



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 762 OF 2011**

**PAUL MUTHIANI NGOLENI ..... CLAIMANT**

**VERSUS**

**TAMIMI LIMITED T/A**

**THE GIRAFFE MANOR ..... RESPONDENT**

Mr. Bosire for claimant

Mr. Kashidi for respondent

**JUDGMENT**

1. The suit is premised on an amended memorandum of claim filed on 23<sup>rd</sup> October, 2010. The claimant seeks compensation for unlawful termination of employment and various terminal benefits to wit;

- i. Overtime Kshs. 1,1638,060.60.
- ii. Service pay Kshs.101,293.50.
- iii. Notice pay kshs.28.941; and
- iv. Issuance of certificate of service.

**Facts of the case**

2. The claimant states that he was employed by the respondent on a casual basis on 30<sup>th</sup> December 1994 till June 2000 and was confirmed to permanent and pensionable basis by Giraffe Manor till the year 2009.

3. That on 1<sup>st</sup> March 2009, Giraffe Manor was taken over by Tamimi Limited and the claimant continued working for Tamimi Limited till November 2009.

4. In his evidence before court, the claimant informed the court that he worked as head of department serving food and entertainment to customers.

5. The claimant testified that he earned a monthly salary of Kshs.28,941 per month.

6. That by a letter dated 11<sup>th</sup> August 2009, the respondent terminated his employment. The termination followed an inquiry by himself to the respondent when he would get a written contract, since the new

company had given him three months contract. He had waited for five (5) months to get an extension of the contract in vain.

7. The claimant stated that he worked from 6.30 a.m. to 12 a.m. midnight. He had a break between 12 a.m. to 3 p.m. in the afternoon. He worked for 14 – 15 hours a day instead of 8 hours a day for eight 8 months served under the new company. The claimant asked to be paid overtime but was sacked before the payment was done. The claimant seeks payment for service pay at 15 days salary for each year completed for 7 years he had served under his previous employer Giraffe Manor which was taken over by the respondent. The claimant also seeks payment in lieu of notice, and compensation for unlawful termination of employment. He also seeks grant of certificate of service.

8. The claimant was 63 years old and had not obtained alternative employment.

9. The claimant emphasized that Tamimi Limited took over all the responsibilities by his previous employer Giraffe Manor in terms of the law applicable. That Giraffe Manor told the employees that their service pay would be paid by Tamimi Limited. The Directors of the two companies were the same. This was just a cosmetic change. The business remained in the same premises and same bosses conducted the business.

10. Tamimi gave the claimant a three months contract on 1<sup>st</sup> March 2009 as head waiter and bar man. He was to be put on a five years contract upon completion of probation. He was paid a basic salary of Kshs.16,675 per the attached payslips for August and September 2009.

11. The letter of termination states that the services of claimant were no longer required due to major anticipated changes.

12. The claimant seeks the reliefs sought with costs and interest.

## **Response**

13. Respondent filed a reply to the amended memorandum of claim and called RW1 Nicholas Ferguson to testify in support of the defence case.

14. RW1 was the General Manager of Giraffe Manor. RW1 told the court that the claimant was an employee of Tamimi Limited from 1<sup>st</sup> March 2009 until 18<sup>th</sup> November 2009.

15. RW1 stated further that Tamimi Limited bought the assets and business of Giraffe Manor and the agreement was signed on 27<sup>th</sup> February 2009 and same was dated 8<sup>th</sup> January 2009.

16. In terms of Clause 2.2 thereof, all liabilities of Giraffe Manor were not to be transferred to the buyer except as provided in the agreement.

17. Under Clause 12.1, transfer of the business could result in redundancy of all employees.

18. That the seller was to pay in full statutory service pay for years of service.

19. That the claimant's position was restructured hence the termination on 18<sup>th</sup> November 2009. That the position became obsolete and the claimant was declared redundant.

20. That under Tamimi, the claimant worked for 8 hours a day between 1<sup>st</sup> March 2009 to 18<sup>th</sup> November 2009. The claimant was paid overtime of 228 hours during that period. The claimant signed for it on 13<sup>th</sup> November 2009. Tamimi retained the letter heads of Giraffe Manor, hence the payslips have that name. The monthly salary fluctuated from month to month because service charge was paid according to the number of guests served. Otherwise the basic pay was Kshs.16,673.00.

21. Tamimi could only pay for service pay at fifteen (15) days a year for the eight (8) months and eight (8) days the claimant served the company.

