



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 35 OF 2012

JAMES NTHENGE.....CLAIMANT

VERSUS

OLIVE GARDENS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 12th January 2012 seeking resolution of a dispute between him and the Respondent. He averred that the Respondent had hired him on 6th January 2011 as an assistant barman for an initial fixed period of 3 years. He was entitled to a monthly salary of Kshs. 15,000/- a month. Notwithstanding the stressful environment within which the Claimant was required to work, the Claimant performed his employment responsibilities in an exemplary manner. He further averred that on 1st October 2011 the director of the Respondent unfairly and without any colour of right terminated the Claimant's employment with the Respondent. His contract provided for a reasonable notice of termination or pay in lieu thereof. The Claimant alleged breach of the contract and claimed damages for the loss of service. He thus sought one month salary in lieu of notice Kshs. 15,000/-, loss of income for the remainder of the contract sum Kshs. 420,000/-, unpaid leave for the year 2011 Kshs. 10,500/-, compensation for 12 months 180,000/-, damages for breach of contract, certificate of service and costs of the suit.
2. The Respondent filed a Memorandum of Reply and Defence on 29th February 2012. In the Defence the Respondent denied that the Claimant had been employed as an assistant barman for a period of 3 years from 6th January 2011 or that he worked diligently in spite of the stressful environment within which the Claimant worked. The Respondent averred that the termination was justified and reasonable notice was given to the Claimant. The Claimant was not entitled to salary in lieu of notice and the Respondent averred that the Claimant was given his final dues as required under the contract of employment and was therefore not entitled to any other relief.
3. The Claimant testified on 2nd October 2014 and 18th November 2014. He stated that he was employed by the Respondent as an assistant barman and that he worked for 9-10 months. He testified that on 30th September he was on night shift and in the morning the director Margaret Nderitu called a few of the staff and gave them termination letters. He stated the letter had no reason for termination.
4. In cross examination he testified that he did not get the letter addressed to him on arrogance and insubordination.

5. In re-examination he testified that he was not given a hearing and was just told that his employment was at an end.
6. The Respondent did not call any evidence and relied on the documents filed in Court. The parties consented to file written submissions and the Claimant filed submissions on 24th November 2014. In the submissions the Claimant reiterated the claim and asserted that he had proved his case. He submitted that the Respondent breached the law in particular Sections 47(1), 46, 43, 41 of the Employment Act and ILO Convention 158 Article 4. Reliance was placed on the case of **Davies Kamau v Olive Gardens Industrial Cause No 33 of 2012, Samson Mwangi Gaita v Kensalt Limited [2013] eKLR, Moses Kaunda Moro v CMC Motors Group Limited [2013] eKLR** and **Loice Rose Obengo v Nyanza Reproductive Health Society [2013] eKLR**.
7. The Respondent submitted on 9th December 2014 and stated that it entered into a contract of employment with the Claimant. He was to take up the duties of an assistant barman at the premises and establishment of the Respondent at a monthly salary of 15,000/- a month. It was submitted that the Claimant's services were terminated on account of neglect of duty. The Respondent stated that the termination was justified and that the Claimant was required to prove the unfair termination. The Respondent cited a few authorities but did not avail any copies.
8. The Claimant had a burden under Section 47(5) of the Employment Act. The Respondent asserts that it had a right to dismiss due to the alleged neglect of duties by the Claimant. The simple view of it is that the Claimant was dismissed summarily without adherence to the requirements of Section 41 of the Employment Act. Section 41 provides 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.
9. The Claimant was thus entitled to the procedural fairness set out above. This was admittedly not availed to him and for this reason the termination even if justified was unfair within the meaning of the Employment Act. The Claimant seeks payment of the balance of his contract dues, compensation as well as general damages. He did not render any services beyond the period of employment and he is not entitled to recover for the balance of the contract. He is also not entitled to any general damages as these are inapplicable to contracts of employment. He is only entitled to payment of compensation in terms of Section 49 of the Employment Act for the unlawful termination which I cap at 9 months. He is also entitled to the Certificate of Service and costs of the suit.
10. In the final analysis I enter judgment for the Claimant against the Respondent for
 1. Kshs. 135,000/- as compensation,
 2. Certificate of service
 3. Costs of the suit

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of **March** 2015

Nzioki wa Makau

JUDGE