



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 46 OF 2014

WISELY PATRICK SIMASI & 8 OTHERS CLAIMANTS

VERSUS

LAMATHE HYGIENE FOOD RESPONDENT

J U D G M E N T

INTRODUCTION

1. The Claimants herein bring this suit against the respondent, their former employer claiming their accrued employment dues plus compensation for unfair dismissal from employment by the respondent on 6.2.2014. The basis of the suit is that their dismissal from employment was unfair and breach of the law because there was no valid reason for termination and they were not given a prior hearing.
2. The respondent has denied liability and averred that it is the claimants who downed their tools without any strike notice as a consequence of which she was forced to close down the restaurant and hire new staff because the claimants were all casual employees.
3. The suit was heard on 15.9.2014 when the claimants called Ali Muhamed Bakuli and Wesley Patrick Simasi and CW1 and 2 respectively while the respondent called Solomon Muriuki Johnson as RW1. After the close of the hearing, both parties filed written submissions for consideration by the court.

CLAIMANT'S CASE

4. CW1 is the first claimant in the suit. He was employed by the respondent on 15.8.2008 as a cleaner in the respondent's restaurant. The contract was verbal. CW1 started with a daily pay Kshs.220 which was later increased to Kshs.300. He worked from 6.00 a.m. to 8.00 p.m. Daily without any rest day or holiday. He also never went for any leave. When RW1 became the new manager in 2014, he extended the working hours to 10.00 p.m.
5. CW1 explained that on 6.2.2014, all the claimants reported to work as usual but first demanded to meet the respondent's director to air some grievances before starting work. RW1 however told them that he was ready to receive the grievances because he was final on the matters. The grievances included wages, working hours, repair of chimney and repainting of the hotel which were all meant to improve their working conditions. After hearing the grievances RW1 however told the claimant to wait for the Director because he was coming to address them. In the meanwhile, RW1 directed the claimants to return their uniform and the chairs from the veranda to the hotel after which he closed the hotel and left. CW1 further explained that the Director called CW2 at about 3.00 p.m. to say that he was away and promised to talk to the Claimants when he

- returned.
6. On 7.2.2014, the claimant reported to work as usual but the respondent's cashier, one Patricia prevented them from entering the restaurant. They found new employees at the hotel and RW1 told them (claimants) to wait for the Director of the respondent. When the Director failed to show up by 11.30 a.m, the claimants went to report the matter to their union. The union official went with the claimants to the respondent but they were told that all the claimants had been dismissed. The dismissal letter was however never served upon the claimants but on 13.2.2014, RW1 gave them copy of his letter dated 6.2.2014 addressed to the Labour Officer indicating that he had dismissed the claimants. According to CW1 the dismissal was unfair and unjust.
 7. CW1 prayed for 12 months salary as compensation for unfair termination. He also prayed for one month salary in lieu of notice. He further prayed for pay in respect of the accrued leave days for the years served at the rate of 21 leave days per year. He also prayed for compensation for the rest days and holidays worked for years served. He prayed for overtime at the rate of 6 hours per day. He further prayed for service pay plus salary arrears in respect of the underpaid salary. He prayed that judgment be entered for himself and the rest of the claimants as stipulated in the Memorandum of Claim and particularized in schedule 1, 2 and 3 annexed to the claim. Lastly he prayed for release of the registration certificate for the claimants self help group called Utangamano plus Kshs.5,000 which were all kept in the Respondent's office.
 8. On cross examination by the defence counsel, CW1 confirmed that initially he used to work in 6.00 a.m. to 2.30 p.m. Shift or 3.00 p.m. to 10.00 p.m. Shift but that arrangement was changed from 1.5.2013 when the shifts were merged into one running from 6.00 a.m. To 10.00 p.m. He admitted that on 6.2.2014, the claimants refused to work demanding that the Director should hear their grievances. CW1 maintained that he used to work for 14 hours per day from 1.5.2013 when the two shifts were merged. He further maintained that the hotel operated during Sundays and public holidays. He however admitted that he was a member of NSSF and the respondent used to remit his contributions.
 9. CW2 is the 9th claimant. On 6.2.2014, he reported to work as usual at 6.00 a.m. together with the other claimants but demanded to talk to the Director before starting their duties. The grievances according to CW2 started from May 2013 when RW1 became the new manager of the hotel. CW2 explained that at 6.00 a.m. the Director called him, via phone enquiring whether there was a strike but CW1 denied and told him that the workers only wanted to talk to him first as earlier notified. According to CW2, the Director ordered that the hotel be closed down and the workers to wait until they receive a call after the Director returned from Nairobi. RW1 however told the claimants to wait for the Director because he was on th way which made them to wait for him until 4.00 p.m. When the Director failed to show up the claimants went home and returned to work on 7.2.2014 at 6.00 a.m. only to find the hotel operating under a new staff. According to CW2, RW1 refused to talk to the claimants and told them to wait for the Director as a result of which they reported the matter to their union.
 10. On cross examination by the defence counsel, CW2 confirmed that he was working as the supervisor for the respondent. He explained that the Director called him to say that he was away at Nairobi and promised to talk to the claimants. He contended that the boss prevented the claimants from working when he ordered for the close of the hotel. He maintained that they were ready to work and that is why they waited for the Director from 6.00 a.m. To 4.00 p.m. after RW1 told them to wait for the Director.

