



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 239 OF 2014

PATRICK LUMUMBA SHIROYA.....CLAIMANT

VERSUS

NAIROBI UPPERHILL HOTEL.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit against the Respondent on 21st February 2014. He sought resolution of a dispute he framed as wrongful and unlawful termination of the Claimant's services and failure by the Respondent to pay full terminal benefits to the Claimant. He averred that he was employed on 3rd July 2013 as a doorman, potter and security supervisor at a monthly salary of Kshs. 20,000/-. He averred that he served the Respondent until 2nd January 2014 when the Respondent unlawfully and without any reasonable cause terminated the Claimant's employment without giving him any notice and/or full pay of his terminal benefits. He thus sought payment of 3 months salary in lieu of notice Kshs. 60,000/-, service for 6 months Kshs. 120,000/-, general damages for unlawful termination equivalent to 6 months pay Kshs. 120,000/-, Kshs. 2,000/- deducted for 6 months totalling Kshs. 12,000/- and overtime pay to be quantified at the hearing. The Claimant submitted that he was employed on permanent basis and that he served with diligence and worked at times for longer than the hours legally stipulated. He submitted that on 2nd January he was verbally suspended from work on the basis that work production was low. He stated that the circumstances leading to the verbal dismissal without payment of full terminal benefits due to low work production was unlawful. He thus sought the sums claimed above as well as sought a certificate of service cost of the claim together with interest.
2. The Respondent filed a statement of response to the Claimant's memorandum of claim on 13th March 2014. In it, the Respondent denied the averments of the Claimant in respect to his employment on 3rd July 2013 as doorman, potter and security supervisor at a monthly salary of Kshs. 20,000/-. The Respondent denied that the Claimant was entitled to the sums claimed as payment in lieu of notice, damages for unlawful termination, overtime pay as well as the sums sought as deductions for 6 months. The Respondent in the alternative averred that the Claimant was on probation as per the terms of the letter of appointment which provided that termination could be by either party giving one month's notice in writing or payment in lieu of notice or by payment of equivalent amount of wages in lieu of such notice. The Respondent averred that it did not dismiss the Claimant on account of low work production but that it was the Claimant who absconded duty and has never reported to work from work. The Respondent submitted that the Claimant was appointed by the Respondent to the position of doorman on 15th July 2013 earning a gross salary of Kshs. 20,000/- and that the wages were dutifully paid when they fell due. The

Respondent submitted that the Claimant had absconded duty which was a fundamental breach of his obligations arising from the contract of service and that his conduct amounted to gross misconduct so as to justify summary dismissal without notice. The Respondent thus sought the dismissal of the Claimant's claim with costs.

3. The Claimant filed a reply to the Respondent's response on 9th April 2014 and in it averred that the Respondent's response constituted mere denial of the Claimant's claim and is intended to mislead the Court. The Claimant averred that he was not on probation as averred by the Respondent and that he did not abscond from duty but was told to leave by the Respondent's directors. He thus sought the dismissal with costs of the statement of response and judgment be entered in his favour as prayed for in the memorandum of claim.
4. The parties consented to disposing the matter through written submissions. The Claimant filed submissions on 19th June 2015 and the Respondent filed submissions on 4th December 2015. In the intervening period between the filing of submissions by the Claimant and the submissions by the Respondent, the Respondent filed an interlocutory application seeking to strike out the submissions of the Claimant on account of a 'scandalous' affidavit attached to the Claimant's submissions. The application was subsequently withdrawn by consent of parties as was the offending affidavit. Parties agreed that the Respondent was to file its submissions hence the lengthy pause between the two documents.
5. In his submissions, the Claimant submitted that he was employed on 3rd July as doorman, potter and security supervisor at a monthly salary of Kshs. 20,000/-. He submitted that he served the Respondent with diligence and loyalty and on 1st January 2014 at about 11.00pm he was on patrol on the Respondent's hotel when he stumbled on a one Wahome emerging from a room with the receptionist and that Wahome got angry with the Claimant and asked if the Claimant was spying on him. The Claimant averred that he denied the allegations and was later informed by Wahome that he had been sacked. He submitted that on 2nd January 2014 when he reported for duty the guards refused to let him in stating that Wahome had given strict instructions that the Claimant should not enter the premises. He submitted that he tried to call Wahome severally on his mobile phone but Wahome declined to pick the Claimant's calls. The Claimant submitted that the Respondent failed to comply with conditions set out in Section 40 of the Employment Act 2007. He submitted that he was entitled to terminal benefits being 3 months salary in lieu of notice Kshs. 60,000/-, service for 6 months Kshs. 120,000/-, general damages for unlawful termination equivalent to 6 months pay Kshs. 120,000/-, Kshs. 2,000/- deducted for 6 months totalling Kshs. 12,000/- and overtime pay for 6 months Kshs. 12,000/- making a grand total of Kshs. 324,000/- plus costs and interest.
6. The Respondent on its part, submitted that the Claimant was by letter of appointment dated 3rd July 2013 employed as a doorman for a probationary period of 6 months which ran from 3rd July 2013 and was set to lapse on 3rd January 2014. The Respondent submitted that on 2nd January 2014 the Claimant absconded from duty and the Respondent did not hear from him until receipt of a demand letter from the Claimant's advocates in mid January 2014. The Respondent submitted that at no point did it dismiss the Claimant from employment. The Respondent submitted that the Claimant's word cannot be trusted as he has claimed employment as doorman, potter and security supervisor while the letter of offer shows he was employed as a doorman. The Respondent submitted that a probationary contract was one to which the provisions of Sections 42(1) and 47(6) of the Employment Act applied. It was submitted that the provisions of Section 41 of the Employment Act did not apply to the Claimant's contract. Reliance was placed on the case of **Danish Jalang'o & Another v Amicabre Travel Services Limited [2014] eKLR** where Rika J. dealt with the issue of probationary contracts. The Respondent submitted that the Claimant did not merit any of the prayers in his claim and thus urged the dismissal of the suit.
7. The Claimant's claim was one in which the relief sought was in respect of wrongful and unlawful termination. In the claim before me, the Claimant therefore had a burden to discharge in regard to

