



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 156 OF 2016

SALIM MWANGONI ZAKACLAIMANT

VERSUS

1. SATWINDER SATI SIGH

2. DAVENDAR SHANKY SIGN [t/a Punjabi Dhaba Restaurant].....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for unfair termination of the claimant's contract of service and non-payment of the rightful terminal dues by the respondents. In total the claimant prays for ksh.187980 made up of terminal dues plus compensation for the unfair termination. The respondents instructed counsel who entered appearance but thereafter never filed any defence and instead obtained leave to cease acting for them.

2. The suit was heard on 3/5/2017 when the claimant testified as CW1 but the respondents never participated in the trial. After the hearing the claimant filed written submissions.

CLAIMANTS CASE

3. CW1 stated that he was employed by the respondents on 13/3/2011 as a waiter in their Punjabi Dhaba Restaurant. His salary was ksh.11500 per month but he was never given any written contract. He was however given an employment card which he produced as exhibit No. 1.

4. CW1 testified that he worked continuously as such until 9/12/2015 when on arrival the first respondent told him and his colleagues Mr. Said a cook to go upstairs and carry down timber. He however protested against the said assignment because that was not part of his duties as a waiter. His colleagues Mr. Said never protested but joined casual employees who had been hired to carry the timber. In response the first respondent told the claimant to go away and come for his dues on the following Sunday.

5. The claimant complied with the termination order but when he came back for his dues, he was paid save for ksh. 1000 which was paid through Mpesa on 12/1/2016. He therefore contends that the termination of his employment was unfair because he was not given any chance to defend himself; he was denied his terminal dues and was never given a certificate of service. He therefore prayed for salary in lieu of notice, compensation, and service pay for 4 years and leave for 2015.

ANALYSIS AND DETERMINATION

6. There is no dispute that the claimant was employed by the respondents on 13/3/2011 as a waiter in their Punjabu Dhaba Restaurant Mombasa. There is also no dispute that the claimant worked as such until 9/12/2015 when he was terminated by the first respondent. The issues for determination are:

(a) Whether the termination was unfair.

(b) Whether reliefs sought should issue.

Unfair termination

7. Under Section 45(2) of the Employment Act, termination of contract of service of an employee is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case the uncontested evidence by the claimant is that the reason for his dismissal was that he protested against instructions by employer to carry timber which was not part of his job as a waiter in the hotel. It is further uncontested evidence that he was not given any chance to defend himself before the dismissal. The respondent having not filed any defence or participated in the trial, he has not discharged his burden under Section 45(2) 43 and 47(5) of the Act which require him to prove and justify the reason for terminating his employee's contract of service. Consequently, I find and hold that the termination of the claimant's contract of service on 9/12/2015 was unfair within the meaning of Section 45 of the Act.

Reliefs

8. Under Section 49 of the Act, I award the claimant ksh.11500 being one month salary in lieu of notice plus ksh.69000 being salary for six months as compensation for the unfair termination. The said compensation is awarded after considering that the claimant had served for 4 years and had no proven misconduct which contributed to his dismissal.

9. I also award the claim for salary for the 9 days worked in December 2015 being ksh.3980.70 as prayed. I further award the claim for leave for the year 2015 being 23 days equaling to ksh.10,173.10. In making the said award, I have considered rule 9 of the Regulations of Wages (Hotel and Catering Traders) Order which provides for annual leave of 24 days for employees who work under that industry like the claimant herein. Finally I award the claimant service pay for 4 years at the conventional rate of 15 days pay per complete year of service. He will therefore get ksh.23000 a prayed.

10. The claim for general damages for unfair termination is dismissed because it is not founded on the law. The claim for certificate of service is however granted because it is his right under Section 47 of the Act.

DISPOSITION

11. For the reason that the claimant's contract of service was unfairly terminated, I enter judgment for him in the sum of ksh.117,653.80 plus costs and interest. The said sum shall be subject to statutory deductions.

Dated, signed and delivered this 13th October 2017

O. N. Makau

Judge