



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 98 OF 2012

KENYA HOTELS ALLIED WORKERS UNION..... CLAIMANT

VERSUS

THE OFFICE RESTAURANT

JOSHA MAKIYA ARONI

PENINA CHEPKEMOI ARONI

THE OFFICE RESTAURANT LTD..... RESPONDENTS

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues and compensation for unfair and unlawful termination brought by the claimant union on behalf Mr. Douglas Konga Oyugi hereinafter called the grievant. The gist of the claimant's case is that the grievant was employed by the respondent on from 28.11.2001 as a barman earning kshs.3500 per month and worked without any disciplinary case until 28.11.2006 when he was unlawfully, unfairly and wrongfully declared redundant. The reason cited for the termination of the grievant is the business could not afford his salary any more.

2. The respondents admit that they employed the grievant but only on casual basis and for general duties and not as a barman. They denied that the alleged redundancy and averred that it is the grievant who terminated his services when he disappeared after he secured a permanent employment in a tea Packaging Company.

3. The suit was disposed of by way of written submissions based on the pleadings witness statements and the supporting documents filed.

Analysis and Determination

4. After carefully considering the pleadings, evidence and the submissions, it is clear that the grievant was employed by the Respondents at their business called The Office Restaurant.. The main issues for determination herein are:

- a. Whether the grievant terminated his employment through desertion or he was unfairly and unlawfully declared redundant.

b. Whether the reliefs sought should be granted.

Desertion v Unfair and unlawful redundancy

5. The claimant's case is that on 28.7.2006 the grievant returned to work after attending burial of his mother in-law but the respondents told him that business had gone down and they had no option but to declare him redundant. There was no prior notice and the grievant was not paid any terminal dues. The respondent has denied the alleged redundancy and maintained that it is the grievant who deserted work after getting a permanent job with a Tea Packaging Company.

6. The claimant has not denied that he secured another permanent job with a Tea Packaging Company and deserted the respondents' employment either before this court or before the conciliator who heard the dispute in 2008. The court therefore finds on a balance of probability that the claimant was never declared redundant but he is the one who, without any notice, terminated his employment with the respondents and opted for a more secure job with a Tea Packaging Company.

Reliefs

7. In view of the foregoing the court declines to make declaration that the claimant was unlawfully and unfairly declared redundant. Likewise the court declines to make declaration that the grievant was entitled to one month leave after every twelve (12) months because no evidence was adduced to support that relief. Under EA then in force the minimum annual leave was not one month and as such the claimant was bound to adduce evidence to prove that he was entitled to one month annual leave.

8. As regards the underpayment of salary, the court has considered the submission by the respondents that they only employed the grievant from 2005 to 2006. That before that period the business was being operated by Ravinda Singh Marwaha according to lease documents and correspondents produced by the respondents herein. The said evidence has not been rebutted by the claimant. Consequently the court agrees with the submissions by the respondents that in considering to award any reliefs to the grievant, the period to factor should be limited to only 2005 and 2006 and no more.

9. In view of the foregoing, the court makes a declaration that the respondents underpaid the grievant his salary between 2005 and 2006. The claimant pleaded that he was being paid kshs 3500 as at the time of his termination. The respondents have asked the court to assess the underpayment using kshs 11723 which was the rate provided under the General Wage Order 2005-2006. The rate of the underpayment was kshs.8223 for the period between June 2005 when the lease in favour of the respondents was registered and June when the grievant deserted employment which 13 months which works to kshs.106,899.

10. The claim for salary in lieu of notice is dismissed because the court has already made a finding that the grievant is the one who terminated his services. Likewise the claim for salary for July 2006 is dismissed because the grievant had deserted work and never worked for the respondents. The claims for overtime and public holidays worked are also dismissed for lack of evidence and particulars. In addition the claim for compensation for unlawful and unfair redundancy is dismissed because it was not provided for under the EA then in force. The court will however award him 21 days annual leave for the period 2005-2006 being kshs. 8206.10. Lastly the grievant is granted the prayer for Certificate of Service.

Disposition

11. For the reasons stated above, judgment is entered for the claimant for the sum of kshs. 115105.10 plus costs and interest from the 2012 when the suit was filed in this court . He will also have Certificate of Service.

Signed, dated and delivered at Mombasa this 26th day of February 2016.

O.N. MAKAU

JUDGE