



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 22 OF 2014

BETWEEN

GILBERT KASUMALI KITHI CLAIMANT

VERSUS

NYALI BEACH HOLIDAY RESORT RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Kenga Advocate, instructed by Kenga & Company Advocates for the Claimant

*Mr. Omwenga Advocate, instructed by Mogaka Omwenga & Mabeya Advocates
for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed his initial Statement of Claim on 6th February 2014, the Amended Statement of Claim on 24th February 2014 and Further Amended Statement of Claim on 17th March 2014. He claims he was employed by the Respondent Hotel as an Italian Chef on 23rd August 2008, earning Kshs. 16,000 per month. His contract was terminated by the Respondent on 19th August 2012 in circumstances he feels amounted to unfair and unlawful termination. He seeks the following orders against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 16,000;
- b. Annual leave for the 4 years at 21 days per year, amounting to Kshs. 51,692;
- c. Travelling allowance at Kshs. 6,000;
- d. House allowance for 4 years at Kshs. 240,000;
- e. Service charge for 4 years at Kshs. 336,000;

- f. LBR increment for 4 years at Kshs. 365,600;
- g. Un-provided boots for 4 years at Kshs. 16,000;
- h. Gratuity pay at 18 days' salary for each completed year of service at Kshs. 44,307;
- i. Public holidays overtime pay at Kshs. 46,904;
- j. Normal overtime of 250 days at Kshs. 133,250;
- k. Salary arrears for August 2012 at Kshs. 8,000;
- Compensation for the remainder of the employment period under Section 49[1][b] of the Employment Act 2007 at Kshs. 7,392,000;
- m. Compensation under Section 49 [1] [c] of the Employment Act 2007 at Kshs.336,000;
- Interest on the above amounts from 19th August 2012 until payment is made in full; and
- Costs of the Claim.

2. The Claim is denied. The Respondent filed Its Statement of Response on 12th March 2014. It concedes to having employed the Claimant in the stated position, and on a salary of Kshs. 16,000 per month. The salary was consolidated. There were several complaints against the Claimant. Discussions held between him and the Management failed to resolve these complaints. He was given to late arrival for duty. He was provided a pair of uniforms; he chose instead to keep wearing an old and ragged outfit, which attire he had made unofficial changes to. He did not cooperate with his Colleagues, including the Head Chef. He refused to take the instructions of the Head Chef. He spent most of his time sleeping at work. He did not adhere to the shift schedule. He is only entitled to 1 month salary in lieu of notice, which was offered to him by the Respondent; he declined the offer. The Respondent urges the Court to reject the Claim with costs to the Respondent.

3. The Claimant testified, and closed his case on 2nd October 2014. He was recalled briefly on 17th November 2014, to enable him react to documents filed by the Respondent after the he had closed his case. The Respondent testified through its Director Mr. Ratilal Shah on 27th November 2014, when the hearing closed. The dispute was last mentioned in Court on 11th December 2014, when Parties confirmed the filing of their Final Arguments, and were advised Award would be delivered on 13th March 2015.

4. Mr. Kithi testified he was employed through a letter of appointment dated 23rd August 2008. His basic salary was Kshs. 16,000; Kshs. 5,000 as house rent allowance; Kshs. 7,000 as share of fixed charge; and Kshs. 4,000 for safety boots every year; and Kshs. 1,500 as transport allowance.

5. He was summarily dismissed in a letter dated 17th August 2012. The dismissal was effective from 17th August 2012. The letter was in a plain paper- it did not have the Respondent's Logo. No reasons were given for the decision.

6. He was not given notice or pay in lieu of notice. He never went on annual leave. He was not compensated for the unutilized annual leave. He was entitled under his contract, to 28 days of annual leave. He was not paid house rent allowance for the entire time worked. He testified he did not wish to pursue the claim for LBR increment. He was denied gratuity pay. He was compelled to work double shift on Fridays, Saturday and Sunday, and also on Special Occasions when the Respondent hosted certain visitors. He testified he did not wish to pursue the claim for compensation for the remainder of the employment period. He was not paid his salary for the days worked in August 2012.

