



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 337 OF 2014**

**ARTHUR DAVID OKWOMI.....CLAIMANT**

**VERSUS**

**CAFESSERIE LTD .....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. This is a Claim for Kshs.351666 being separation dues arising from wrongful and unfair termination of the Claimant's employment by the respondent in November 2013. It is the claimant's case that his termination was based on unjustifiable grounds and without following the procedure provided under the Employment Act.

2. On the other hand the respondent has denied liability for unfair and wrongful dismissal of the claimant and averred that it is the claimant who deserted work after being invited to disciplinary hearing for gross misconduct. Consequently, the respondent maintained that she did not contravene any law in the termination of the claimant's services as he is the one who left his job voluntarily.

3. The Suit was heard on 3.3.2015 when the claimant testified as CW1 while the respondent called Salia Taabu Jumanne as RW1. Thereafter both parties filed written submissions.

**CLAIMANT'S CASE**

4. CW1 was employed by the respondent as a Chef from 7.11.2011 to 13.11.2013. His salary was Kshs.20000. on 13.11.2013, CW1 was called to the office by Mr. Rafi Talias who told him that his work performance was not good and as such had decided to terminate his services. CW1 was further told to collect his termination letter on 15.11.2013. The letter was however never given to CW1 despite his several visits to the office. Instead he was given a Certificate of Service dated 15.11.2013.

5. CW1 contended that no performance appraisal was done on him, and no chance was given to him to defend himself on the alleged poor performance before his dismissal. In addition CW1 maintained that the termination was without prior notice. He therefore prayed for 3 months salary in lieu of notice, gratuity, outstanding leave days, compensation for unfair termination and salary underpayment.

6. On cross examination by the defence counsel, CW1 stated that Mr. Rafi Talias told him that the Director and the Head Chef are the ones who said that CW1 should not continue working. Cw1 denied even fighting Collins Dawa at the kitchen on 11.11.2013 but admitted that he was paid salary and leave

days on 12.12.2013 long after his dismissal. He further admitted that he was paid House Allowance and 48 hours salary in lieu of notice but contended that that notice period was too short. He also admitted that he was a contributing member of NSSF. He denied ever absconding work from 13.11.2013 to 12.12.2013 and maintained that he visited the office severally including 15.12.2013 when he was given certificate of service. He concluded by stating that he was never invited to the meeting where the Director, Rafi Talias and the Head Chef discussed CW1's performance and decided to dismiss him.

### **DEFENCE CASE**

7. RW1 is the General Manager for the Respondent in East Africa. She confirmed that CW1 was employed by the Respondent at the Mombasa Branch. She explained that on the night of 11.11.2013, CW1 fought with Collins Dawa at the hotel kitchen and they were verbally sent home the same night to attend disciplinary hearing on 12.11.2013. Mr. Dawa attended the disciplinary hearing and given a warning letter and transferred to Kampala. However CW1 did not attend the hearing even after several phone calls which went un answered as as such he was dismissed. According to her CW1 only reappeared on 18.11.2013 when he collected his recommendation letter dated 15.11.2013. She produced payslip dated November 2013 which was used to pay CW1 for the days worked in November, 7 days leave and 2 days pay in lieu of notice.

8. On cross-examination by the claimant's counsel, RW1 explained that CW1 was invited to the disciplinary hearing by phone call but she could not produce any prove of the alleged call. She further explained that Mr. Dawa was working at Kampala, Mr. Mbugua was working in Kigali Rwanda while Rafi Talias was in Nairobi on official duties and as such they could not testify. She maintained that CW1 deserted work.

### **ANALYSIS AND DETERMINATION**

9. After carefully considering the pleadings, evidence and submissions, it is clear that CW1 was employed by the Respondent between 7.11.2011 and 13.11.2013. The issues in dispute are whether the claimant deserted work or he was unfairly dismissed by the Respondent, and whether the reliefs sought ought to be granted.

### **DESERTION OR UNFAIR TERMINATION**

10. The respondent's case is that on 11.11.2013 CW1 fought with another colleague, Mr. Dawa while on duty at the Respondent's kitchen at Mombasa and they were both verbally sent home to attend a disciplinary hearing on 12.11.2013. That CW1 never attended the hearing and never picked the several phone calls which were made to him by the Respondent as a consequence of which CW1 was dismissed. CW1 has denied the alleged fight and summons to any disciplinary hearing and maintained that he was dismissed for alleged poor performance without any prior performance appraisal or a chance to defend himself.

11. The court finds no merits in the defence case advanced by the respondent. The testimony by the RW1 is dismissed for being mere hearsay if not hot air. She was not a witness of the alleged fight and she was not involved in the disciplinary process for the claimant or Mr. Dawa. The evidence of CW1's stands un rebutted by the defence. Consequently, the court finds on a balance of probability that CW1 was dismissed.

12. Under section 41 of the employment Act, an employer who intends to dismiss his employee on ground of poor performance must explain the reason for the intended dismissal and thereafter accord the employee a chance to defend himself. The said proceedings must be accompanied by a fellow employee of his choice and the proceedings must be conducted in a language of the employees' understanding. In the present case that procedure was not followed. CW1 was dismissed by Mr. Rafi Talias for allegation of poor performance of work by CW1. The said termination was communicated verbally and CW1 was never given a chance to defend himself because Mr. Rafi Talias told him that the decision to dismiss him was made by the Director and the Head Chef. That decisions was therefore made earlier by the 2 said

officers and Mr. Rafi Talias was only communicating the decision. In addition, the alleged reasons for termination has not been proved including fighting while on duty, absconding duty and poor performance. There is no evidence tendered by the defence to prove that CW1 failed to meet expressly agreed targets. Consequently, the court finds and holds that CW1 never deserted work but was unfairly dismissed by the respondent. Such dismissal was unjustified.

### **RELIEFS**

13. Under section 49 of the Employment Act, an unfairly dismissed employee is entitled to salary in lieu of notice, accrued benefits plus compensation for unfair termination. There is no dispute that CW1 was earning a gross salary of Kshs.20000 per month. He is therefore awarded Kshs. 20000 for salary in lieu of notice as provided for under the Law. Under section 7 of the Employment Act, no employer is allowed to employ any one for less terms than the ones provided for under the said Act. Meaning that the alleged right to terminate contract of service or 2 days pay in lieu of notice is neither here nor there. It was an illegal terms of service and therefore not binding "*ab initio*". Consequently the claimant's rightly under section 35 of the Act is granted. The said provision entitles an employee whose pay interval is one month and above

to at least 28 days termination notice in writing. The award herein will however be less Kshs.1333.35 paid on 12.12.2013 in lieu of 2 days notice.

14. The Claimant's for the award Kshs.120,000 being 6 months gross salary for unfair termination because there was no justification for the dismissal. However the claim for arrears of House Allowance is dismissed because the salary of Kshs. 20000 was consolidated pay according to the payslips provided. Likewise the claim for gratuity is dismissed for lack of evidence or any legal basis. Even if the claimant intended to seek service pay, the same would also fail because the claimant was a member of NSSF and the respondent remitted all his contributions promptly. Lastly the claims for 7 days leave is dismissed because CW1 admitted that she was paid the same on 12.12.2013.

### **DISPOSITION**

15. For the reasons stated above, judgment is entered is entered for the claimant in the sum of Kshs. 138,666.65 plus costs and interest.

**Dated, signed and delivered this 15<sup>th</sup> May, 2015.**

**O. N. Makau**

**Judge**