



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT**

**AT MOMBASA**

**CAUSE 324 OF 2015**

**BONIFACE MULANDI.....CLAIMANT**

**VERSUS**

**ALI BARBOURS RESTAURANT LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for compensation of damages for wrongful and unfair termination of the claimant's employment contract by the Respondent on 3.4.2015. The respondent has denied liability for the alleged wrongful and unfair termination and avers that the claimant was dismissed for gross misconduct and after being accorded the due process. The Suit was heard on 15.2.2016 when the claimant testified as CW1 and the respondent called Geetru Marcella Pynket and Kathryn Jane Robertson as the defence witnesses RW1 and RW2. Thereafter both parties filed written submissions.

**Claimant's Case**

2. CW1 explained that he was employed by the respondent in October 2008 as a casual and on 1.4.2010 he was given a one year written contract which ended on 31.3.2009. That he was given similar contracts in succession until 31.3.2014. From 1.4.2014 he was not given any written contract but he continued in the same work until 3.4.2015 when he was summarily dismissed. His salary by then was Kshs.12524.

3. According to CW1, his dismissal was unfair because the reason given for the dismissal was false and the procedure followed to dismiss him was unfair. He explained that on 3.4.2015, he was off duty during the day having worked in the night shift the previous night. That at around 2 pm, he received a call from RW2 summoning him to her office. The tone of the caller sounded harsh and so CW1 rushed to see her. On arrival he found RW2 on phone and he could see a letter on her table. That when she finished with the phone, RW2 told him that he had been fired for socializing and drinking with clients while on duty. CW1 attempted to air some defence but the dismissal letter had already been signed and RW2 told him that her hands were tied in that matter.

4. CW1 denied that he drunk while on duty on 2.4.2015. He however admitted that he socialized with the customers at the bar because that was part of his work as a waiter. He denied ever playing pool with the customer he was serving that night, namely a British Couple. That the bar is served with CCTV Cameras which could have provided evidence of him drinking while on duty if at all it was true that he drunk while on duty.

5. CW1 further contended that he was not given any chance to give his side of the story before the dismissal. He maintained that by the time he arrived in the office of RW2, the dismissal letter had already been written and his attempt to give his defence was not allowed by the RW2 who said that her hands were tied in the matter left with no other option. CW1 acknowledged receipt of the dismissal letter dated 3.4.2015 on the same date.

6. CW1 prayed for salary in lieu of notice, salary for March and April 2015, service charge for October 2008 to March 2010 NSSF benefits for the 6 years worked, transport and uniforms and overtime for October 2008 to April 2015. He further prayed for compensation for occupational eye disease which was caused on him due by the computer screens he used for placing customer orders.

### **Defence Case**

7. RW1 is the respondent's Manager since December 2013. On 2.4.2015, she was on night shift. That from her office she was able to see the waiters and the customers in the bar. That he saw a familiar English couple being served by CW1 who started with orders of 2 drinks but later the orders started to come in 3 units including 2 pieces of Tusker Malt and one piece of Spirits. RW1 then went to investigate and found the couple playing pool and another group of revelers playing Dats nearby. That later on RW1 went back to the bar and found that all the other customers had left except the English couple who were still playing pool with CW1. RW1 however admitted that it was okay for a customer to request a waiter to play with him if he had no partner to play with. That shortly thereafter CW1 went next to her at the bar counter and ordered for 3 Tusker beers, smiled at her and went back to serve the couple and continued playing pool with them.

8. RW1 explained further that when she went back to her office the male guest followed her and asked whether there was anything wrong and she told him that it was wrong for a waiter to abandon his duty to do what he was doing. That in response the guest told her that he was surprised. That shortly thereafter CW1 pleaded with her not to report the matter to the bosses but she maintained that the CCTV Cameras had already captured what had happened and as such she had no choice but to report to the bosses. That she reported the matter to RW2 and later learned that CW1 had been dismissed. RW1 maintained that CW1 drank with the customers on 2.4.2015. She further admitted that there were CCTV footages for the events 2.4.2015.

9. RW2 is the General Manager for the respondent for 5 years now. She admitted that CW1 was their employee at the Forty thieves Bar. That on 3.4.2015, she received a report that CW1 was socializing and drinking with customers. She admitted that there was nothing wrong for CW1 chatting with customers but contended that it was wrong to drink or play pool with them.

10. RW2 called CW1 to her office on 4.4.2015 and explained to him the wrong he had done the previous night and then asked him to explain himself out. That CW1 never denied the offence but he only prayed for leniency. That she refused to the request in order to deter other employees from misbehaving while at work and proceeded to serve him with the dismissal letter the following day, 4.4.2015. She then promised him that his terminal dues were to be paid through his bank. The dues included salary for March and April 2015 and leave days outstanding of which she maintained that it was paid through the bank.

