



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 220 OF 2015

(Before D. K. N. Marete)

LUKA TAABU ASIMETO.....CLAIMANT

VERSUS

TERESIA MBUGUA C/O GOSHEN FOOD INVESTMENT....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 30th July, 2015. It does not set out an issue in dispute on its face.

The respondent in a Replying Memorandum dated 9th September, 2015 denies the claim and prays that the same is dismissed with costs.

The claimant's case is that at all material times to this suit, he was employed by the respondent as a waiter. This was with effect from 1st April, 2014. At the time of unfair termination he had risen to the position of Manager and earned Kshs. 12,000.00. This to him was an underpayment.

The claimant's further case is that he served with loyalty, diligence and dedication until 28th June, 2016 when the respondent without any lawful excuse unprocedurally and unfairly orally dismissed him and refused to pay his terminal dues. The claimant avers that in the morning of 28th June, 2015 he asked from the respondent for some salary increment beginning the month of July, 2015 when the respondent, Teresia Mbugua, told him that she no longer required his services. She further said that the claimant had worked enough at the hotel and did not require his services anymore and that the claimant should clear and leave as the respondent had found a relative to perform the claimant's managerial duties at Goshen Food and Investments.

It is his other case that the dismissal was illegal, unjustified, unfair and or an unlawful and violates the provisions of the Employment Act. This is as follows;

6. It is the claimant's case that the dismissal was illegal unjustified, unfair and/or unlawful and the same violates the provisions of Employment Act No. 11 of 2007 and in particular section 35 (1) (c) (5), 44 (4), 45 (2), 28 (10) of Section 10 of the Labour Institutions Act.

7. Section 41 (1) of the Employment Act requires an employer before terminating an employment of an employee on grounds of misconduct, poor performance to explain to the employee in a language he/she understands the reasons for which an employer is considering termination and the employer

shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The claimant contends that there was no explanation from the respondent on the intended dismissal.

8. Section 44 (40 of the Employment Act lists grounds which amount to gross misconduct and which would entitle an employer to summarily dismiss an employee; however the same provides that an employee should be given an opportunity to dispute the truthfulness or accusation. The claimant submits that the respondent did not accord him a chance to dispute the correctness of accusation before dismissing him.

9. Section 45 (2) of the Employment Act provides that the employment should not be terminated unfairly. The act further proceeds to provide that a termination of employment by an employer is unfair if the employer fails to prove:

- a) That the reason for termination is valid.
- b) That the reason for the termination is a fair reason (s)
- c) That the employment was terminated in accordance with fair procedure.

He tabulates and claims his terminal dues as hereunder;

i. One month pay in lieu of notice Kshs.
12,000/

ii. Underpayment of wages

a) Legal Notice No. 68 of 1/5/2012

8221.20 + 1233.18 less 5800 x 12 months Kshs.43850/

b) Legal Notice No.68 of 1/5/2012

9312.15 + 1406 less 8000 x 12 months
Kshs.33337/

c) 9312.15 + 1406 less 10,000 x 10 months

(May 2014 to Feb 2015)
Kshs. 7781/

iii. Accrued leave for May 2012 – June 2015

21 days x 3 yrs x monthly wages

12000 x 3 yrs
Kshs. 36,000/

iv. Unpaid overtime worked

Between May 2012 to June 2015 at 3 hours per day

26 days per month x 12 months per year x 3 years 2 months

988 days x 3 hours per day

2694 hours x 1.5 x 9373/195
Kshs.213704/

v. Unpaid rest days for 3 years

4 days per month x 12 months x 3 years

144 days + 8 days

152 days x 2 x 10778.95/30
Kshs.109226/

vi. Unpaid wage for June 2015
Kshs.12,000/

vii.12 months salary as compensation for unfair termination

12,000 x 12
Kshs.144000/

TOTAL
KSHS.611,898/

He also particularizes his grounds of unlawfulness as follows;

- a) *The respondent terminated claimant's employment without proving that the reason for termination was valid as provided for under Section 43 and 45 of the Employment Act,*
- b) *The respondent did not give the claimant termination notice as required under Section 35 (1) (c) and 36 of the Employment Act.*
- c) *The respondent did not regulate the Employee's working hours as required under section 27 (1) of the Employment Act.*
- d) *The respondent denied the claimant's employment without following the procedure laid down in the employment act specifically the procedure laid out in Section 14 and 414 of the Employment Act.*
- e) *The respondent failed to pay the claimant his 12 months wages for loss of employment as provided under section 15 (c) of the Labour Institution Act.*
- f) *The respondent denied the claimant his lawful leave days contrary to section 28 (1) of the Employment Act which provides for annual leave with full pay.*
- g) *The respondent failed to accord the claimant with an opportunity to challenge the allegations against him before termination employment.*
- h) *The respondent did not act in accordance with justice and equity in terminating employment contrary to section 45 of the Employment Act.*
- i) *The respondent failed to give the claimant certificate of service as required under section 51 of the Employment Act.*
- j) *The respondent failed to reduce the engagement with the claimant into a written contract provided by the Employment Act.*

In the penultimate the claimant prays for;

- a) Declaration that the dismissal was unprocedural, unlawful and unfairly in the circumstance that the claimant is entitled the compensation.*
- b) The sum of Kshs. 611,898/as set out in paragraph 10 above.*
- c) Cost of this suit and interest on (b) and (c) above at court rates from time of filing the suit until payment in full and*
- d) Any other further and better relief the Honourable Court may deem just and fit to grant.*

The respondent denies the claim and posits that there was no termination as the claimant left work on his own. The respondent further submits that the claimant was a frequent absentee and absconded work without justifiable reason and in the instant case has never reported back after picking his salary for June, 2015.

