



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.209 OF 2015

(Before D. K. N. Marete)

ANTHONY SIMIYU WAFULA.....CLAIMANT

VERSUS

THUKU MWANGI T/A NAIROBI CHIPS HOTEL.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 26th June, 2015 and filed on 1st July, 2015. It does not expressly disclose the issue in dispute on its face.

The Respondent in his Answer to Memorandum of Claim dated 17th July, 2015 denies the claim and prays that the same be dismissed with costs.

The claimants case is that at all material times to this case, he was employed by the claimant as a waiter with effect from 8th May, 2013. It is his further case that he served the respondent with loyalty, diligence and competency and discharged his duties to the best of his ability until the 4th April, 2015 when he was orally, unfairly and unprocedurally dismissed. He was not paid his terminal dues as well. This, he contends and submits was a contravention of Section 41, 44 and 45 of the Employment Act, 2007. This is coupled with Section 43 (1) and Article 41 of the Constitution of Kenya, 2010.

He prays as follows;

1. *One month pay in lieu of notice*

Basic Salary

Kshs. 9,372/-

2. *Severance pay*

15days x years worked x basic /30 days

Kshs.9,372

3. *Overtime dues*

45 hrs per week (normal working hours for a waiter as per the law) The claimant worked from 6.00am upto 6.00pm

12hrs x 6days/72hrs – 45hrs = 27hrs Overtime

$27\text{hrs} \times 4\text{wks} = 108\text{hrs p.m}$

$108\text{hrs} \times 1.5 \times 9372/195 = 7785$

$7785 \times 24 \text{ months} \text{ Kshs.}186,840/-$

4. *Leave dues*

$21\text{days} \times \text{yrs worked} \times \text{basic} + \text{hse allowance}$

$21\text{days} \times 2\text{yrs} \times 10777.8/26 \text{ days} \text{ Kshs.}17,410.29/-$

5. *Compensation for unfair termination*

Gross pay x 12 months

$10777 \times 12 \text{ months} \text{ Kshs.}129,333.6/-$

TOTAL Kshs. 352,327.89/-

The claimant further avers that the termination was unlawful, unfair and or illegal on the following grounds:-

- a. *The respondent terminated claimant's employment without following the laid down procedures in the Employment Act.*
- b. *The Respondent did not give the claimant termination notice as required under Section 35 (1) (b) (c) of the Employment Act.*
- c. *The Respondent terminated claimant's employment without proving that the reason for the termination was valid as provided under Section 43 & 45 of the Employment Act.*
- d. *The Respondent did not give the claimant lawful leave days contrary to Section 28 (1) of the Employment Act.*
- e. *The respondent did not regulate the working hours of the claimant contrary to section 27 of the Employment Act. The claimant worked from 6.00am upto 6.00pm.*
- f. *The respondent failed to pay the claimant his severance pay as by law requires.*
- g. *The respondent failed to give the claimant certificate of service as required under Section 51 of the Employment Act.*
- h. *The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institution Act and Section 49 (c) of the Employment Act.*
- i. *The respondent did not act in accordance with justice and equity as provided by Section 45 (2) and 4 (b) of the Employment Act.*

The respondent denies the claim. It is his case that;

- a. *The Claimant was employed by the Respondent as a waiter in the respondent's business premises.*
- b. *The Claimant duties were to ensure that the Respondent's customers were attended to appropriately in serving food.*

- c. *The Claimant was further required to immediately report on duty at 7.00am and depart therefrom at 5.00p.m.*

The respondent further contends that the claimant was not as dutiful as he claims and was prone to the following issues of breach of contract;

- i. *He, on diverse dates between May 2015 absented himself from duty without permission.*
- ii. *He was given warning on various occasions.*
- iii. *He failed to ensure that he consistently availed himself on duty.*
- iv. *He failed to keep himself clean and presentable before customers at the respondent's business.*
- v. *He fared poorly in the weekly performance appraisals.*
- vi. *He refused, neglected and/or failed to improve his performance in spite of several warnings.*

The misconduct of the claimant above cited amounted to gross misconduct leading to justifiable summary dismissal, where due process was pursued. He also denies the sustainability of terminal dues as claimed.

The matter came to court severally until the 8th December, 2015 when the parties agreed on a disposal of the issues in dispute by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this case?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. In support of a case for unlawful termination the claimant that this was so on the following grounds;

- a. *The respondent terminated claimant's employment without following the laid down procedures in the Employment Act.*
- b. *The Respondent did not give the claimant termination notice as required under Section 35 (1) (b) (c) of the Employment Act.*
 - c. *The Respondent terminated claimant's employment without proving that the reason for the termination was valid as provided under Section 43 & 45 of the Employment Act.*
 - d. *The Respondent did not give the claimant lawful leave days contrary to Section 28 (1) of the Employment Act.*
 - e. *The respondent did not regulate the working hours of the claimant contrary to section 27 of the Employment Act. The claimant worked from 6.00am upto 6.00pm.*
 - f. *The respondent failed to pay the claimant his severance pay as by law requires.*
 - g. *The respondent failed to give the claimant certificate of service as required under Section 51 of the Employment Act.*

h. The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institution Act and Section 49 (c) of the Employment Act.

I. The respondent did not act in accordance with justice and equity as provided by Section 45 (2) and 4 (b) of the Employment Act.

It is not in dispute that the claimant was an employee of the respondent. The claimant seeks to rely on Section 47 (5) of the Employment Act as follows;

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

He also seeks to rely on Section 45 of the Employment Act, 2007 as follows;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(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 employees 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.

Section 45 (4) (b) of the Employment Act, 2007 provides;

“... that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.”

This is further illustrated in the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, where the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

- a. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*
- b. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;*
- c. That the employer has heard and considered any explanations by the employee or their representative;*
- d. Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.*

The respondent denies this and puts in a case of gross misconduct on the part of the claimant. The claimant does not address or controvert this in any way throughout the proceedings. Instead, he insist on a case of unlawful termination of employment citing lack of due process in the termination. There is no

evidence tendered to support his case or in any way contradict the respondents defence on grounds of misconduct, absenting and absconding from duty, and lack of due diligence in the performance of his duties all occasioning the dismissal.

This matter to me tilts in favour of a case of lawful termination of employment. The balance of probabilities and a discernment of evidence from the pleadings propel a case in favour of lawful termination of employment. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

This being the case, the other issues for determination lapse accordingly. I am therefore inclined to dismiss the claim with costs to the respondent.

Delivered, dated and signed this 17th day of February 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.
2. Mr. Onkongi instructed by Mr. Nyambegera & Company Advocates for the respondent.