7. Mr. Kithi denied that he was paid through the various Vouchers exhibited by the Respondent. The

signatures on the Vouchers differed and were not his. He was not paid annual leave pay and travelling allowance as shown in the Vouchers. The Authorizing Officer in the Vouchers was unknown. The amounts shown to have been paid in annual leave pay varied. He did not apply for annual leave and the annual leave application form did not bear his signature. He did not wear an old uniform at work. He never received any warning from the Respondent.

8. Cross-examined, Mr. Kithi testified he did not demand leave pay, overtime pay, house rent allowance, service charge and others, in writing, during his time in employment. He did not do so through his Advocate or through the Labour Office. He only complained after termination.

9. He received the termination letter. There is no signature in the letter. He did not sign the letter. It has no letterhead. He did not sign the Vouchers showing him to have received leave pay. He did not report to the Police that someone had forged his signature. No one was charged with the offence of forgery. The Chief Chef was Mr. Singh. The Claimant did not know if it was his Workmates who lodged complaints against him. He was not paid his salary for August 2012. He did not refuse to receive his salary. It is not true that he wrote a letter in 2010 to the Respondent, seeking to voluntarily retire early. The letter did not bear his signature. He has been working for another Employer after termination. He denied that his respective prayers are highly exaggerated. He told the Court upon redirection and recall that his contract was clear. He did not think it necessary to report the dispute to the Labour Office, during employment. He apprehended the Respondent would victimize him for making such a complaint. The letter of dismissal was issued by Ms. Grace Aleba, the Accountant. He reported the forgery of his signature to the Police but no prosecution took place. He did not normally sign anywhere on receiving his salary. Mr. Kithi urges the Court to uphold his Claim.

10. Mr. Ratilal Shah testified that the Claimant's salary of Kshs. 16,000 was all-inclusive. It included the house rent allowance. He was disturbing the other Employees nearly all the time. He was sleeping at work. The other staff complained about the Claimant to the Management on 12th April 2012. The Hotel was half-booked. The Respondent reviewed the complaints lodged by other Members of the Staff and determined it was better to have the Claimant leave.

11. The Claimant received travelling allowance and signed the Voucher in acknowledgement. In the kitchen area, no one was required to wear boots. He was not entitled to gratuity. Public Holidays were compensated as shown in the Vouchers attached to the Statement of Response. He acknowledged payment. He took a loan of Kshs. 8,000 for August 2012, which Mr. Shah testified, should be offset against the salary for the days worked in that month. Compensation is not merited. The Vouchers are genuine, not forged, and the Respondent has not been investigated or prosecuted by the Police for forgery.

12. Cross-examined, Mr. Shah agreed he signed the Claimant's letter of appointment. The letter gave to the Claimant basic salary of Kshs. 16,000 per month; Kshs. 5,000 in house rent allowance; service charge of Kshs. 7,000; Kshs. 4,000 for safety boots per year; and Kshs. 1,500 in transport allowance. The Witness agreed with these terms contained in the letter of appointment. He maintained that the salary was consolidated at Kshs. 16,000 however.

13. Mr. Shah did not write to the Claimant after receiving the complaint from the other Employees. The Claimant was always arguing in the kitchen. Mr. Shah saw the Claimant sleeping at a certain corner in the Workplace.

