



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 13 OF 2017

(Before D. K. N. Marete)

JAMES MWITA.....1ST PLAINTIFF

KENNEDY OLUOCH.....2ND PLAINTIFF

JOSEPH SABOKE.....3RD PLAINTIFF

VERSUS

AHMED SALIM T/A CORNER SALAMA HOTEL.....DEFENDANT

JUDGEMENT

This matter was originated by way of a Statement of Claim dated 3rd March, 2017. It does not disclose any issue in dispute on its face.

The respondent in a Defendants Statement of Defence dated 18th October, 2017 denies the claim and prays that the same be dismissed with costs.

The plaintiffs' case is that on or about 29th July, 2016 the defendant unlawfully and without any legal cause constructively and without benefits terminated their services. This was by failing to retain them in employment.

The plaintiffs' claim against the defendant is for the sum of Kshs.266,400.00 with costs and interests at commercial rate of 14% being amount owed in terms of terminal dues to them.

They pray as follows;

a) The sum of Kshs.266,400/=

b) Costs of the suit.

c) Interest of (a) & (b)

The defendant denies the claim.

She opens her case as follows;

2. **WITHOUT PREJUDICE** to anything contained herein, the Defendant states that the suit filed herein is bad in law, inept, ambiguous and does not or does not sufficiently disclose proper particulars of the claim and/or the cause of action and the same ought to be dismissed with costs.

The defendant's other case the plaintiffs' claim against him is strange and an imagination as he has never entered and or appended his signature on the agreement to employ the plaintiffs' on the purported sums and puts the plaintiffs' into strict proof thereof.

It is her further averment that the plaintiffs' statement of claim is bad in law, incompetent, fatally defective and an abusive to the court process. They are thus not entitled to the relief sought.

The matter came to variously until 29th November, 2017 when the parties agreed on a determination by way of written submission.

The issues for determination therefore are;

1. Whether the claimants' contract of service can be termed as employment?
2. Whether there was a termination of employment of the claimants?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether the claimants' contract of service can be termed as employment. The claimants' in their written submission dated 6th December, 2017 outline their case as follows;

The Claimants were employed by the Respondent in his hotel, Corner Salama Hotel in Kericho town. The 1st and the 2nd Claimant were employed in the year 1998 while the 3rd Claimant was employed in the year 1991 at a fee of Kshs. 400/= per day as Cashiers. The Hotel was later closed to pay way for renovation, and later on it was opened. That on or about the 29th day of July 2016, the Claimant when the Claimants were to report to work, they found new employee that had been hired to take their places of work.

That the Claimants lodged their complaints against their Respondent in the County Labour Office in Kericho, where the County Officer wrote a complaint letter to the Managing Director Corner Salama Hotel on settling the matter but to which the Respondent ignored. The matter has been in several occasions be in and out of court to reconsider settlement but the Respondent has been very unwilling to cooperate with the Claimants.

The Claimants were prematurely terminated from their employment by the Respondent without any notice despite being in service for almost twenty and thirty years respectively; this termination was contrary to the Employment Act, 2007.

The claimants' answer the issue of employment affirmatively by relying on section 35 and 37 of the Employment Act, 2007 as follows;

(1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be -

a) ...

b) ...

c) Where the contract is to pay wages or salary periodically at intervals of or exceeding one

month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

Section 37 1. Notwithstanding any provisions of this Act, where a casual employee –

a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employees shall be deemed to be one where wages are paid monthly and section 35(1) (c) shall apply to that contract of service.

On this the claimants' sought to rely on the authority of **Mary Kitsao Ngowa & 37 others v Krystalline Salt Limited, [2014] eKLR** where O.N. Makau, J. observed as follows;

“under section 37 of the Employment Act, this court has the power to vary the terms and conditions of service of workers and declare that employees are employed in terms and conditions consistent with the said Act. In this case, the claimants worked continuously for days, which in the aggregate was more than a month and as such under Section 37(1) (a) they had become protected by Section 35 (1) (c) from arbitrary dismissal. Under Section 35(1) an employee cannot be terminated without prior written notice of 28 days. In this case therefore, the respondent was barred from terminating the claimant's employment without a prior written notice of 28 days.

On the other hand, if the respondent intended to declare the claimant redundant, she was bound to follow the procedure provided for under section 40 of the Employment Act. The said provisions provides in mandatory terms that before declaring an employee redundant, he shall first serve at least one month written notice on the employee or his trade union and the labour officer.

In addition the employer must conduct a fair selection process to identify those affected by the intended redundancy. In this case, the respondent ignored the provision of the section 40 supra and summarily declared the claimants redundant on the mistaken believe that they were piece-rate workers who were not protected by the law.”

This agreeably is a case of employment. It is not disputed or at all.

The 2nd issue for determination is whether Whether there was a termination of employment of the claimants? The respondent in support of her case of no termination of employment relies on the evidence and witness statements of Paul Siele, David Mwangi Kagwa, Salim Ahmed Zubedi and Richard Maritim who currently work at Corner Salama Hotel. It is their evidence that when the claimants' went back to the hotel to reclaim their jobs, they were informed that their jobs were not available as the hotel had changed ownership. The original owner Salim had now assigned Abubkar as the new owner. The duty of cashier had been assigned to Salim Ahmed and therefore the claimants were reassigned other duties in the kitchen. They rejected the offer of re-assignment to kitchen duty and left only to come up with the present suit.

Was there termination in the circumstances? My answer is no. There was no termination of the claimants in the circumstances of the respondent's evidence above. This evidence remains uncontroverted and I therefore find a case of no termination of employment.

The 3 rd issue for determination is whether the claimants' are entitled to the relief sought. They are not. Having lost on a case of termination, they become disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 15th day of December, 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Orina instructed by E.M. Orina & Company Advocates for the plaintiffs’.
2. Mr. Nyandimo instructed by E.K. Korir & Company Advocates for the defendant.