



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

CAUSE NO.1280 of 2013

JOHN MUIA MBUTE..... 1ST CLAIMANT

ONESMUS MUTUNGI..... 2ND CLAIMANT

VERSUS

RAKIM RAJAN T/A

SMOKEY'S BAR & RESTAURANT RESPONDENT

JUDGEMENT

1. The issue in dispute is the unfair termination of the claimants and refusal to pay final dues and benefits.
2. The claimants were both employed as waiters by the respondent and running a business of a restaurant as managing director and the entity called Smokey's bar & Restaurant respectively. The claimants were each paid kshs.12, 500.00 and Kshs.9, 000.00 respectively as monthly wages exclusive of house allowances. They worked diligently until 2nd April 2013 and 12th may 2013 when they were verbally terminated from employment without notice or a letter to show cause or payment of terminal dues. The matter was reported to the Minister for the payment of terminal dues but the respondent did not oblige. The claimant instructed their advocate to make demand against the respondent but there was no response.
3. The 1st claimant is seeking;
 - a) One month notice at kshs.12, 500.00;
 - b) Leave of 20 days due Kshs.9, 615.00;
 - c) Off—duty balance of 1 day Kshs.480.00;
 - d) Public holidays worked 3 days Kshs.2, 886.00;
 - e) Salary balance Kshs.5, 500.00;
 - f) Overtime worked Kshs.933, 120.00;
 - g) Service gratuity Kshs.42, 300.00;

h) House allowance of 15% of basic pay Kshs.202, 500.00;

i) 12 months compensation; and

j) Certificate of service

4. The second claimant is seeking;

a) One month notice pay kshs.9,000.00;

b) Days worked 12 and unpaid kshs.4,338.00;

c) Leave of 1 year and 5 months kshs.13,020.00;

d) Off duty kshs.24,616.00;

e) Public holiday balance of 1 day kshs.724.00;

f) House allowance at 15% kshs.23,970.00;

g) Overtime worked kshs.110,160.00;

h) Service gratuity kshs.4,700.00;

i) 12 months compensation; and

j) Certificate of service.

5. The claimant also claim that they were not given notice or a hearing before termination and there was no reason for the same. The termination did not follow due process and was unfair and seek costs and terminal dues from the respondent.

6. In evidence, the 2nd claimant testified that he was employed by the respondent since 2011 as a waiter but was not given housing or paid in lieu of the same. He would start work at 4pm and leave after 4am and would remain at work for over 12 hours and was never paid for the overtime hours. He reported to work every day, 7 days at work with no rest, off day or payment in lieu. On public holidays he would report to work without pay that is due or compensation for being at work. He never took leave until 12th march 2013 when he went to the finance officer and lodged a complaint about his off days and non-payment of NSSF which was begin deducted but he had not been issued with the membership card.

7. On 13th March 2013 when the claimant reported to work he was stopped at the gate by security guard. He remained at the gate until 2pm. He kept on reporting daily but was never allowed inside the respondent premises. The finance officer, Wilfred said that the claimant had lost some food and should not be allowed inside the premises.

8. The witness also testified that in defence the respondent accused him of stealing chicken wings but this allegations are not true as he was never called to answer to such an issue. The only person who told him about such an issue was the security guard at the gate when he refused to open the gate for him. The claimant was a waiter and food was prepared upon request in the kitchen by the chef. At the gate one had to be searched before leaving work and no foodstuffs were ever found on the claimant. The letter produced as evidence and admission to the allegations is not signed and is dated the date when the claimant was not allowed in the respondent premises, the 13th May 2013.

9. In cross-examination, the claimant testified that he was employed by Mr Karim to work for the restaurant. There is a contract but the signatures are not his. He was never given a pay slip and only got

one in 2013. He was paid through vouchers. In the vouchers the salary was kshs.9, 000.00; house allowance was paid but the overtime was not paid. There was no NSSF paid. He never stole chicken wings as no such matter ever came to his attention while at work.

Defence

10. In defence, the respondent states that the claimants were paid a salary that was inclusive of house allowance and they both left employment on their own volition after an incident of gross misconduct. There has never been demand made upon the respondent as stated in the claim. The claimants deserted work after they were summoned by the respondent for gross misconduct.

