



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1076 OF 2014

ERICK SHISIALI KHAHU.....CLAIMANT

VERSUS

THE VARGA LIMITED T/A

KENYA MOTOR SPORTS CLUB RESPONDENT

Mr. Achila for the claimant

Mr. Wagara for the respondent

JUDGMENT

1. The claimant brought this suit vide a memorandum of claim on 30th June 2014. The claimant seeks compensation for wrongful and unlawful termination of employment and terminal benefits to wit;

(i) Three (3) months salary in lieu of notice and unpaid salary while the claimant was on compulsory leave.

Facts of the claim

2. The claimant was employed by the respondent as a waiter earning a monthly salary of Kshs.12,000.00 on or about April 2009. In February 2010, the claimant was promoted to a barman and his salary was increased to Kshs.25,000.00 per month.

3. The claimant was registered with NHIF and NSSF but the respondent did not remit contributions to NSSF in the sum of Kshs.6,000.00.

4. The claimant worked diligently for a period of four (4) years. On the 13th and 14th July 2013, certain customers had a Polo tournament at the sports club and they paid Kshs.30,000.00. The customer demanded an ETR receipt from the claimant after he had received the cash payment.

5. On 18th September, 2007 Mr. Rajiv Shah wrote a text message to the claimant that he should not have issued the customers with an ETR receipt and asked the claimant to proceed on leave. The claimant had seven days outstanding leave. Upon his return Mr. Rajiv Shah asked the claimant to proceed on a further thirty (30) days leave and report back on 13th October 2013.

6. When the claimant returned Mr. Rajiv Shah asked him to go back and wait for his call. To date the claimant has never been called back. The claimant states that the conduct by the respondent amounted to wrongful and unlawful termination of employment and seeks the reliefs sought in the memorandum of claim.

Response

7. Respondent filed a memorandum of response on 1st August 2014. The respondent admits having employed the claimant as a waiter in 2009 at a monthly salary of Kshs.12,000.00. The respondent states that in September 2012, it promoted the claimant to the position of a bar man earning a salary of Kshs.15,000.00 per month. The respondent therefore denies that the salary of the claimant was Kshs.25,000.00 per month.

8. The respondent attached payment vouchers in respect of money paid to the claimant. None of the vouchers reflected the salary of Kshs.12,000.00 or Kshs.15,000.00 as alleged by the respondent. It would appear the claimant was paid in bits and pieces if indeed the vouchers reflected the salary paid to the claimant in the years 2012 / 2013.

9. The respondent avers that the claimant worked for it until it was discovered that the barman misappropriated and siphoned the respondent's daily bar sales to the tune of unnamed figure. The respondent further avers that the claimant was put to task over the matter but failed to offer a tangible explanation and on 18th September 2013 the claimant was put on compulsory paid leave pending investigation.

10. The respondent denies that the claimant was sent home for having issued ETR receipt to a customer since this was a common practice of the respondent.

11. The respondent states that the termination of the employment of the claimant was lawful, procedural and fair.

Determination

12. The claimant testified under oath in support of the particulars of claim. The respondent failed to attend the hearing of the suit on 10th November, 2015.

13. The claimant filed an affidavit of service sworn by Norngel Okelo G'oganyo a court process server in which it was demonstrated that the respondent received a copy of the hearing notice dated 8th December 2014 on 9th December 2014. The attached notice bears a stamp of the advocates of the respondent duly signed in acknowledgement of receipt.

14. The matter proceeded ex-parte and the testimony by the claimant remains uncontroverted. The court having carefully assessed the evidence by the claimant find that the claimant served the respondent diligently and was wrongfully and unlawfully dismissed from employment without notice and without being given a chance to show cause why his employment should not be terminated.

15. The claimant was humiliated by being sent on compulsory leave with a false promise that he would be recalled back. The claimant was kept in limbo until the time he filed suit.

16. The claimant has proved his case on a balance of probability and is entitled to compensation in terms of section 49 of the Employment Act 2007.

17. The claimant lost his source of income and was kept for several months without pay awaiting to be recalled. The claimant was not given any certificate of service and was not paid any terminal benefits. The claimant had served diligently for over four years and his career prospects were wrongly curtailed.

18. The court finds that the claimant earned Kshs.25,000 per month at the time of termination and is awarded eight months' salary as compensation for the wrongful and unlawful dismissal in the sum of Kshs.200,000.00.

19. Further the claimant is awarded terminal benefits as follows;

(i) Kshs.25,000.00 being one month in lieu of notice;

(ii) Kshs.6,000.00 being unremitted NSSF dues;

(iii) Kshs.25,000.00 for the period the claimant stayed on unpaid compulsory leave between 18th September to 13th October 2013.

Total amount to the claimant is Kshs.256,000.00;

(iv) The award is payable with interest at court rates from date of filing suit till payment in full.

(v) The respondents to pay the costs of the suit.

Dated and delivered at Nairobi this 6th day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE