



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 131 OF 2015

DOUGLAS WANJOHI MUCHEMI.....CLAIMANT

VERSUS

GEOFFREY KIBUI KAMAU T/A HOTEL STARBUCKS..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 15th July, 2016)

RULING

The claimant filed the statement of claim on 29.07.2015 through Muchiri Wa Gathoni & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination of employment was unfair, unprocedural, wrongful and illegal.
- b. A declaration that the act of the respondent of not paying the claimant his terminal dues was unlawful, illegal and amounted to breach of the contract of employment.
- c. That owing to the breach of the terms of employment by the respondent as aforesaid the claimant is entitled to the general damages for breach of contract and the amount pleaded in paragraph 10 above with interest from the date each item fell due.
- d. A certificate of service as pleaded in paragraph 9 above.
- e. Any other relief the court may deem fit to grant.
- f. Costs of the claim.

The respondent filed the statement of defence on 02.09.2015 through Maina Karingithi & Company Advocates. The respondent prayed that the claimant's claim be dismissed with costs.

The respondent employed the claimant as a waiter effective 15.01.2013. On 15.02.2015 the claimant reported on duty as usual for 12 noon shift. At 3.00pm the respondent summoned the claimant and dismissed him by telling the claimant that he was not happy with his services and that the claimant had to leave job forthwith. The claimant testified that before the termination the respondent had not told him anything about the alleged poor performance leading to his termination.

The claimant's case was that on weekdays he worked from 12 noon to 3.00am or 4.00am. On weekends on Fridays he testified that he worked from 6.00am through the night to Saturday 5.00am. The claimant testified that he worked 44 hours of overtime every week because the hotel was on a highway at Karatina and it was extremely busy business. He stated that at time of employment there was no agreement on working hours. Since February 2013 the claimant's NSSF dues were duly deducted and not remitted till end November 2013 when they were remitted. Whenever the claimant suffered shortages, he testified that the same was recovered from his monthly pay.

The respondent's case was that the hotel operated from 7.00am to 11.30pm and staff could only work

within those hours. However, the respondent failed to provide the workers' job attendance register to confirm that the workers indeed worked within the designed hours and shifts. The respondent testified that the claimant worked from 15.01.2013 to September 2013 on temporary basis then from October 2013 on permanent basis when deduction and remission of NSSF commenced. The respondent further testified that he terminated the claimant's employment on 15.02.2015 verbally and on account of poor service in view of the complaints made by the customers against the claimant. The customers' complaints ranged from overcharging, the staff being dirty and drunken and the claimant was the culprit. The claimant also suffered shortages about withheld revenues which were frequently recovered. On the date of termination the respondent testified that the claimant reported at 3.30pm while drunk so he was fired there and then.

The **1st issue** is whether the termination of the claimant's contract of employment was unfair. The evidence is clear that there was no notice and a hearing for a valid termination on account of poor performance or misconduct as provided in section 41 of the Employment Act, 2007. As was held in **Shankar Saklani –Versus- DHL Global Forwarding (K) Limited [2012]eKLR** a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract.

The **2nd issue** is whether the claimant was entitled to full 12 months' compensation under section 49(1) (c) for the unfair termination and whether the claimant is entitled to the other payments as prayed for. The court has considered the claimant's admitted frequent shortages that were recovered and there is no reason to doubt that the claimant in that way contributed to his termination. The court puts that contribution at 50% and the claimant is awarded 6 months' gross salaries being **Kshs.51, 000.00** at Kshs.8, 500.00 per month. He is further awarded **Kshs. 8, 500.00** one month pay in lieu of the termination notice. The court has considered the evidence on record. The court finds that on a balance of probability and in absence of the employer's records on the issue, the claimant has established that he worked overtime as claimed and is awarded **Kshs. 161, 990** as the reasonable compensation for the overtime served and not paid. The claimant is awarded **Kshs. 11, 900.00** being pay in lieu of annual leave for 2 years served. As this was not a case for redundancy, prayer for severance pay was unfounded and the same is declined. Finally the claimant is entitled to a certificate of service as his statutory right.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The declaration that the respondent's termination of the claimant's contract of employment was unfair, unprocedural, wrongful and illegal.
- b. The declaration that the act of the respondent of not paying the claimant his terminal dues was unlawful, illegal and amounted to breach of the contract of employment.
- c. The respondent to pay the claimant Kshs.233, 390.00 by 01.09.2016 failing interest to be payable thereon at court rates from the date of the judgment till full payment.
- d. The respondent to deliver to the claimant a certificate of service by 01.09.2016.
- e. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 15th July, 2016.**

BYRAM ONGAYA

JUDGE