22. The respondent paid in lieu of one month notice; for leave days not taken, seventeen (17) days November salary and accrued service charge in the sum of Kshs.74,738.30. The claimant received the amount and signed for it.

23. The respondent also made exgratia payment to the claimant in the sum of Kshs.10,000.00 and service gratuity in the sum of Kshs.52,056 which RW1 states was paid in error and counter claims the amounts. The respondent also counter claims an advance payment of Kshs.2,000.00. The notice pay paid was Kshs.28,941.00 which included service charge which fluctuated.

24. The receipt filed by the respondent in respect of severance pay in the sum of Kshs.52,056.00 reads:-

*“first payment of severance for Ngoleni.”*

The receipt has a cancellation by which the word ‘severance’ replaced the word ‘overtime.’

25. The respondent prays that the suit lacks merit and it be dismissed with costs and the counter claim of Kshs.52,056.00, exgratia payment of Kshs.10,000.00 and advance payment of Kshs.2,000.00 be granted to the respondent.

## **26. Determination**

1. Whether the termination of the employment of the claimant was for a valid reason and in terms of a fair procedure.
2. Is the claimant entitled to service pay for the seven (7) years served under Giraffe Manor?
3. Is the claimant entitled to overtime for the entire period of service for seven (7) years.
4. Is the respondent entitled to payment of the counter claim?
5. Who should pay the costs of the suit?

## **Termination**

27. The respondent purported to terminate the employment of the claimant on grounds of redundancy without following the procedural requirements under Section 40 of the Employment Act, No. 11 of 2007.

28. It is evident that the termination of the employment of the claimant was not notified to the Labour Office.

The claimant was not notified of the intention to be declared redundant within a month of the date of declaration nor was the claimant given the selection criteria used in targeting him for redundancy. The claimant had served the business for over seven (7) years before the change of name. The evidence by the claimant that only the name changed but the management remained the same was not contested. Instead the respondent relied on a business take-over agreement, which has no evidence of registration and which does not refer at all to the employees of Giraffe Manor. The allegation that the agreement terminated the employment of all employees including the claimant is only made verbally before court.

29. It is the court’s considered view that the letter of termination did not satisfy the requirements of Section 40 of the Act.

30. Failure to give the requisite notice and provide selection criteria prejudiced the claimant and led to his loss of employment unlawfully and unfairly.

31. Accordingly, the claimant is entitled to compensation in terms of Section 49 of the Employment Act. The claimant told the court that he had children in school and a family to take care of. He was left without means to earn income in an unjustified manner. He clearly wished to continue working. He did not contribute to the loss of employment. He was not given a certificate of service to aid him to get a replacement job. He was now aged 63 years and unlikely to get an equivalent job. He has suffered loss and damage and the court awards him ten (10) months salary as compensation for unlawful and unfair termination of employment in the sum of Kshs. (10 x 16,675) 166,750.00.

### **Terminal benefits**

32. In terms of the agreement tabulating the payment made to the claimant and signed by both parties on 19<sup>th</sup> November 2009, the claimant was paid in lieu of annual leave, one month's salary in lieu of service pay in the sum of Kshs.9,127.00, service charge in the sum of Kshs.11,800.00, overtime in the sum of Kshs.33,794.60 for 228 hours and part payment severance pay in the sum of Kshs.52,056.00 and Kshs.15,207.60 was to be paid in respect of overtime. The claimant expected Kshs.10,000 travel allowance and respondent noted that it was to advise on the same.

33. In terms of this agreement at least Kshs.75,207.60 is due and owing to the claimant.

34. This severance pay is no doubt meant to cover fifteen (15) days salary for seven (7) years and eight months served by the claimant (16,675 x 7 x 0.5) Kshs.58,362.50.

35. Accordingly, the court awards the claimant:-

- i. Kshs.15,207.60 in respect of the unpaid balance of overtime.
- ii. Kshs.6,306.50 being the balance of seven (7) years severance pay.

36. The rest of the claim made by the claimant in the statement of claim in respect of overtime, service pay, notice pay, are unproven and are dismissed.

37. Accordingly, the final award to the claimant is as follows;

- i. Compensation Kshs.166,750.00
- ii. Kshs.15,207.60 unpaid overtime.
- iii. Kshs.6,306.50 unpaid severance pay.

**Total award Kshs.188,264.10.**

The counter claim is unmeritorious and same is dismissed.

- iv. The respondent to pay costs of the suit.
- v. The respondent to provide certificate of service within thirty (30) days from today.

38. Interest has not been prayed for and same is not awarded.

**Dated and delivered at Nairobi this 4<sup>th</sup> day of November 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**