



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 34 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 21<sup>st</sup> September 2017)**

**GEORGE KANIARU.....CLAIMANT**

**VERSUS**

**OLIVE GARDENS LIMITED .....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Memorandum of Claim on 12.1.2012 through the firm of Waiganjo Wachira & Company Advocates indicating breach of employment contract, wrongful and unlawful dismissal and non-payment of employee's dues and accrued rights.

2. The Claimant's case is that he was employed on 6.1.2011 by the Respondent as a Cook for a fixed period of 3 years (Appendix GK 1). His salary was 22,277/= per month. He indicates that he performed his responsibility in an exemplary manner. That on or about 1-10-2011, the Respondent's Director without any reason unfairly, wrongfully and unlawfully terminated the Claimant's employment (Appendix GK 2). He avers that he was not given reasonable notice before the termination.

3. He avers that he was wrongfully dismissed and seeks to be paid:

***1. 1 month salary in lieu of notice = 22,277/=.***

***2. Loss of income for the remainder of the term (2 years and 4 months) – 623,756/=.***

***3. Unpaid leave for 2011 = 14/30 x 22,277 = 15,603/=.***

***4. Compensation of Kshs.22,277 x 12 = 300,000/=.***

***TOTAL = Kshs.928,960/=***

4. The Respondent on their part filed their Memorandum of Reply on 31.3.2012 through the firm of Kiai Nuthu & Associates Advocates. They have admitted employing the Claimant but deny it was for a fixed term of 3 years.

5. They also aver that the contract was terminated in accordance with the terms of the contract and reasons for termination had been communicated to the Claimant. They also aver that they gave Claimant reasonable notice before terminating the contract.

6. The Respondent denies that the Claimant is entitled to prayers sought.

7. The parties have also filed their submissions whereby the Claimant reiterates his evidence. He urges the Court to consider that the Respondent did not have valid reasons to terminate the Claimant and that the Claimant was not terminated fairly nor was he given adequate notice before being termination. They cited **GMV vs Bank of Africa Kenya Limited Case No.1227 of 2011 & D.K. Njagi Marete vs TSC (2013) EKLR** and urged Court to find for Claimant as prayed.

8. On their part the Respondents failed to file any submissions.

9. I have considered all evidence on record and pleadings and submissions filed. The issues for determination by this Court are as follows:

***1. Whether the Respondent had valid reasons to dismiss the claimant.***

***2. Whether Claimant was accorded due process before dismissal.***

***3. Whether the Claimant is entitled to remedies sought.***

10. On the 1<sup>st</sup> issue, reference is made to the dismissal letter addressed to the Claimant dated 1/10/2011 which states as follows:

**“RE: SUMMARY DISMISSAL – GEORGE KIROGA KANIARU**

***I write to inform you that you have been summarily dismissed from the Olive Gardens Limited. Reference is made to the conversation between us in which reasons for your dismissal were explained to you and to which you had no credible explanation.***

***Reference is thus made to Section 44 of the Employment Act 2001 sub-section 4(c), (e) and (g). You are required on receipt of this letter to hand over all property that belongs to Olive Gardens Limited and pick your cheque for your final dues form the account accounts office.***

***Sincerely,***

***Signed***

**MARGARET KARUNGARU**

***For: Olive Gardens Limited “***

11. The letter fails to state the reasons as to why the Claimant was dismissed only alluding to some conversation between the Respondent and the Claimant. The conversation details are not disclosed. It is therefore not clear why the Claimant was dismissed.

12. Section 43 (1) & (2) of Employment Act states as follows:

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.***

13. The reason the employer relies on to dismiss must be valid and real or tangible and cannot be imagined or left to speculation. In this case no reason is stated and it therefore follows that the provisions

of Section 43 of Employment Act are not met and therefore this Court finds that the Respondent did not have valid reasons to dismiss the Claimant.

14. On the 2<sup>nd</sup> issue, the issue of due process comes in. The process envisaged is that stated at Section 41 of Employment Act 2007 which provides as follows:

**“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.**

15. In this case, the Claimant was on a 3 year contract effective 6.11.2011. This contract would ordinarily have terminated on 5.11.2014. It was also a term of the contract that:

**“TERMINATION OF CONTRACT**

***This contract shall immediately come to an end on the happening of the following but without prejudice to rights accrued:***

***a) Closure of the hotel.***

***b) By either party giving a month’s notice in writing to that effect personally (and not through the post, email or sms) or a month’s pay in lieu of notice.***

***c) In accordance to the guidelines provided for by the Employment Act, No. 11 of 2007 PART IV on Termination and Dismissal and with particular reference to Section 44(4) a-g on Summary Dismissal.***

16. In line with this contract, if the same was to be terminated, Section 41 of Employment Act was to come into play. This never occurred.

17. On Section 44 of employment Act, it is also clear that parameters therein were never employed. This can be inferred from the summary dismissal letter which does not state reasons for the dismissal which reasons can be felled against the backdrop of Section 44 of employment Act 2007.

18. That being the scenario, it is my finding that the Claimant was dismissed without valid reasons and without following due process.

19. Section 45(2) of Employment Act 2007 states as follows:

**(2) “A termination of employment by an employer is unfair if the employer fails to prove:**

***a) that the reason for the termination is valid;***

***b) that the reason for the termination is a fair reason:-***

***i) related to the employee’s conduct, capacity or compatibility; or***

***ii) based on the operational requirements of the employer; and***

***c) that the employment was terminated in accordance with fair procedure.***

20. It is my finding therefore that the dismissal of the Claimant herein was unjustified and unfair and I declare it so.

21. On the last issue, the Claimant has sought a raft of prayers. In relation to prayer No. 2 on loss of income for the rest of the term (2 years and 4 months), I do find that indeed the Claimant legitimately expected to serve for 3 years unless the hotel closed shop or upon following due process as envisaged under the Employment Act. This never happened.

22. In that case the early, illegal and unfair dismissal of the Claimant was in breach of his right to fair administrative action and his right to natural justice which provides that a man should not be condemned unheard. The dismissal was also abrupt and degrading.

23. I will therefore award the prayers for his legitimate expectation to earn a salary for 3 years cut short by 2 years 4 months which is equivalent to **Kshs.22,277 x 28 = 623,756/=**.

24. I also award him 1 months salary in lieu of notice = 22,277/= and unpaid leave for year 2011 = 15,603/=

**TOTAL = 661,636/=**

25. In view of the award for the remedies of the contract period not served, I will not award any damages for unlawful dismissal.

26. I also award Claimant costs of this case.

**Read in open Court this 21<sup>st</sup> day of September, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Akuno holding brief for D. K. Wanyike for Claimant – Present

No appearance for Respondent