14. The Vouchers were prepared by the Accountant Ms. Grace. She did not put her name on the Vouchers. It was not shown who checked or authorized the Vouchers. There was no identity card number on the Vouchers. Mr. Shah did not agree that the signatures on the Vouchers varied and were forgeries. The Claimant sent someone to collect his salary under the first Voucher. The Respondent has a Logo. The Vouchers do not have the Logo. The Witness testified the Respondent was not keeping anything away from the Court. The Respondent was ready to pay to the Claimant 1 month salary in lieu of notice. Redirected, Mr. Shah testified that Kshs. 16,000 paid to the Claimant monthly, was all inclusive. The letter of appointment was not signed by Mr. Shah; it was not prepared by the Respondent; and was not rubber stamped by the Respondent. The Claimant did not complain about being paid Kshs. 16,000 per

month.

15. The Claimant submits that the sums contained in the contract of employment, save for the basic salary were never paid to the Claimant. These cannot be contested. The contested items according to the Claimant are annual leave of 4 years; travelling allowance of 4 years; public holidays; pending days; and compensation for unfair and unlawful termination. The Claimant disputed signing the Vouchers. The Respondent should have called the Accountant Grace, to prove the authenticity of the Vouchers as required under Sections 107, 108, and 109 of the Evidence Act Cap 80 the Laws of Kenya. The Employer keeps custody of Employment Records, and the onus was on the Respondent to avail these Records to the Court. The Respondent did not call the Employees who lodged a complaint with the Respondent against the Claimant. There was no hearing given to the Claimant in terms of Section 41 of the Employment Act 2007. No valid reason was given for the Respondent's decision under Section 45 of the Act. The Claimant was not registered to any Social Security Plan. He is entitled to service pay under Section 35 of the Act. He merits annual leave pay of 28 days for every year, under his contract and Section 28 of the Act. In total, the Claimant submits he deserves payment of Kshs. 1,251,567 in terminal benefits and compensation.

16. The Respondent submits the Court should not rely on the letter of appointment dated 23rd August 2008, as it is not signed by any of the Respondent's Directors, is forged, and subject of Police Investigation. His prayers are unsupported by evidence. He did not make the claims during the 4 years of employment. He did not give any evidence for payment of service charge. He cannot be awarded what he did not plead.

The Court Finds and Awards:-

17. Gilbert Kasumari Kithi was employed as Italian Chef by the Nyali Beach Holiday Resort Mombasa, on 23rd August 2008. He produced a letter of appointment, allegedly issued by the Respondent. The Director Ratilal Shah was not forthright about this letter.

18. Mr. Shah said nothing about the letter of appointment in his evidence in chief. On cross-examination, the Director testified he agreed with the contents of the letter of appointment. But upon redirection, the Witness disowned the letter of appointment, stating that the Respondent did not prepare the letter; it is not signed by the Director; and it does not have the Respondent's rubber stamp.

19. Section 9 [2] of the Employment Act 2007 requires that the Employer shall be responsible for drawing up the contract, giving the particulars of employment. This law also requires the Employer to indicate in the contract that the Employee has consented to the terms and conditions contained in the contract.

20. Section 10 [7] of the Act states:

“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.”

21. The Claimant produced a written contract. It is on the letterhead of the Respondent. The letter is signed by the Claimant, accepting the terms and conditions of employment stipulated in the contract. It has the names of Shah Ratilal and Bhiku and although not signed by these Directors, bears the rubber stamp of the Respondent. Mr. Shah himself acknowledged the contents of the letter of appointment on cross-examination, but redirected, recanted his evidence.

22. The Respondent ought to have disproved the terms contained in the disputed letter of appointment, as required under Section 10[7] of the Act. Mr. Shah instead kept changing position, conceding at one point the contents of the disputed letter, while disowning the same letter when redirected.

23. There was no other written contract produced by the Respondent. Section 74 of the Employment Act

2007 requires Employers to keep records of all Employees with whom they have entered into contract with, with details of each Employee captured in such records. It would not have been difficult for the Respondent to disprove the letter of appointment, by production of the Claimant's employment record.

