



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
CAUSE NO. 2090 OF 2015

JOSEPH MULINGE MBIVYE.....CLAIMANT

VERSUS

GAYE'S KITCHEN LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 25th November 2015 seeking to have three issues resolved. He enumerated them as whether he was entitled to a contract of employment, whether the dismissal was lawful and fair, whether he was entitled to his terminal dues. He averred that he was employed on 1st February 2010 as a waiter earning Kshs. 12,000/- a month exclusive of house allowance. He stated that he was not issued with a formal contract of employment but nevertheless carried out his duties with zeal. He averred that he worked overtime from 6.00am to 8.00pm on Mondays to Sundays and was not paid overtime and was not issued with an itemized payslip. He averred that he worked without going on leave for the entire duration of his contract. He stated that he was summoned at around 2.00pm on 4th July 2013 by Mrs. Gayes the Respondent's director and accused of stealing some cooking oil from the kitchen. He averred that he was the only one accused of stealing the oil yet there were other workers who had accessed the same area the oil was stored. He particularised the malice, breach of contract and statutory duty of care and enumerated that the Respondent failed to issue him with a warning letter, termination letter or issue a notification of hearing and a disciplinary hearing to enable the Claimant defend himself prior to the dismissal. The Claimant sought salary in lieu of notice – Kshs. 12,000/-, accrued annual leave – Kshs. 25,200/-, house allowance for months worked in 2010, 2011, 2012 and 2013 – Kshs. 73,800/-, overtime accrued – Kshs. 775,844.64, 12 months compensation – Kshs. 144,000/-. The Claimant also sought certificate of service, costs of the suit, and interest on amounts awarded at court rates.

2. The Respondent entered appearance on 16th December 2015 and did not file a defence to the claim. The case thus proceeded as undefended. The Claimant testified on 18th July 2016 and stated that he had sued the Respondent who was his employer from 1st February 2010 to 4th July 2014. He stated that he earned Kshs. 12,000/- a month and was not issued any payslip but had a job ID card. He testified that his NHIF payments were made by the Respondent as shown by his NHIF data summary. He stated that he would report to work and have breakfast prepared and later lunch would be brought in. He testified that he was called after lunch on 4th July 2014 and told of the loss of cooking oil. He stated that he was not aware of the theft and that he was not given an opportunity to explain and was dismissed. He stated that he sought legal advice and his lawyer wrote to the Respondent and the Respondent's lawyer replied and asked him to collect his dues from the Labour office. He testified that when he got there, the labour office

was not aware of his claim. He sought notice, overtime, house allowance and leave pay. He prayed for a certificate of service and cost of the suit plus interest.

3. The Claimant was from the deduction on the NHIF data summary an employee of the Respondent from October 2012. The Respondent was code No. 80822 while his previous employer was code No. 88888. From the documents availed, he was therefore only an employee of the Respondent for about 33 months only. He stated that his pay was 12,000/- a month and that he worked overtime on weekdays and weekends. He however did not produce a time sheet or time card showing his work times. He stated in his evidence that breakfast would be prepared but lunch would be brought in. in the Court's view, since he was not a cook but a waiter and the service was one that would be required at mealtimes, he must have had some time in between the time he reported to the time he left each day. He cannot conceivably have been working from 6.00am to 8.00pm each day non-stop every day of the week for the 33 months he served at the Respondent. The claim on overtime is rejected as lacking any basis and unsupported by any evidence. He had a claim for house allowance. The Employment Act under Section 31 makes provision as follows:-

31.(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

4. The law provides that the Section does not apply where the employee has a contract that specifies that the salary is consolidated. In this case, there was no contract of employment and the Claimant therefore did not receive any house allowance for the 33 months of service. Section 41 of the Employment Act makes provision as follows:-

41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

5. The Claimant asserts that he was dismissed without adherence to this section. The Respondent never filed a defence and it is uncontested that the Claimant was dismissed summarily without adherence to the dictates of the law. The employer has the prerogative to hire and fire but should do so within the confines of the law. There may have existed grounds for the dismissal. This we will not know as the Respondent chose not to participate in the trial. The Claimant has proved his case on a balance of probabilities and is entitled to the following reliefs:-

a. Payment of one month salary in lieu of notice Kshs. 12,000/-

b. House allowance 15% of basic pay for 33 months Kshs. 59,400/-

c. Salary for days worked in July 2014 Kshs. 1,840/-

d. Compensation for 3 months Kshs. 41,400/-

e. Costs of the suit

f. Interest on a), b), c) and d) above at Court rates from date of judgment till payment in full

g. The sums in a), b), c) and d) above to be subject to statutory deductions as per Section 49 of the Employment Act.

h. Certificate of service in terms of Section 51 of the Employment Act

Orders accordingly.

Dated at Nairobi this 29th day of July 2016

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 15th day of August 2016

Linnnet Ndolo

JUDGE