DEFENCE CASE

11. RW1 is Manager for the respondent since 3.2.2014. On 6.2.2014 the claimants never reported to work at 6.00 a.m. as usual forcing him to call the Director at 8.00 a.m. to notify him that the claimants had not reported to work. According to RW1, the workers reported at 9.00 a.m. and sat outside the hotel and refused to work. He then reported the matter to the Director who instructed RW1 to close down the hotel at 10.00 a.m. RW1 denied ever talking to CW2 on that day. He explained that the hotel operated on two shifts starting 6.00 a.m. to 2.30 p.m. and the second one from 3.00 p.m. to 10.00 p.m. He denied that the Claimants were working in one shift running from 6.00 a.m. To 10.00 p.m. He maintained that he had only worked with the claimants from 3.2.2014 to 6.2.2014 when they left work. He denied the claim for leave, holidays and rest days.

He produced an affidavit sworn by Furaha Karisa (4th Claimant) to show that he had been paid his terminal dues amounting to Kshs.42,900. He denied ever dismissing the claimants from employment. He however admitted that he hired new staff with instructions from the Director in order to mitigate the loss in relation to the perishables.

12. On cross examination by the claimant's representative, RW1 confirmed that the Director wrote a letter dated 6.2.2014 to the Labour Officer confirming that he had dismissed the claimants from employment after they refused to do their duties. RW1 maintained that the claimants worked only on weekdays and not weekends. He however did not have any employment records to confirm that the claimants enjoyed 2 off days per week or that they went for their annual leaves and public holidays. RW1 denied that he introduced new terms and conditions of service for the claimants. He maintained that each of the 2 shifts had one cashier, one waiter, one cook and one cleaner plus a supervisor. He maintained that one waiter was enough to serve the 10 tables in the hotel both inside and at the verandah outside. He also maintained that one cook was enough to cook all the dishes in the hotel. He denied that all the claimants were serving under one shift.

ANALYSIS AND DETERMINATION

13. After carefully reading and considering the pleadings, evidence and the written submissions filed there is no dispute that the parties herein were engaged in an employment relationship on diverse dates between 2002 and 2014. There is also no dispute that the claimants downed tools on 6.2.2014 demanding to air some grievances to the Director of the respondent with respect to issues connected to their terms and conditions of their service. It is further not denied that the Director never met the claimants but instead he instructed RW1 to close down the hotel and hire new staff. It is also not denied that the Director wrote to the Labour Officer on 6.2.2014 explaining that he dismissed the claimants summarily for participating in an illegal strike. The issues for determination are whether the summary dismissal of the claimant was unfair and whether the reliefs sought should be granted.

Unfair termination

14. The claimant contends that their dismissal was unfair for want of a valid reason and for being denied a chance of being heard before the dismissal. This court is not in doubt that there existed a valid and fair reason for the respondent to dismiss all the claimants. It is obvious that by staging a strike without prior notice to the employer was a good reason to warrant summary dismissal of all the claimants. The court however has an issue with the procedure followed in dismissing the claimants from employment. Firstly the decision that the claimants were dismissed was never communicated to the claimants themselves but to the Labour Officer. Secondly, the letter to the Labour Officer was served on the claimant on 13.2.2014 after they persisted in their demand to resume work. Lastly, the dismissal was on ground of misconduct under Section 44 of the Employment Act which was subject to Section 41 and 45 of the said Act. Under the said Section 45 and 41 supra, the respondent was bound to follow fair procedure which is basically to accord the claimants a hearing before dismissal. In this case the procedure prescribed under Section 41 supra was not proved by the respondent as required under Section 45 of the Employment Act. Consequently the court finds that the summary dismissal of the claimants by the respondent on 6.2.2014 was unfair within the meaning of Section 45 *supra*.