24. Mr. Shah testified the Claimant was paid an all-inclusive salary of Kshs. 16,000 per month. The letter of appointment indicates the Claimant was entitled to Kshs. 16,000 as basic salary. There were other specified allowances. Nowhere was the sum of Kshs. 16,000 expressed to be a consolidated salary. The Respondent's Witness was completely unpersuasive in holding that Kshs. 16,000 was all-inclusive.

25. The Parties agree that the Claimant was throughout his employment, only paid the basic salary. The allowances are listed in the contract to comprise: Kshs. 5,000 in house rent allowance; Kshs. 7,000 service charge; Kshs. 4,000 annually in place of safety boots; and Kshs. 1,500 as transport allowance. The frequency of payment of the transport allowance is rather ambiguous in the contract. It is not shown if the item was payable monthly or annually, but the Claimant resolved this ambiguity for the Court in his submissions, affirming transport allowance was paid once in a year, like the safety boots allowance. The Claimant in fact, pleads Traveling Allowance, not Transport Allowance. In issue, it appears therefore, is Leave Travelling Allowance, which goes with the Annual Leave, and is payable once in a year. The safety boots allowance was payable under the contract as an alternative to the provision of the actual boots. Mr. Shah was not correct in his evidence that boots were not needed in the Kitchen. It was an item given to the Claimant in the contract.

26. ***The Court finds the Claimant is entitled to, and is granted:***

- a. ***House rent allowance of 4 years at Kshs. 5,000 per month, amounting to Kshs. 240,000;***
- b. ***Service charge of 4 years at Kshs. 7,000 per month, amounting to Kshs. 336,000; and***
- c. ***Safety boots allowance of 4 years at Kshs. 4,000 per year, amounting to Kshs. 16,000;***

27. The prayer for notice pay is not opposed. The letter of appointment allowed either Party to terminate the contract by written notice of 1 month, or payment of 1 month salary in lieu of such notice. ***The Claimant is granted 1 month basic salary in lieu of notice at Kshs. 16,000.***

28. There is adequate evidence to show the Claimant was not paid his salary for 17 days worked in August 2012. This cannot be denied to him on the basis that he did not include this item in his prayers. Employment Claims are unlike Civil Claims where a Party cannot get anything outside his pleadings. In Employment Claims, the Court has the latitude to go beyond the pleadings, the overall objective being the enforcement of labour standards and administration of social justice. An Employee cannot be denied his salary which he has worked for, simply because he overlooked to pray the Court for the salary in the pleadings. Evidence which is not contested shows the Claimant worked for 17 days in August 2012. ***He is granted salary for 17 days computed at Kshs. 16,000 divide by 26 = Kshs. 615 x 17 days= Kshs. 10,461.***

29. The Claimant prays for annual leave pay. There were Petty Cash Vouchers produced by the Respondent, indicating the Claimant received annual leave pay. There was an Annual Leave Application Form. The Claimant disowned these documents, but the Court formed the view that he was being less than candid in this regard. It is difficult to see why the Respondent would generate volumes of falsified Petty Cash Vouchers. The signature on most of the Vouchers is consistently familiar to the signature of the Claimant contained in the letter of appointment produced by him. Only he would know why he used other signatures elsewhere, particularly in his Verifying Affidavit. The Pay Slip for November 2009 shows the Claimant received leave pay. He does not question this Pay Slip. He cannot be owed annual leave pay of 4 years in view of these documents.

30. The Court is satisfied the documents availed by the Respondent are sufficient to discount the claims for annual leave pay; travelling allowance; and public holidays overtime. These claims are rejected.

31. Section 35 [6] of the Employment Act 2007 makes the Claimant ineligible for gratuity pay. He was

subscribed to the N.S.S.F as shown in the Pay Slips and the Payment Vouchers. There was no provision for additional social security payments in his contract, outside the N.S.S.F. The claim for gratuity pay is declined.

32. The prayer for normal day overtime, so-called pending days in the Statement of Claim, was not well founded. The Claimant merely stated he worked on Friday, Saturday, Sunday and on Special Occasions. He did not assist the Court in understanding the computation of 250 days worth of normal overtime. This claim is declined.