11. According to RW2, CW1 was a good employee with no records of misconduct, she produced medical reports from the same Doctor who had examined CW1 explaining that CW1 was suffering from Eye Cataracts which could not have been caused by computer but other factors including age or trauma. She denied the claims for transport and uniform allowances and maintained that the workers were only being given T-shirts as their uniform while transport was only provided for night shift. She further denied the Claim for overtime and maintained that the contract of employment provided for long hours service. Lastly she denied the Claim for service charge and contended that CW1 was paid all his service charge except for the April 2015. She explained that CW1 was disqualified from April 2015 service charge because he never served the minimum required days in a month being 15 days.

## **Analysis and Determination**

12. There is no dispute from the pleadings evidence and submissions that the Claimant was employed by the Respondent from October 2008 till 3.4.2015 when he was dismissed. The issues for determination are:-

- a. Whether there was a valid and fair reason for dismissing the claimant.
- b. Whether a fair procedure was followed before dismissing him.
- c. Whether the dismissal was wrongful and unfair.
- d. Whether the reliefs sought ought to be granted.

## **Reasons for the Dismissal**

13. The dismissal letter stated as follows:-

***“On 2<sup>nd</sup> April 2015 on your night duty you were socializing with clients and drinking on duty. This is not appropriate in your position and you have been with the company long enough to know this is not part of your duties. This also means you have no respect for your employer and fellow employees.***

***This is not professional and NOT acceptable in any way”.***

14. The claimant has denied the alleged offence and maintained that he only extended friendly service to the British couple by opening the pool and arranging the balls for them and availing coins to them. He denied ever drinking beer while on duty or playing pool with them. He maintained that he did his duties well that night and made the highest sales. He faulted the respondent for not availing the CCTV footages to prove the alleged misconduct. The respondent has not availed the CCTV footages to prove that indeed CW1 abandoned his duty and went to drink, play pool and socialize with customers. In addition, the Respondent never called any other witness, like other waiters or bar man to confirm the allegations by RW1. Without such, the Court is left with the word by CW1 against RW1.

15. On balance of probability, the Court finds in favour of the claimant by holding that the Respondent dismissed the Claimant without a valid reason. If there was, she did not prove that reason in this case as required by section 43 and 47 of the Employment Act (EA) which puts the burden of proving and justifying the reason for dismissing an employee on the employer. The reason for the foregoing finding, is that the respondent deliberately failed to call other employees or produce CCTV footages of the Claimant drinking and playing pool with customers. The only reasonable inference this Court makes out of the said default by the Respondent is that such other witnesses and CCTV footages would have provided adverse evidence to the defence case. The answer to the first issue for determination is therefore in the negative.

## **Procedure Followed**

16. The Claimant has contended that he was dismissed without following a fair procedure. That he was only called from home by a harsh sounding RW2 and upon reaching her office she told him that he had been fired for drinking while on duty and socializing with customers. That he was not given a chance to defend himself before the dismissal. That RW2 just gave him the dismissal letter which was already signed and she told him that her hands were tied on the matter. RW2 on the other hand has contended that she explained the offences to the claimant and gave him a chance to explain himself out but he never denied the offence. That thereafter he suspended him and told him to collect his letter the following day.

17. After careful consideration of the evidence from both sides, the Court finds in favour of the claimant that the procedure followed in dismissing him was not fair within the meaning of section 41 and 45 of the

EA which bar the employers from dismissing the services of the employees without following fair procedure. Section 41 specifically requires that before terminating an employee's services on ground of misconduct, the employer shall first accord the employee a hearing in the presence of another employee of accused employee's choice. That the employer is required to explain the offence to the employee and then give him and his companion a chance to air their representations for consideration by the employer before the dismissal is done. That such proceedings must be conducted in a language that the employee understands. On a balance of probability the foregoing procedure was not followed before the dismissal of the claimant. He was not accorded any hearing in the presence of another employee of his choice. The Court believes that by the time he arrived at the office of RW2, the dismissal letter had already been signed and RW2 clarified to him that her hands on the matter were tied.

18. In addition to the foregoing, the Court finds RW2 to be untruthful by lying that she gave CW1 a hearing and thereafter suspended him until 4.4.2015 when he collected the dismissal letter. On the other hand the Court finds that the Claimant was truthful on the same matter when he said that he found the dismissal letter ready and he signed to acknowledge received of the same on 3.4.2015.

19. The Court has verified the copies of the dismissal letter filed by both the claimant and the respondent and confirmed that they were received and signed for by the claimant on 3.4.2015 and not 4.4.2015 as alleged by the RW2. The answer to the second issue for determination is therefore also in the negative.