Reliefs

15. In view of the foregoing finding, the dismissal of the claimants by the respondent on 6.2.2014 is declared unfair and the respondent ordered to pay to the claimants the sums awarded herein below. They will each get one month salary in lieu of notice, 63 leave days being leave within the 3 years limitation period, and 3 months salary as compensation for unfair termination.
16. The claim for public holidays is dismissed for lack of particulars. The second schedule and the affidavits filed by the claimants merely talks of 11 public holidays but no details of the holidays. The claim for rest days is also dismissed. CW2 who was the supervisor did not say anything about work without rest day. Even if the affidavits filed by the claimant allege that they worked without rest, it is not highly probably that the claimants worked for over 4 years without any rest

day at all. The law entitles an employee to one rest day per week which the court believes that all the claimants took during their services

17. The prayer for overtime is however granted for the period between May 2013 and 5.2.29014 being 9 months at the rate of 4 hours per day for 26 days in a month. Lastly the prayer for underpayment is only granted for the period between May 2013 and February 2014 which is approximately 9 months. The reason for not awarding the underpayment for the rest of the period of service is because there was no evidence or pleadings to show when the salary reviews were done. The court was therefore unable to tell whether the salary reviews were done simultaneously with the publication of the wage orders or not. The minimum wages applicable to the claimants will therefore apply in calculating the awards for each claimant except for the CW2 (Wesly P. Wafula) whose salary of Kshs.20,000 was above the minimum wage.
18. In view of the fact that the claimants' job titles and duties were not disputed by the defence, the court proceeds to assess the award for each claimant as pleaded by them in the claim and the annexed schedules to the respective annual wage orders.

Ali M. Bakuli (Cleaner)

One month salary in lieu of notice	14118
63 leave days	20540
3 Months Salary for unfair termination	42354
Overtime	81806.40
Under payment	<u>46170</u>
	<u>204,988.40</u>

Esther Akoth Omondi (Cashier)

One month salary in lieu of Notice	31878
63 leave days	46349
3 Months salary for unfair termination	95634
Overtime	186076.80
Under payment	<u>179010</u>
	<u>538,947</u>

Godwin Musa Ngemu (Waiter)

One month salary	15232.50
63 leave days	22183.60
3 months salary for unfair termination	45697.50
Overtime	89107.20
Underpayment	<u>42592.50</u>
	<u>214,813.30</u>

John Karisa Furaha (Cook)

Settled amicably and confirmed vide his affidavit sworn on 10.4.2014 (Exh. d.2)

Justus Musyoka Nili (Waiter)

One month salary in lieu of Notice	15232.50
63 leave days	22183.60
3 months salary for unfair termination	45697.50
Overtime	89107.20
Under payment	<u>42592.50</u>
	<u>214,813.30</u>

Morgan Ngombo (Cleaner)

One month salary in lieu of notice	14118
63 leave days	20540
3 months salary for unfair termination	42354
Overtime	81806.40
Underpayment	<u>46170</u>
	<u>204,988.40</u>

Joseph M. Musya (Cook)

One month salary in lieu of notice	15232.50
63 leave days	22183.60
3 months salary for unfair termination	45697.50
Overtime	89107.20
Underpayment	<u>29092.50</u>
	<u>201,313.30</u>

Valentine S. Lumiti (Waiter)

One month salary in lieu of notice	15232.50
63 leave days	22183.60
3 months salary for unfair termination	45697.50
Overtime	89107.20

Underpayment	<u>42592.50</u>
	<u>214,813.30</u>

Wesley P.S. Wafula (Supervisor)

One month salary in lieu of notice	20000
63 leave days	42000
3 months salary for unfair termination	60000
Overtime @ Ksh.96.15 per hours	<u>103842</u>
	<u>225,842</u>

DISPOSITION

For reasons above stated judgment is entered for all the claimants declaring their dismissal unfair and awarding them an aggregate judgment of Kshs.2,020,519 to be shared by all the claimants, except John Karisa Furaha, as assessed above. The successful 8 claimants are also awarded costs and interest.

Dated signed and delivered this 13th February 2015.

O. N Makau

Judge