



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1479 OF 2013

DENNIS MBUVI.....CLAIMANT

VS

RAJ SHAH T/A KENYA MOTOR SPORTS

CLUB BAR & RESTAURANT.....RESPONDENT

AWARD

Introduction

1. The Claimant's claim brought by way of Statement of Claim dated 3rd September and filed in Court on 11th September 2013 seeks compensation for unlawful termination and payment of terminal dues. The Respondent did not file a defence and did not attend the hearing.

The Claimant's Case

2. The Claimant states that he was employed by the Respondent as a Chef at a monthly salary of Kshs.15,000 effective 1st September 2011. He was not issued with a written employment contract. The Claimant pleads that he was not paid house allowance and never took his annual leave.

3. On 15th February 2013, the Claimant's employment was terminated without notice. It is his case that the termination was unjustifiable and that due procedure was not followed in effecting the termination.

4. On 13th May 2013, the Claimant's Advocate wrote a demand letter to the Respondent. In response, the Respondent's Advocate responded on the same day, stating that the Claimant was a casual employee and was dismissed for gross misconduct.

5. The Claimant claims the following:

- a. A declaration that the termination of his employment was unlawful
- b. 12 months' salary in compensation for unlawful termination.....Kshs.207,000
- c. 1 month's salary in lieu of notice.....15,000
- d. Leave for 1 year and 5 months.....20,770
- e. Service gratuity @ 15 days' pay for each completed year.....15,000
- f. House allowance for 17 months @ 15% of basic salary.....57,750
- g. Overtime (4 hours Friday-Sunday).....119,232
- h. Certificate of service

- i. Costs plus interest

Findings and Determination

- 6. There are two issues for determination in this case:
 - a. Whether the termination of the Claimant's employment was justifiable and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

7. The Claimant told the Court that he was terminated without justifiable cause and that the termination ignored due procedure. The Respondent did not file a reply but in a letter dated 13th May 2013, the Respondent's Advocate states that the Claimant was a casual employee and was dismissed for gross misconduct. The Claimant testified that he worked continuously and denied the allegations of gross misconduct contained in the letter from the Respondent's Advocate. The Respondent did not present any evidence to the contrary.

8. The Respondent did not document the Claimant's employment as required under Section 9 of the Employment Act, 2007. In light of this, the Court adopts the Claimant's testimony with regard to the terms and conditions of his employment. That said, the suggestion that the Claimant was a casual employee is rejected.

9. In addition, the allegations of gross misconduct were not proved and cannot therefore be used as a basis for the termination of the Claimant's employment. At any rate, the Claimant was not subjected to the mandatory disciplinary procedure set out in Section 41 of the Act.

Remedies

10. From the foregoing, the Court finds that the termination of the Claimant's employment was unjustifiable and unfair and awards him four (4) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct in the termination transaction. I further award the Claimant one (1) months' salary in lieu of notice.

11. With regard to the claim for house allowance, the Court did not find any evidence that the Claimant's salary was inclusive of house allowance. I therefore allow the claim for house allowance at the rate 15% and adopt the resultant gross figure of Kshs.17,250 as the Claimant's monthly salary for purposes of this claim.

12. In the absence of leave records to show that the Claimant had taken his annual leave, the claim for leave pay must also succeed. In similar vein, there was no evidence that the Claimant was a contributing member of the National Social Security Fund (NSSF) and he is therefore entitled to service pay.

13. The claim for overtime compensation was not proved and is dismissed.

14. Finally, I make an award in favour of the Claimant in the following terms:

- a. 4 months' salary in compensation for unlawful termination.....Kshs.69,000
- b. 1 month's salary in lieu of notice.....17,250
- c. House allowance for 16 and ½ months.....37,125
- d. Leave pay (17,250/30x21+17,250/30x1.75x4).....16,100
- e. Service pay for 1 complete year of service.....8,625

Total.....148,100

15. The award amount will attract interest at court rates from the date of the award until payment in full.

16. I further direct the Respondent to issue the Claimant with a certificate of service in accordance with Section 51 of the Employment Act, 2007.

17. The Claimant will have the costs of this case.

18. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 1ST DAY OF APRIL 2016

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JUDGE

Appearance:

Mr. Nyabena for the Claimant

No appearance for the Respondent