### **Unfair Termination**

20. In view of the finding herein above that the respondent did not prove valid and fair reason for dismissing the claimant and that fair procedure was not followed before the dismissal, the Court makes a further finding that the said dismissal amounted to an unfair and wrongful termination of the claimant's employment contract within the meaning of section 45(2) of the EA. The said section provides that termination of employment contract of an employee is unfair if the employer fails to prove that it was founded on a valid and fair reason and it was done after following a fair procedure.

### **Reliefs**

21. The claimant prayed for salary in lieu of notice, salary for March and April 2015, service charge and NSSF benefits for January 2009 to March 2010, transport allowance for 6 years, Uniform Allowances, compensation for wrongful dismissal, leave allowance and overtime.

### **Salary in lieu of Notice**

22. The Claimants fixed term contract lapsed on 31.3.2014 but he continued without any written contract. Consequently, the claimant's employment contract was governed by the law namely the Regulation of wages (Hotels and catering Trades) Order. Regulation 18 of the said Regulations Limits temporary employment in the Hotel industry to 6 months term after which the employee is deemed to convert to regular terms employee. In this case the claimant worked continuously from October 2008 to April 2015. He had therefore become a permanent employee, after completing 6 months of continuous service, with or without any written contract. There is no dispute that the Claimant served for 6 years since 2008. Under Regulation 20(1) (b) of the said Regulations, the termination notice for an employee who has completed 5 years' service is 2 months or salary in lieu of notice. The claimant has prayed for 3 months but without any legal basis. He will therefore get only 2 months' salary being kshs. 25048 in lieu of notice.

### **Unpaid Salary**

23. The Claimant prayed for salary for March plus 2 days worked in April 2015. The RW2 testified that the said salary was paid through the bank but the Claimant denied. The Court awards to the claimant kshs. 12524 and kshs. 835 being salary for March and April 2015 respectively. The reason for the award being that the Respondent did not prove that she paid the same to the claimant as alleged by RW2.

### **Service Charge**

24. The Claimant prayed for service charge for March 2015 amounting to kshs. 4500. RW2 testified that the money was paid but no evidence was adduced to prove that it was paid. Consequently the sum of kshs. 4500 is awarded as prayed. However the claim for service charge and NSSF benefits for 2009 – 2010 is dismissed for being time barred. Under section 90 of the EA, a claim founded on Employment Contract must be instituted in Court before the expiry of 3 years from the date it accrues. The Suit herein was filed on 25.11.2015, about 5 years after the right to the service charge accrued.

### **Transport Allowance**

25. The claimant prayed for kshs.100 per day for 6 years. However, no legal or contractual basis was given to entitle the claimant to such allowance and as such it must fail.

### **Uniform**

26. The claimant prayed for 2 trousers and 2 pairs of shoes per year for the 6 years served. However, no legal basis or contractual basis was given to justify the Claim and it is therefore dismissed.

### **Compensation for Wrongful Dismissal**

27. The Claimant prayed for 3 months' salary as compensation for his wrongful dismissal. Under section 49(1) of the EA, the Court has the discretion to award an employee who is unjustly dismissed up to 12 months gross salary as compensation. The Court awards the claimant kshs. 37572 being 3 months gross salary as his compensation for the wrong and unfair dismissal by the Respondent. In making the said award, the Court has considered the fact that the claimant was likely to secure an alternative employment within 3 months after dismissal.

### **Leave Allowance**

28. No particulars on evidence was adduced to support this prayer and as such it is dismissed.

### **Overtime**

29. CW1 testified that he worked extra hours every day he was on duty for the six years served. RW2 denied the claim for over time on ground that the claimant had accepted the contract to serve long hours. The claimant has filed written contract for 2010-2014 showing that he was to work 52 hours in a week and rest for one day. That translates to about 8½ hours per day. Under Regulation 5 of the aforesaid Regulations, an employee is supposed to work for 45 hours in a week of 6 days which translates to 7½ hours per day. Consequently the Court awards the claimant overtime of 1 hour per day for 26 day in a month. For 6 years, the overtime was 1 hour X 26 days X 12 X 6years = 1872 hours. It is hourly pay calculated from the salary of Kshs. 12524 per month was kshs. 55.70. Consequently, 1872 hours equals to kshs. 104,270.40.

### **Disposition**

30. For the reasons stated above, judgement is entered for the Claimant in the sum of kshs. 184,749.40 plus costs and interest.

Signed, Dated and Delivered at Mombasa this 1<sup>st</sup> day of July 2016.

**ONESMUS MAKAU**

**JUDGE**