



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

CAUSE NO. 239 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

WILLIAM OCHIENG ORONDO.....PETITIONER

Versus

ATURUKAN HOTEL LIMITED.....RESPONDENT

J U D G E M E N T

The Claimant was employed by the Respondent as General Manager at its hotel by letter dated 27th October, 2013 on a three (3) year contract. The letter set out the terms of the Claimant's contract being a salary of Shs.225,450 per month, a three bedroom furnished company house, airtime and entertainment allowance and medical cover as per Hotel policy among others. The contract was terminable by either party upon giving three (3) months notice or pay in lieu. The contract also provided for gratuity at 15% of basic salary.

The Claimant gave notice of resignation by his letter dated 22nd May, 2014 which indicated that his resignation will take effect on 25th August, 2014. However on 11th August 2014 the claimant was summarily dismissed by letter of the same date. The grounds for dismissal are that he had been having a relationship with a junior female staff with whom he was involved in a fight at the house allocated to him by the company causing disturbance to the neighbours who called the hotel for intervention. The letter further stated that the relationship with a junior staff was a contravention of the Hotel Policy and the Employment Act.

Aggrieved by the dismissal the Claimant filed this suit in which he alleges that the dismissal was wrongful, unlawful and without just cause and he was never given a hearing. He seeks payment of outstanding dues from the Respondent as follows:-

- a) Pay in lieu of notice for three months $225,450 \times 3 = 676,350/-$
- b) Unpaid leave for 10 months 187,875/-
- c) Overtime worked 1,352,700/-
- d) Off days worked overtime (87 days) 653,805/-
- e) Holidays worked overtime (18 days) 135,270/-
- f) Leave allowance @ 1/3 of basic pay 65,000/-

- g) Gratuity @ 15% per month of basic pay 338,175/-
- h) Under payment/Salary arrears for 9 months 1,161,715/-
- i) House allowance not given 15,000 x 3 months 45,000/-

Total 4,615,890/-

He further seeks the following prayers:-

- a) Loss income, leave days worked, unpaid house allowance, overtime worked, salary arrears, off days worked, underpayment, pay in lieu of notice, gratuity and general damages for unlawful termination of employment as per paragraph 14 above
- b) Exemplary damages
- c) Costs of the suit
- d) Interest on (a) and (b) above
- e) Any other or further relief as the court may deem just and fit to grant.

The Respondent filed a response to the claim in which it states that the claimant's salary was reduced by consent to Shs.120,000 per month due to economic challenges as was done for all other staff. The Respondent states that the termination of the Claimant's contract was for valid reason and was procedurally fair as the claimant was invited for hearing and was found culpable before he was summarily dismissed. The Respondent denied that the Claimant is entitled to any of the prayers sought.

At the hearing of the case the Claimant testified on his behalf. The Respondent called one witness MR. WELLINGTON KADENGE (RW1), a Restaurant Manager at the Respondent's Hotel. Parties were thereafter directed to file written submissions. The claimant filed his submissions but the Respondent did not and did not attend court on the date of mention to confirm filing of submissions and to take hearing date.

Claimants Case

The Claimant's Case as contained in the Memorandum of Claim and the annexures thereto, his testimony in court and his written submissions. In brief his case is that he gave notice of resignation as he was offended by the consistent underpayment of his salary by the Respondent. He was paid Shs.160,000 on 2nd December, 2013 being his first salary instead of Shs.225,450. No explanation was given. For the entire period he worked for the Respondent from November 2013 to May 2014 when he was dismissed he was paid a total of Shs.980,000 instead of Shs.2,111,715 that he was entitled to.

The Claimant testified that he was provided with accommodation at the Respondent's hotel initially then given a rented house from January 2014. He occupied the rented house up to April 2014 when he was forced to move out and rent his own accommodation due to issues with the landlady over rent arrears. He has claimed rent at the rate of Shs.15,000 per month for the 3 months when he stayed at the rented house.

The Claimant testified that he was reporting for work at 6.30 am and worked until late at night, that he never took his one day off per week and worked through all the public holidays. He also testified that he did not take annual leave.

In the submissions the Claimant stated that the allegations against him by the Respondent were malicious and were never proved. He stated that:-

- a) The name of the alleged female employee was never indicated nor her designation disclosed.

b) The respondent's witness indicated that the complaint was lodged by the Landlord but he failed to give the name of the Landlord.

c) The alleged female junior staff was never called as a witness to shed light on what actually transpired.

d) No complaint letter from the landlord was produced by the respondent. In fact the witness admitted that he was not present when the report was being made.

e) The claimant's testimony that at the time of his dismissal he was not leaving in the house allocated to him by the company was not challenged by the respondent. The respondent did not produce any evidence to show that they were paying for the house at the time of the client's dismissal.

f) The respondent's witness stated that the claimant withdrew his letter of resignation but failed to explain how and when it was withdrawn. He admitted that he did not see any letter from the claimant withdrawing the notice.

g) The claimant was condemned unheard as he was never offered an opportunity to defend himself against the allegation levelled against him before he was dismissed from employment.

Respondents Case

The Respondents Case is contained in its Response to the Memorandum of Claim and the testimony of RW1. RW1 testified that there was a time when the Respondent reduced salaries of all employees as it was experiencing financial constraints. He testified that it was the General Manager, at that time the Claimant, who implemented the salary reductions. He however did not know the salary earned by the Claimant.