11. The respondent witness was Wilfred Sibota Metobo and testified that he works for the respondent as the manager. The claimants were employed by the respondent as waiters. On 2nd April 2013 when the witness reported to work, the security person reported that when the workers were leaving the previous day, the 1st claimant was found with 2 packets of serviettes. The proprietor of the respondent was called and the claimant was told to report back to work the next day.

12. With regard to the 1st claimant, the witness testified that on 13th May 2013 while the witness was in his regular work he went to the kitchen for random inspection when he met with the 2nd claimant and he discovered he had 2 portions of pousin wings, 2 portions of pousin chips and 1 portion of daal bhajia. He asked for the receipts for the food but he did not have any. Upon interrogation, the 2nd claimant admitted to have stolen the food and while this was ongoing, Jane Njeri came from the kitchen and heard what was going on. The claimant was cleared to the office and a letter issued noting that he had acted contrary to set regulations and this was an act of misconduct. He refused to accept or sign the letter and took off and never came back to work.

13. The claimant left work for due cause and the claims should be dismissed. The claims for notice is not due as the claimant's absconded duty.

Leave of 20 days is due and the respondent is willing to pay;

Off duty on 1 days is due;

Work during 3 public holidays are due;

Salary balance for 2 days is due.

14. On the overtime claims, each employee had 8 hours all being 48 hours a week in 6 days. There were shifts, 1st shift running from 9am to 5pm; 2nd shift running from 5pm to midnight. The 2nd shift was 7 hours. Each employee left upon the lapse of their shift of 8 hours. On Saturdays and Sunday there was more work and the employees had to work extra hours to cover 1 hour of the 2nd shift all covering 48 hours. There was no overtime work and hence the shifts system.

15. Gratuity claim does not arise as the respondent paid NSSF. House allowance was inclusive in the salary. Compensation is not due as the claimant absconded duty and were not terminated.

16. The 2nd claimant was employed on 1st April 2013 and not in 2011 as claimant and was issued with a contract. The claimant signed his contract and the witness prepared his contract. The respondent part was not signed as the proprietor Mr Karim was on safari. The claimant worked for 1 month only. The claimant never went to the office to check on his NSSF dues, he was caught stealing food. Before he could be heard he absconded duty.

17. No dues are owing to the 2nd claimant save for 2 days' pay; no leave is owed as he worked for a month; he had not earned off duty and there was nothing on public holidays. House allowance was inclusive of the monthly pay. Since the claimant absconded duty, his case does not relate to unfair

termination.

18. In cross-examination, the witness testified that the 1st claimant had a contract done by Pherose but the document attached to the claim does not have a letter-head of the respondent. Each contract is private but the respondent has not signed. The 2nd claimant was also issued with a contract but the respondent had not signed it. He tried reaching out to the claimants by phone but to no avail. All the work attendance must be registered at the gate with the security guard but this was not produced in court.

19. The second witness for the respondent was Petro Lutwai who testified that he was a security guard at the respondent. He was employed in November 2011 to June 2013. In the evening he would register each employee and take a record of entry and exit. He would also conduct a search.

20. On the night on 1st February 2013 he was at work. The 1st claimant was searched and found carrying serviettes in his pockets. No employee was allowed to carry the property of the respondent out of the work place. He called Wilfred on phone who instructed him to let the claimant go home and report the next day and he retained the serviettes. The claimant did no report to duty again.

He knew the 2nd claimant and was never told to prevent him in assessing the respondent premises. He knew him well and could not prevent him from attending work.

Submissions

21. At the close of hearing the 2nd respondent witness, parties were allocated a hearing date for the attendance of the 3rd respondent witness who was said to be unwell on condition there was evidence of such sickness. On the allocated date, 20th June 2016, counsel holding brief for the respondent sought adjournment as the 3rd witness was still sick or they be allowed to close their case. There was no evidence produced to confirm that the witness was ailing or still ailing and the defence was closed.

22. Parties were directed to file their written submissions with a mention date on 25th July 2016 to confirm and be allocated with a date for judgement. On the due date the respondent had not filed any submissions and were added 7 days. On 18th August 2016 The respondent was absent and never filed any submissions.

23. The claimant submit that the 2nd claimant was employed in November 2011 and not 1st April 2013. Section 9 of the Employment Act was not adhered to as the claimant was not issued with any written contract of employment. The alleged agreement issued to the 2nd claimant is not signed or dated. There was no master roll produced to confirm the dates and time of work.