33. The main remaining prayer left for the determination of the Court is whether termination was unfair, warranting a grant of compensation capped at 12 months' gross salary, under Section 49 [1] [c] of the Employment Act 2007.

34. The Act, under Sections 41, 43 and 45, requires an Employee is availed procedural and substantive justice, before the termination decision is taken. The Employer must demonstrate fair and valid reasons for the decision, and carry out the decision fairly.

35. Mr. Shah explained that the Claimant's Co-Employees wrote to the Management of 12th April 2012, raising certain complaints against the Claimant. These were:-

- The Claimant persistently reported to work late, even when requested by his Colleagues to report early, and despite the fact that he lived nearer to the Hotel than most of his Colleagues;
- The Claimant preferred to wear his old uniform which he had crudely adjusted at the sleeves. One part of his old trouser was knee- high, the other reaching his foot. He refused to wear any of the pair of new uniform given to him by the Respondent; and
- He spent most of the time sleeping at work alleging he had domestic problems. He refused to take the instructions of the Head Chef. He did not cooperate with the other staff on shift schedule.

36. These were serious allegations of an Employee being incompatible, which is a fair termination reason, under Section 45 [2] [b] [i] of the Employment Act 2007. This Court established in the ***Industrial Court at Nairobi Cause Number 635 of 2010 between Dede Esi Annie Amanor- Wilks v. Action Aid International [2014] e-KLR*** that Employers have the right to weed out incompatible Employees from their Enterprises.

37. In principle, the Respondent would therefore have been entitled to terminate the Claimant's contract for incompatibility. The Court must however question whether the allegations by the Co-Employees were independently investigated by the Respondent, the Claimant heard, and the allegations against him established. There is no record whatsoever of investigations carried out, and requirement made of the Claimant to defend himself. Mr. Shah testified he had to choose between the Claimant and other Employees.

38. It was not clear why the Employees and not the Employer would be concerned about the Claimant's lack of grooming or his lateness to duty. It is not clear why the Employees, and not the Employer, would be concerned about the Claimant's defiance of the Head Chef. Why were the Employees and not the Employer concerned about the Claimant sleeping at work? The Respondent needed to do more, rather than merely take the views of the Employees at face value. It certainly needed to do more to persuade the Court that the allegations contained in the letter of 12th April 2012 against the Claimant, were fair and valid reasons, warranting the dismissal of the Claimant. Is it possible that all these offences were committed by the Claimant, there was no warning, nothing from the Employer, and no record for instance, of the Claimant's late arrival for duty?

39. There were no charges against the Claimant. There was no hearing in compliance to the minimum statutory disciplinary procedure, created under Section 41 of the Employment Act. Termination was unfair on procedural as well as substantive grounds. The Claimant is entitled to compensation, which the Court grants at the equivalent of 10 months' gross salary. He earned a basic salary of Kshs. 16,000, house rent allowance of Kshs. 5,000 and fixed service charge of Kshs. 7,000, bringing his gross monthly salary

to Kshs. 28,000. **Compensation is granted at Kshs. 28,000 x 10 months = Kshs. 280,000.**

40. The Parties shall bear their own costs, and there shall be no order on the interest.

In sum, IT IS ORDERED:

- a. **Termination of the Claimant's contract was unfair.**
- b. **The Respondent shall, within 30 days of the delivery of this Award pay to the Claimant 10 months' gross salary in compensation at Kshs. 280,000; 17 days' salary at Kshs. 10,461; 1 month basic salary in lieu of notice at Kshs. 16,000; safety boots allowance at Kshs.16,000; service charge at Kshs.336,000; and house rent allowance at Kshs. 240,000- total Kshs. 898,461**
- c. **No order on the costs and interest.**

Dated and delivered at Mombasa this 13th day of March 2015

James Rika

Judge