He testified that he was aware the Claimant gave a notice of resignation but he later heard that the Claimant had withdrawn the letter. He stated that the claimant was involved in a fight at his house which was rented by the company and the matter was reported to the office. The Claimant was called to a meeting with the Board of Directors and thereafter dismissed. He however did not attend the meeting and could not recall the date of the meeting only stating it was in August.

Issues and determination

The issues for determination are whether the dismissal of the Claimant was fair and whether he entitled to the prayers sought.

For dismissal to be valid there must be valid reason and the employee must be given an opportunity to respond to the charges against him.

Section 41 of the Employment Act (the Act) provides for the procedure for dismissal/termination while section 43 provides for proof of reason for termination or dismissal.

The reasons in the Claimant's letter of dismissal are that he had a relationship with a junior colleague, and fought with her in the company house against the Respondent's policy and Employment Act. No policy was produced and there is no provision in the Employment Act covering either. The claimant denied having a relationship with a junior colleague. He denied fighting and further denied having been housed in a company house at the time of the alleged fight. None of these issues were contested by the Respondent. As pointed out in the Claimant's submissions, the name of the employee alleged to have been having a relationship with the claimant was not disclosed, the report alleged to have been made by the landlord was not substantiated, and the Respondent's witness did not even know the name of the landlord.

The Claimant also denied having been called for a disciplinary hearing. RW1 testified that the Claimant

was called for a meeting with the directors but he did not attend the meeting and did not know what transpire there. He could not even tell the date of the meeting. No letter was produced inviting the claimant for the meeting or charging him with any offence and no minutes of the disciplinary meeting were produced.

For these reasons, I find that the Respondent failed to prove either valid reason for dismissal or its compliance with fair procedure. The summary dismissal was therefore unfair within the context of section 45 of the Act.

Remedies

1. Arrears of Salary

The Claimant prayed for arrears of salary in the sum of Shs.1,161,715. In his submissions he gave a breakdown of payments received, and the arrears claimed as follows:-

November 2013 - Kshs.160,000

December 2013 - Kshs.80,000/-

January 2014 Kshs.130,000/-

February 2014 Kshs.130,000/-

March 2014 Kshs.100,000

April 2014 Kshs.70,000

May 2014 Kshs.80,000

June 2014 Kshs.100,000

July 2014 Kshs.100,000

August 2014 Kshs.Nil

The claimant testified that having been employed at a monthly salary of Kshs.225,450/- per month his total salary for the 9 months worked was supposed to be Kshs.2,111,715/-

The Respondent's position is that the claimant's salary was reduced to shs.120,000 per month. That does not explain the reason why he was consistently paid less than the said shs.120,000. No letter or minutes were produced as evidence of reduction of the salary. The Respondent did not contest payment of the Claimant's salary as set out in his written submissions.

I find that the Claimant has proved the underpayments on a balance of probability and award him the sum of Shs.1,161,715 as claimed.

2. Gratuity

The Claimant's contract provided for 15% gratuity on basic salary. The respondent did not contest that the claimant is entitled to the same. I therefore award him gratuity at 15% of salary for the period of 9 months worked in the sum of Shs.316,757.25 being 15% of Shs.2,111,715 being the salary for 9 months.

3. Holidays Worked

The Claimant did not specify which public holidays he worked or how he arrived at the figure claimed of

Shs.135,270 or 18 days claimed.

I find that this head of claim has not been proved and dismiss it.

4. Overtime Worked

The Claimant's letter of appointment does not provide for payment for overtime work. He did not provide a schedule of the hours worked overtime other than stating that he reported for work at 6.30 am and left work late. In any event the Respondent's job as general manager and his duties of being responsible for day to day operations of the Hotel would require him to be at work as demanded by the responsibilities and exigencies of the office. Such extra work is normally included in the package paid to an officer at such senior level unless specified otherwise in his terms of contract.

I find that at his level and based on his responsibilities, the claimant is not entitled to payment for overtime work.

5. Off Days Worked

As in the case of holidays worked, the Claimant has not specified which days he worked on his off days. He did not specify when his off days fell due and did not give a breakdown of the tabulation of Shs.653,805 or 87 days claimed.

I find this head of claim not proved and dismiss it.

6. House Allowance

The Claimant did not produce receipts for rent he alleges to have paid nor produce any other evidence that he indeed leased premises after moving out of the premises provided by the Respondent. His contract provided for the employer to provide accommodation with no provision for him to lease accommodation at the Respondent's expense.

The prayer is therefore not proved and is dismissed.

7. Annual Leave

The Claimant was entitled to 30 days annual leave according to his contract. Having worked for 9 months he is entitled to 22.5 days. This translates to Shs.169,087.50 which I award him.

8. Leave Allowance

Neither the Claimant's contract nor the law provide for leave allowance. The prayer is therefore without legal or contractual basis and is dismissed.

9. Pay in Lieu of Notice

The Claimant's contract provided for termination notice of 3 months. Having found that the claimant's dismissal was unfair, he is entitled to pay in lieu of notice as provided under section 49(1) of the Act. I award him the sum of Shs.676,350 being 3 months salary in lieu of notice.

10. Compensation

The Claimant prayed for compensation for unfair dismissal. I find that the Claimant is not entitled to the same as he had already signified his intention to leave the employment of the Respondent by tendering a resignation notice, even though he was dismissed summarily before expiry of the notice. The prayer is therefore dismissed.

11. Costs and Interest

The Respondent will pay the Claimant's costs for this suit and interest shall accrue on decretal sum from date of judgment.

Dated, Signed and Delivered this 23rd day of June, 2016

MAUREEN ONYANGO

JUDGE