24. There were no valid or fair reasons for the termination of the claimants. The 1st claimant worked for the respondent until 2nd April 2013 when he was terminated from his employment by Karim Rajan. When he made effort to report back to work he was refused entry. Equally for the 2nd claimant, it was alleged that he stole food and was chased away without notice, reasons or a hearing.

25. The law was not followed as required under section 41(2) of the Employment Act. The claimants were not issued with notice or given a hearing.

Determination

26. Section 7 of the Employment Act make it mandatory that every employer should issue and employment contract in accordance with the Act. The requirements that should go into such a contract are set out under section 9 and 10 of the Act. In essence, section 10 gives a template within which an employment contract should follow. The respondent has attached an employment contract for each claimant which are not signed by themselves. With regard to the 2nd claimant, Mr Metobo the respondent first witness testified that the contract was not signed as the proprietor Mr Karim was on safari. When he

came back, he forgot to have the document signed.

There is no explanation as to why, the contract of the 1st claimant was never signed despite the claimant allegedly signing it on 1st March 2005.

27. Section 10(6) and (7) of the Employment Act is relevant to refer thus;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

28. The alleged contract documents by the respondent as produced end up being of no value to the court and the word of the claimant must prevail. Where the respondent as the employer deliberately fails to abide by the mandatory provisions of the law, the court can only surmise that the documents submitted were an afterthought and only meant to circumvent the course of justice. With regard to the dates and time of service, the evidence of the employee/claimant shall be taken into account.

29. The allegations levelled by the respondent against both claimants are serious. Each is accused of stealing serviette and chicken wings respectively. Such allegation border on criminal act and are in violation of section 44 of the Employment Act. However, the respondent seem to have casually treated such serious allegations. With regard to the 1st claimant, upon the allegations that a security guard discovered him to be in possession of serviette upon check at end of his shift, there is nothing to indicate that such a report was ever documented. What Mr Metobo did was a follow up to the allegations without indicating that the security guard ever did a statement or indicated his names or details of his discovery of stolen goods. The allegation that the claimant absconded duty is equally not supported.

30. The respondent has not produced work records or shift schedules for the court to assess that indeed the claimant was on duty on diverse dates and then he suddenly abscond upon the alleged discovery and theft of serviette. This leaves a very fluid state of affairs that can only work to the disadvantage of the respondent as the office required to keep work record. See section 10 of the Employment Act cited above.

31. With regard to the 2nd claimant, the respondent witness alleges that he is the one who caught him with stolen food worth kshs.300.00. However no statement was done after the event or even one from Jane Njeri who is alleged to have observed the exchange between the claimant and the witness. Save for the court statements now filed by the respondent and dated 5th November 2014, the same date the statement of defence was filed, this witness as the one who witnessed the alleged theft did not do any statement. The allegations that the claimant then absconded duty is therefore left exposed.

32. The offence of stealing and absconding duty is regulated under section 44(4) of the Employment Act and carry the sanction of summary dismissal or dismissal with less notice thus;

4. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) An employee commits, or on reasonable and sufficient grounds is suspected of having

committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

33. It is therefore not sufficient for an employer to state that the employee stole or absconded duty. Such are matters fundamental to an employment contract and the employer must demonstrate what measures they took in addressing such gross misconduct. Mr Metobo testified that he made effort to call the claimant to attend work so as to be questioned on their conduct, however such evidence is fluid and not supported. Where indeed each claimant had a valid contract of employment, pursuant to section 9 and 10 of the Employment Act, the physical, address and details of each claimant should have been part of the record of the respondent as the employer. Such requirements are a statutory regulation as keeping of the same is not at the option of the respondent as the employer. Indeed, the failure to keep such record and produce them in court when a matter such as this one has been filed, warrants sanctions against the respondent.

