



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**CAUSE NO. 45 OF 2015**  
**(Originally Nakuru Chief Magistrate's Court Civil Case No. 508 of 2010)**

**DAVID ASIGE KEYA**

**CLAIMANT**

**v**

**HOTEL WATERBUCK LIMITED**

**RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent in the Chief Magistrates Court in 2010 alleging wrongful dismissal.
2. The Respondent failed to file a defence, and on 18 June 2010, the Claimant applied for interlocutory judgment.
3. On 11 March 2011 the Respondent sought leave to have its Defence amended and the leave was granted. An amended Defence was filed on 22 August 2011 and this prompted the Claimant to file a Reply to the Defence on 5 September 2011.
4. Supporting documentation and witness statements were thereafter filed and on 19 April 2012, the Claimant filed issues.
5. The Respondent filed a Defence on 18 June 2010, and on 25 February 2011 the Respondent changed advocates.
6. On 23 November 2012, the Claimant filed an amended Plaintiff after getting leave on 29 October 2012.
7. On 4 December 2014, Hon. Moranga, Principal Magistrate ordered the suit transferred to this Court for hearing and determination, and it was mentioned before the Court on 21 April 2015 when the hearing was fixed for 13 July 2015.
8. The Court has considered the pleadings, evidence and submissions and adopted the issues for determination as filed by the parties.

**Whether/when Claimant was an employee of the Respondent**

9. The Claimant contended that he was employed by the Respondent in November 2006 as a barman but he was not issued with a written contract.
10. The Respondent's witness John Nyamolo confirmed in his testimony that the Claimant was an employee of the Respondent from August 2008.
11. Written contracts of employment are ordinarily drawn up by the employer. None was issued in this case, and considering the failure to issue/produce one to the Claimant, and inconsistent dates

of commencement of the relationship herein, the Court finds that the Claimant was an employee of the Respondent from November 2006.

### **Whether Claimant deserted employment**

12. In its Defence and testimony, the Respondent contended that the Claimant deserted employment after being arrested by Police.
13. During testimony, the Respondent's witness stated that after the release of the Claimant from prison in January 2010, the Respondent's Director found that an ETR machine was not displaced and sought to know from the Claimant and 2 other employees.
14. According to the witness, the Claimant went and got the ETR machine from a drawer after which the Director told the employees to get out. The 3 employees left and only returned after 4 days.
15. When asked by the Director to explain the absence, the 3 including the Claimant did not explain but decided to leave again never to report again.
16. The Claimant on the other hand asserted that he was orally dismissed. He testified that sometime on 28 February 2010, he was summoned to the office where he found the Respondent's Director, Manager and Accountant, and the Director wanted to know what he was doing at work. This prompted the Manager to ask him to remove his uniform and leave.
17. And he stated that this transpired after he had been arrested by officers from Kenya Revenue Authority, charged and convicted in Court. The Respondent had paid the fine.
18. From the inconsistent accounts, the Court is unable to find who between the Claimant and Respondent's witness told the correct version and therefore the answer to the question will turn on application of the law on dismissal where an employee deserts.

### **Whether termination of Claimant's employment was unlawful**

19. Desertion from work is repudiation of the employment contract. It is also a misconduct which entitles an employer to summarily dismiss an employee.
20. But pursuant to section 41 of the Employment Act, 2007 the employer should afford the employee an opportunity to explain his whereabouts or risk dismissal.
21. In the present case, the Respondent's witness stated that the Claimant went missing and returned after about 4 days. When asked to explain he disappeared again.
22. All this was verbal. There was no documentation or correspondence produced by the Respondent to demonstrate that a show cause notice was given to the Claimant.
23. A prudent employer is well advised to keep records when it intends to take disciplinary action against an employee.
24. There was no suggestion that the Claimant was issued with a show cause notice or ultimatum to explain his whereabouts after the second disappearance.
25. The Court therefore finds that the Respondent has failed to discharge the burden placed upon it by section 41 of the Employment Act, 2007 and therefore the dismissal was unfair.

### **Appropriate remedies**

#### ***3 months wages in lieu of notice***

26. The Claimant did not lay any evidentiary or contractual basis for seeking 3 months wages in lieu of notice as opposed the statutory minimum provided for in section 35 of the Employment Act, 2007.
27. The Court finds he is entitled to 1 month pay in lieu of notice.

#### ***Wages for February 2010***

28. The Claimant contended he served until 28 February 2010. The Respondent's witness stated that if the Claimant was not paid the wages he would be entitled to the same.
29. The Court finds that the Claimant is entitled to the earned wages which was quantified as Kshs 8,000/-.

### ***Overtime***

30. Under this head, the Claimant sought Kshs 54,533/-. The Respondent's testimony was that the employees were working on shifts of 8 hours.
31. The Claimant had earlier testified that there were shifts but the timings he gave are inconsistent. He gave the hours as 9.00am to 11.00pm and 2.00pm to 2.00am.
32. He stated that he worked the 9.00am to 6.00pm shift but actually worked upto 10.00 pm.
33. With the inconsistency on the testimony of the Claimant, the Court finds that the testimony of the Respondent's witness is more probable though attendance records were not produced in Court.

### ***Leave and traveling allowance***

34. No legal, contractual or evidentiary foundation for these heads of claim was laid before Court and the Court declines the invitation by the Claimant.

### ***Overtime during public holidays***

35. The Claimant sought Kshs 1,584/- under this head.
36. The Respondent did not challenge or controvert this head of claim.

### ***Service charge***

37. No evidential basis for this was provided and it is declined.

### ***House allowance***

38. The Claimant sought Kshs 72,000/- as house allowance. The Respondent contended that the wage was consolidated.
39. Section 28 of the Employment Act is clear that an employer should disclose whether a wage includes an element to cover housing where accommodation is not provided.
40. In the instant case, no written contract was drawn and the Court therefore has a basis to presume the wage was not inclusive of housing allowance.
41. This relief is therefore allowed.

### ***Compensation***

42. Under section 49 of the Employment Act, 2007, compensation is one of the primary, though discretionary remedies for unfair termination of employment.
43. The Claimant did not outline in his pleadings compensation as a remedy.

### ***Conclusion***

44. The Court finds and holds that the Respondent did not comply with the requirements of section 41 of the Employment Act, 2007 on procedural fairness and therefore the dismissal of the Claimant was unfair.
45. The Court awards and orders the Respondent to pay the Claimant

- a. House allowance                      Kshs 72,000/-  
b. Overtime (public holidays)      Kshs 1,584/-

**TOTAL      Kshs 73,584/-**

46. The other heads of claim are dismissed.
47. Claimant to have costs of Kshs 25,000/-.

**Delivered, dated and signed in Nakuru on this 8<sup>th</sup> day of March 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mrs. Omwenyo instructed by Omwenyo & Co. Advocates

For Respondent Mr. Simiyu instructed by B.W. Mathenge & Co. Advocates

Court Assistant Nixon