



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 437 OF 2014

RONALD ONYANGO.....CLAIMANT

v

FLAMINGO HILL CAMP LTD.....RESPONDENT

JUDGMENT

1. Ronald Onyango (Claimant) sued Flamingo Hill Camp Ltd (Respondent) on 18 September 2014, and he stated 5 issues as in dispute. These were *unfair transfer/demotion; wrongful lock out from office; wrongful dismissal, salary arrears/overtime, gratuity, pay in lieu of notice and compensation.*
2. The Respondent filed its Response on 7 November 2014. Supporting documentation was also filed and the Cause was heard on 17 June 2015 and 23 July 2015.
3. The Claimant was employed by the Respondent on 1 August 2010 as an Accounts Clerk and his position and terms of service were revised to F & B Controller through a letter dated 1 March 2013.
4. On 16 May 2013, the Respondent wrote to the Claimant raising issues with his work performance. According to the letter, a meeting had been held and the Claimant had admitted to misconduct and he was placed on 2 months disciplinary probation.
5. Around 18 December 2013, the Claimant gave notice of resignation, but soon thereafter he penned off an apology letter to the Respondent, and assured it that he was committed to carrying on with his duties.
6. On 16 July 2014, the Respondent wrote to the Claimant informing him that he had been demoted to the position of kitchen steward and placing him on 6 months' probation.
7. The Claimant responded to the demotion letter on 21 July 2014 after which a meeting was held. No agreement was reached on the circumstances and question of demotion, and on 8 August 2014, the Respondent informed the Claimant of the termination of his employment
8. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the demotion/transfer of the Claimant was unfair, whether the dismissal of the Claimant was unfair and appropriate remedies/orders.* The entitlements sought by the Claimant will be discussed under remedies.

Whether demotion/transfer was unfair

9. It is not disputed that the Claimant was promoted to the position of Food & Beverage Controller on 1 March 2013.

10. However, through a letter dated 16 July 2014 he was demoted and transferred to the kitchen. The immediate reasons given in the demotion letter were that the Claimant had reported to work drunk thus incapable of performing his work. The letter also made reference to previous incidents of misconduct.

11. In his response to the demotion letter, the Claimant denied the assertions of reporting to duty while drunk. He also contended that he had not reported to work late. Generally, he decried the demotion and transfer to the kitchen.

12. It is clear from the demotion/transfer letter that the demotion and transfer was a disciplinary action. The letter expressly informs the Claimant that you have been placed on disciplinary probation for the next six (6) months during which your conduct and work performance will be closely monitored and regularly appraised.

13. The Court has already made reference to the immediate reasons for the demotion and transfer.

14. Now, there is nothing on record to suggest that the Claimant was granted an opportunity to make representations before the disciplinary action to place him on disciplinary probation was considered/taken.

15. The narrative from the documentation produced by the parties show that the relationship between the Claimant and the Respondent was turbulent.

16. But despite that turbulence, the Respondent ought to have granted the Claimant an opportunity to give his side of the story before his demotion/transfer. The demotion was tainted and thus unfair.

Whether dismissal was unfair

17. The reason given for the termination of the Claimant's employment was his refusal to take up your new position and not reporting to work for more than a week....your behaviour therefore amounts to gross misconduct, constitutes a serious breach of the terms of your employment...

18. The dismissal letter alludes to meetings held in the presence of Claimant's union officials on 1 August 2014.

19. The employment relationship was already poisoned by the time of dismissal. According to the testimony of the Claimant, no meeting took place on 1 August 2014.

20. The Respondent's Camp Manager on the other hand stated in his testimony that a meeting was held on 1 August 2014, and that the Claimant and a union representative were present, and that the decision to terminate his services was taken at the meeting.

21. But, in cross examination, he admitted that he did not attend the meeting and that it was attended by among others his Assistant. He also stated that he did not have the minutes in Court but gave the names of 2 union officials who were present.

22. It is the responsibility of the employer to comply with the requirements of section 41 of the Employment Act, 2007. The Respondent could have easily demonstrated compliance had its witness testimony been supported by the minutes which were allegedly taken.

23. Because of the inconsistent testimony and failure to produce minutes of the hearing which could have served to corroborate the testimony of the Respondent's witness and failure to explain the whereabouts of the Assistant Manager who was present at the hearing (or other panel members), the Court finds that the Respondent has failed to prove that it complied with the essentials of statutory procedural fairness in

section 41 of the Employment Act, 2007.

24. With the conclusion reached, it is not necessary to consider whether Respondent has proved the reasons for dismissing the Claimant (Section 43 of the Act) or that the reasons were valid and fair (Section 45 of the Act).

Underpayments

25. The Claimant sought Kshs 215,107/85 on account of underpayments. He made reference in the pleadings to Legal Notices Nos. 98 of 2010, 63 of 2011, 70 of 2012 and 196 of 2013.

26. I have examined the legal notices. The prescribed wages on which the Claimant based the underpayments fall under Artisan Grade 1. I cannot see any rational connection between an Accounts Clerk/Food & Beverage Controller and Artisan Grade 1.

27. The Claimant failed to prove that he was underpaid.

Appropriate remedies/orders/entitlements

Salary arrears

28. The Claimant's testimony that he was not paid wages for July 2014 and part of August 2014 was not challenged.

29. The Respondent had offered to the Claimant these earned wages. He sought Kshs 23,885/50 and the Court finds in his favour.

Salary in lieu of notice

30. The Claimant is entitled to 1 month wage in lieu of notice which the Respondent had also offered.

Underpayments

31. Underpayments were not proved.

Overtime (normal/public holidays)

32. Under this head, the Claimant sought Kshs 545,849/-. He testified that he worked from 7.30am to 8.00pm without payment of overtime.

33. However, he did not lead any evidence as to the contractually agreed working hours or the statutory prescribed working hours (daily or weekly) considering that different working hours are prescribed for different industries/sectors.

Gratuity

34. The Respondent had offered the Claimant gratuity for 2 months. On his part he sought Kshs 57,516/-.

35. Again, no contractual or legal basis for gratuity was laid before Court but considering the tender of the same by the Respondent, the Court finds for him.

Compensation

36. The Court has found the termination of the Claimant's employment procedurally unfair. He served the Respondent for about 4 years. Considering the length of service, the Court would award him the equivalent of 4 months gross wages as compensation (based on gross wage of Kshs 24,528/- in letter

dated 1 March 2013).

Conclusion and Orders

37. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

a. Earned wages	Kshs 30,884/10
b. 1 month pay in lieu of notice	Kshs 19,000/-
c. Gratuity	Kshs 57,516/92
d. 4 months wages compensation	Kshs 98,112/-
TOTAL	Kshs 205,513/02

38. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 5th day of February 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Chege instructed by Munene Chege & Co. Advocates

For Respondent Mr. Morintat/Ms. Njoroge instructed by Kiplenge & Kurgat

Court Assistant Nixon