34. In the circumstances, I find the claimants were summarily dismissed from their employment with the respondent without notice, hearing or being given genuine or valid reasons that were fair and reasonable so as to justify the termination. In any event where the allegations made were investigated to be true, the respondent has not submitted what policy measure they have in place to address misconduct and how an employee is supposed to be given a fair hearing and the right to appeal. The allegation by Mr Metobo that he was called by a security guard and he directed that the claimant should report to work the next day shows the casual manner that complaints were handled. Also the evidence that he met with the 1st claimant carrying food and he admitted that the food was stolen and he proceeded to summon the claimant together with Jane Njeri so as to record a statement I find such evidence of no probative value. As the witness to the alleged theft, Mr Metobo ought to have escalated the matter to his senior to deal with the matter as he was a key witness. Equally, Metobo confirmed that the claimant was a waiter and not the chef. Access to the kitchen and the food alleged to be in the possession of the 2nd claimant should have elicited further investigations which was not done in this case.

35. I find the claimants were terminated for no due cause, there is no evidence to support the allegations made by the respondents against the claimants. The terminations were unfair.

Remedies

36. The respondent admit that the 1st claimant is owed 20 days of leave; off duty on 1 day is due; 3 public holidays are due; and Salary balance for 2 days is due. Such are awarded as claimed.

37. With regard to the 2nd claimant, nothing is admitted on the basis that he was only employed for a month and he absconded duty. There is no record submitted by the respondent as to the nature of dues paid to the claimant upon exit from their service. The evidence that he only worked for a month is not supported at all. That evidence has been challenged and the remedies dues will be assessed.

38. Notice pay is due upon the finding that the terminations were unfair.

39. Salary due for days worked is a right whatever the reason for termination. The claimant shall be paid for days served and not paid. Off duty is a right for every employee under section 27(2). In every 7 days of work, one (1) such day should be paid for taking of rest. Without a record of taking such rest and time off, pay is due. This applies for work done during gazetted public holidays.

40. On house allowance claimed, without any concrete evidence that there was a valid contract of employment issued to the claimant, such is due. In the absence of a written contract, the respondent should have submitted the pay slips required under section 20 of the Employment Act, a statement setting out the dues payable on the nature of the same. Where indeed the house allowance was paid inclusive of the monthly wage, the itemised payment statement should have given such details. The house allowance is therefore due.

20. (1) An employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.

(2) The statement specified in subsection (1) shall contain particulars of—

(a) the gross amount of the wages or salary of the employee;

(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and

(c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.

41. Overtime work is required to emanate from the schedule of records kept by an employer. Mr Lutwai testified that as the security officer at the gate, he kept a record of entry time and exit time for all employees of the respondent. The respondent filed a defence upon service of the memorandum of claim and therein is a claim for overtime but failed to produce any evidence to challenge the claim for overtime in any material way. The statement of defence contains mere denials and the evidence of the witnesses called did not help much in addressing the defence on the claim at hand. Overtime claimed is awarded.

42. Service gratuity is due where there is no compliance with regard to statutory deduction and remittance to the relevant bodies. Such shall be granted as claimed.

43. Compensation is due to the claimant upon the finding that there was unfair termination of employment.

44. Section 51 requires that a Certificate of service be issued to all employee upon exit, whatever the reasons. Such has not been issued to the claimant despite the suit herein being served upon the respondent. Such should be issued unconditionally.

Judgement is hereby entered for the claimants against the respondent in the following terms;

1) A declaration that the claimants were unfairly terminated;

1st claimant

a) Leave of 20 days at kshs.9,615.00;

b) Off duty 1 days Kshs.480.00;

c) Work during 3 public holidays Kshs.2,886.00;

d) Salary balance for 2 days Kshs.5,500.00;

e) Notice pay kshs.12,500.00;

f) Overtime claimed Kshs.933,120.00;

g) Service pay kshs.42,120.00;

h) House allowance kshs.202,500.00;

i) Compensation at 3 months Kshs.37, 500.00.

2nd claimant

a) Compensation for 3 months' salary kshs.27,000.00;

b) Notice pay kshs.9,000.00;

c) Pay for days worked kshs.4,338.00;

d) Leave for one 91) year kshs.9,000.00;

e) Off duty days due kshs.24,616.00;

f) Work during public holidays kshs.724.00;

g) House allowance kshs.23,970.00;

h) Overtime work kshs.110,160.00;

i) Service pay kshs.4,700.00;

2) Certificate of service be issued unconditionally.

3) The claimant are awarded costs.

Delivered in open court at Nairobi this 29th August 2016.

M. MBARU

JUDGE

In the presence of Court assistant: Lilian Njenga