It is the respondent's further case that on numerous occasions he contacted the claimant to establish why he was not at work to no avail and on 2nd July, 2015 she issued a show cause letter but this has not been responded to.

It is the respondent's case that the claimant owes her Kshs. 11,485.00 being an advance paid to him on his own request. She prays that this matter be dismissed with costs.

The matter came to court variously until the 6th June, 2016 when the parties agreed on its disposal by way of written submissions.

The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent?
2. Whether the termination of the employment of the claimant by the respondent, if at all, was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this claim?

The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. The claimant's case and submissions is that he was an employee of the respondent until the morning of 28th July, 2015 when he was unprocedurally dismissed from employment. The respondent denies this. The respondent's case is that the claimant was a frequent absentee and absconded work and in the instant case left work for good after receiving his salary for June, 2015. He has not come back to work, this is as follows;

4. The respondent denies the contents of paragraph 5 of the Memorandum of claim and all the particulars of unlawfulness particularly that his services were unlawfully, unfairly and unprocedurally terminated without any valid reason. That the claimant over that in the morning of 28/06/2015 he asked from the respondent for some salary increment beginning the month of July, 2015 when the respondent told him that she no longer required the claimants services, that the claimant had worked enough at the hotel and did not require his services anymore and that the claimant should clear and leave as the respondent had found a relative to perform the claimant's managerial duties at Goshen food and investments and the respondent invites the claimant to strict proof further and without prejudice to the foregoing, the respondent avers that the claimant services were not terminated as he is the one who left on his own will.

5. *The contents of paragraph 6 of the memorandum of claim are denied, unfounded, untrue and the respondent without prejudice to the foregoing avers that it has in all situations upon being contacted by the claimant, the claimant absconded duty on several occasions without any justifiable reason and from the 28/6/2015, he has never turned up for work and after collecting his June 2015 salary, he has not come back to work since then.*

6. *On the contrary the respondent avers that he on numerous occasions contacted the claimant to find out why he was not at work, but has never received any response from him and on 2nd July, 2015 the respondent wrote a Notice to show cause why his services should not be terminated but the claimant did not and has not responded (see appendix A & B).*

The claimant annexes the following documents to his claim;

1. A copy of his National Identity Card.
2. A copy of his terminal dues assessment letter by Josphat Ojuok, KUCFAW branch secretary, Eldoret.
3. A copy of demand letter dated 6th July, 2015.
4. A copy of a response to the demand by the respondents.
5. A copy of a demand letter dated 30th July, 2015.
6. A statement of account of NSSF for the claimant indicating contributions by the claimant upto 30th April, 2015.

The claimant seeks to rely on Section 45 of the Employment Act, 2007 which provides that;

‘No employer shall terminate the employment of an employee unfairly.

A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee’s conduct, capacity or compatibility;

or

(ii) Based on the operational requirements of the employer;

(c) That the employment was terminated in accordance with fair procedure”

He also seeks to rely on the authority of **Walter Ogal Anuro Vs Teachers Service Commission [2013] eKLR** where it was held;

“that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.

Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

This is buttressed by Section 45 (4) (b) of the Employment Act, 2007 which provides that;

.....that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.

This is illustrated in the authority of **Alphonse Machanga Mwachanya Vs Operation 680 Limited (2013) eKLR**, where the court summarized the legal fairness requirements set out in Section 41 of the Employment Act as follows;

(a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered.

(b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

(c) That the employer has heard and considered any explanations by the employee or their representative.

(d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

The respondent's case is that in the circumstances of this case, there was no termination of the employment of the claimant him having left employment in his own volition and without coercion.

This matter is one for a determination on a test of balance of probabilities. This is because the parties submit diametrically opposed positions in support of their respective cases. It is a case of your word against mine. In as much as the claimant seeks to rely on Sections 41 and 45 of the Employment Act, 2007 and particularly Section 45 (2), the respondent ably submits that this would not be applicable in the circumstances of this case. This is because there indeed was no termination the claimant having absconded duty never to return. On a balance of probability, this is the likely scenario. The claimant, who is duty bound to prove a case of termination has not done this even from the collection of his annexures to the claim. I therefore find a case of no termination of the employment of the claimant by the respondent and hold as such.

On a finding of no termination of employment, all the other issues for determination fall by the wayside. They are not worthy of any consideration.

I am therefore inclined to dismiss this application with orders that each party bears their own costs of the claim. And this clears the last and all other issues for determination.

Delivered, dated and signed this 19th day of July 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa for the claimant.
2. Mr. Misoi instructed by Terer & Company Advocates for the respondent.