the wrongful and unlawful termination and refusal to pay terminal benefits. It was the Claimant's position that he was dismissed after he stumbled upon a Mr. Waweru leaving a hotel room in the company of the receptionist. In the memorandum of claim filed by the Claimant, he stated on the submissions in his pleadings that he was dismissed on account of work production being low. The Claimant had been employed by the Respondent as a Doorman on 3rd July 2013, effectively commencing his service on 15th July 2013. In his letter of employment dated 3rd July 2013, the department the Claimant was in is Front Office and his salary was Kshs. 20,000/- gross. He was entitled to other benefits such as annual leave/off days, gazetted public holidays, medical cover and so on. He was given duties and responsibilities including the line manager who was the Head of Department. He was to serve a probationary period of 6 months during which the employment could be terminated by either party giving 1 month's notice in writing or by payment of equivalent amount of wages in lieu of such notice. The Respondent in its defence averred that the Claimant's services were not discharged as averred by the Claimant and sought proof of the averments made by the Claimant. The Respondent averred in the alternative that the contract in force permitted the discharge of the Claimant by issue of a notice of one month or payment of an equivalent sum in lieu of such notice.

8. It is not disputed that the employment of the Claimant came to an abrupt end circa 2nd January 2014. The Claimant asserts the dismissal was on account of an incident he witnessed which subjected him to lockout by the security officers of the Respondent on instructions of Waweru. On its part, the Respondent asserts that the Claimant absconded from duty from 2nd January 2014. The Claimant was not employed as a security officer and therefore could not have been on patrol on 1st January 2014 when he submits that he stumbled upon Mr. Waweru and the receptionist emerging from a room. The inference being that there was something going on between the two. The Claimant was a doorman. The **Concise Oxford English** dictionary defines doorman as a **person who is on duty at the entrance of a large building**.
9. The Claimant was therefore a person who was on duty at the entrance of the hotel. He was not engaged as a security supervisor or watchman or potter. In the claim, he proved that his services were secured by a contract of service dated 3rd July 2013. The contract provided that he was to be on probation for 6 months and during the probation his services could be terminated on issue of a 1 month written notice or payment of the equivalent of 1 month salary in lieu thereof. The defence of the Respondent is that the Claimant absconded from duty. It was incumbent for the Respondent to show that after the Claimant absconded there was an effort to seek to know his whereabouts or otherwise ascertain the position of the Claimant vis-à-vis the Respondent. I find that the Claimant was dismissed without notice. No evidence was led by the Respondent that indeed the Claimant was paid any sum in lieu of such notice. The Claimant was therefore entitled to receive Kshs. 20,000/- in lieu of notice. His other claims related to the unlawfulness of the dismissal are in my view unsupported. Additionally, there was nothing to support his claim that he worked overtime or that he was entitled service pay. There was no proof there was any illegal deduction from his salary and therefore his claim for damages in that regard would fail.
10. In the final analysis, having found that the dismissal was unlawful to the extent of the non-payment of notice, would the Claimant be entitled to compensation? Section 41 of the Employment Act does not apply to the Claimant. This however does not mean that Section 43 of the Employment Act did not apply. As the employer failed to prove a valid reason for the dismissal therefore Section 45 and 49 of the Employment Act would apply. The Claimant was yet to complete his probation period and the Court would not be inclined to grant compensation beyond one month.
11. The claim succeeds but only in part and judgment is entered for the Claimant against the Respondent for
 - i. Kshs. 20,000/- being notice
 - ii. Kshs 20,000/- being compensation for one month

iii. Kshs. 15,000/- being costs of the suit.

iv. Interest at Court rates on i) and ii) above from the date of this judgment until payment in full.

The sums in i) and ii) above are subject to statutory deduction in terms of Section 49(2) of the Employment Act.

While this may be obiter, I think it is important that I record my remorse at the delay of judgment herein. I wish to apologise to the parties for the delay in delivering the judgment as the same was ready in late February but due to official engagements I was unable to deliver it and this was further aggravated by the loss of the computer on which the only copy of the judgment was saved. I had to rewrite it again hence delivery of the judgment today. I hope the parties accept this apology. Their forbearance and patience is commendable.

Orders accordingly.

Dated and delivered at Nairobi this 11th day of May 2016

Nzioki wa Makau

JUDGE