) Pay in lieu of notice Kshs. 11,633.55
- (ii) Salary for 4 days worked
and not paid Kshs. 1,552.00
- (iii) Underpayments Kshs. 49,071.65
- (iv) Overtime (20x52x1.5x51.20) Kshs. 80,652.00
- (v) Public holidays Kshs. 18,432.00
- (vi) Compensation Kshs. 23,267.10
- (vii) Annual leave Kshs. 8,143.50

The Claimant is also entitled to a Certificate of Service which the Respondent has agreed to issue and which we direct that Respondent issues to the Claimant within 30 days.

Dated and signed and delivered this 20th day of JULY, 2017

MAUREEN ONYANGO

JUDGE