



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 563 OF 2013

DANCUN MUYANGU KIBISU CLAIMANT

VERSUS

MEDITERANEO RESTAURANT RESPONDENT

Mr Nyabena for the Claimant

Mr Ndirangu for the Respondent

JUDGEMENT

1. The Claimant by a statement of claim dated 3rd April 2010 sued the Respondent seeking the following prayers:
 - i. a declaration that his termination from employment was unlawful and unfair;
 - ii. payment of terminal benefits set out in paragraph 8 totaling Kshs 355,399.30;
 - iii. interest on the award and costs.
2. The Respondent filed a memorandum of reply dated 13th May 2013 in which it denies the Claimants claim contending that the Claimant absconded from work after being transferred to the Respondents sister branch.
3. The Claimant testified in support of his case and was cross examined by the Respondent's counsel. The Respondent called one witness named Juston Muteti the Respondent's Human Resource Officer.

Facts of the Case

4. The brief facts of the dispute are that the Claimant was employed by the Respondent on or about December 2008 as a waiter at its restaurant getting a monthly salary of Kshs 7,500. This was later raised to Kshs 10,000 exclusive of house allowance. The contract of employment was verbal. The Claimant worked continuously and with diligence until 4th November 2012 when the Respondent terminated the Claimants services when the Claimant went to seek clarification on his transfer which was in a branch far away from the Claimants place of residence.
5. The Respondent decided vide its Human Resource Officer to dismiss the claimant from duty. The Respondent states that the Claimant refused to be transferred from its Nairobi, Junction

branch to Gigiri Branch on 4th November, 2012 stating that Gigiri was too far. The Respondent explained to him that transport to and from workplace was available but the Claimant was adamant that he would not go to Gigiri branch.

6. The Claimant left work that day and did not return to work. The Respondent calculated his final dues on 14th November 2012. The dues were taken to the Ministry of Labour and Claimant was notified on 15th November 2012.

7. The Respondent denies the Claim by the Claimant and the witness said that instead, the Claimant owed the Respondent Kshs 2,000. He was paid for four (4) days worked in November 2012 and since he absconded he was not owed in lieu of notice and he is not entitled to gratuity since he was registered with the National Social Security Fund. That the Claimant was paid Kshs 6,000 in lieu of leave days not taken.

8. That the Kshs 10,000 was gross pay per month inclusive of house allowance and therefore he is not owed any house allowance as claimed or at all. The Respondent prays the suit be dismissed with costs.

Determination

9. The issues for determination are;

- i. whether the Claimant absconded from work or his employment was terminated by the Respondent?
- ii. if answer to (i) is in the affirmative whether the termination was for a valid reason and in terms of a fair procedure.
- iii. whether the Claimant is entitled to the remedies sought.

Issue i

10. Whether or not the employment of the Claimant was terminated by the Respondent or that he absconded work in protest to a transfer away from home is a question of fact to be determined by the court.

11. The evidence by the parties is mutually destructive especially because the employment was verbal and the transfer was also done verbally which facts are not in dispute. The matter turns purely on the credibility of the testimony by the Claimant vis-a-vis that by RW1 Juston Muteti, the Human Resource Manager of the Respondent. The Court has in mind that the party who alleges must prove his/her allegations on a balance of probability.

12. The Claimant had worked for the Respondent for about four (4) years. The Claimant worked at the Junction Branch which was very near his residence. It would appear that the Claimant was not happy with the transfer to Gigiri branch of the Respondent which is a considerable distance from his residence.

13. The Court accepts the explanation by the Claimant that he sought clarification from the Respondent on the issue of residence since the claimant would be unable to travel home after working late into the night as was customary in the industry.

14. The Court finds that the Claimant resisted the transfer upon being told that the employees would be provided with transport to and from work and did not turn up to work the day that followed. It is understandable therefore that the Respondent computed terminal benefits due to the Claimant on 15th November 2012 and forwarded the same to the Labour Office for collection by the Claimant.

15. In terms thereof, the Claimant was owed 18 days in lieu of leave in the sum of Kshs 6,000 and since he left employment without notice to the employer the Claimant is not entitled to payment in lieu of one month's notice.

16. The Claimant was also paid Kshs 1,333 for the days worked between the 1st November 2012 to 4th December 2012. This computation is attached to the memorandum of reply filed by the Respondent and was admitted as evidence before court.

17. The Court finds that the Respondent had no reason to terminate the employment of the Claimant at the material time and as a matter of fact, the Respondent absconded from work being dissatisfied with the transfer.

Issue ii

18. The Court having found that the Claimant absconded from work this second issue remains moot point.

Issue iii

19. The claimant is not entitled to payment in lieu of notice having absconded from work. The Claimant is equally not entitled to payment of service gratuity since he was duly registered with NSSF and the employer submitted the contribution. This issue is guided by section 35(5) as read with 35(6) of the Employment Act, 2007.

20. The claim for leave travelling allowance has not been substantiated by the Claimant and the Court finds that the same has no basis.

21. Equally there is no evidence that the Claimant worked during public holidays without payment of overtime. The claim remains unproven and is dismissed.

22. Furthermore, the Claimant has not established that he worked overtime on specified days without pay. The claim is also not proved and is equally dismissed.

23. The Claimant was paid a gross salary of Kshs 10,000 per month. The claimant has not shown that at the material period he was underpaid by the Respondent nor has he shown that he was offered payment of house allowance over and above the salary he received monthly. The claim remains unproven and same is dismissed.

24. The Court having found that the Claimant absconded from work it follows that the Respondent did not terminate the Claimants employment and the issue of compensation for wrongful or unlawful termination of employment does not arise. The Claim is dismissed also.

25. The Respondent did not place a counterclaim for payment by the Claimant in lieu of one month's notice. The Court will not make any award in this respect therefore. Employees are cautioned to always give notice to their employers in the event they intend to terminate their employment with the current employer.

26. For these reasons the suit by claimant is dismissed with no order as to costs.

Dated and Delivered at Nairobi this 5th day of February 2016

MATHEWS N. NDUMA

PRINCIPAL JUDGE

