



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
CAUSE NO 2249 OF 2012
EVANS PETER ADOYO.....CLAIMANT

VERSUS

THE MANAGING DIRECTOR OF PANARI HOTEL.....RESPONDENT

Mr Swaka for Claimant

Mr Olewe for Respondent

JUDGMENT

1. The Claimant brought this suit vide a statement of claim on 7th November, 2012 seeking compensation for wrongful dismissal and payment of terminal benefits to wit;

- a. One month's salary in lieu of notice in the sum of Kshs 52,500
- b. Gratuity calculated at 21 days for every year worked in the sum of Kshs 955,500
- c. Payment in lieu of Leave days not taken in the sum of Kshs 64,500
- d. Unpaid remuneration from the time of interdiction to date of filing suit
- e. Interest and costs

Facts of the Claim

2. The Claimant was employed as a Health Club Manager on 12th May, 2008 at a monthly salary of Kshs 45,000. The Claimant worked continuously until when he was terminated on 11th August 2012. The letter of appointment marked "APP1" and letter of termination marked "App9" are annexed to the Statement of Claim.

3. The reasons for termination are contained in the letter of termination and include;

- i. loss of confidence in the Claimant's service by management due to high handedness and lack of team work;
- ii. inability to manage the department;
- iii. covering up for errant staff whenever they committed offences;

iv. dissatisfied staff team due to Claimant's management style;

v. Poor relations with the staff members;

vi. Involvement in private financial business at the workplace against stipulated house rules and regulations.

4. The letter states that the Claimant attended a disciplinary hearing on 9th August, 2012 and was afforded opportunity to explain the allegations. The Management was not satisfied with the explanation hence the dismissal.

5. The Claimant in the statement of claim and oral testimony denies the allegations by the Respondent and in particular denies he was involved in "shylock" activities at the workplace.

6. The Claimant states that he worked well, had good relations with staff, and turned around the performance of the health club as evidenced by very high membership and patronage during his tenure. Membership of the club had grown from 30 persons when he was employed to 170 persons when he left.

7. He emphasized that his services were superb and club members were very happy with him and the Team. The Claimant stated that his troubles started when the Managing Director of the Hotel accused him of allowing a member who had not paid his fees to use the club facilities. The Claimant insisted the client had paid.

8. The Managing Director purported to dismiss the Claimant immediately but he later reversed his decision. The guest brought payment receipts. The Claimant was then given a warning letter which he refused to sign.

9. Soon thereafter the Claimant got a Letter of termination. The Claimant told the Court that he was victimized for refusing the Operations Manager to give complimentary entries to his friends. This was against the company policy.

10. Secondly, a female staff by the name Joyce Mwitwi who was a personal friend to the Human Resource Manager applied for leave. The Claimant declined to approve the leave unless a standby staff was employed. The Human Resource Manager demanded that the Claimant approve the leave but he declined. Joyce then went on leave without the Claimant's approval.

11. Thirdly, a staff of the health club by the name Vincent Kenyari who was scheduled to work in the afternoon reported to work in the morning and then Claimant turned him back because he was the only one scheduled for the afternoon. He reported the matter to the Human Resource manager and the matter was discussed with both the Human Resource Manager and the Operations Manager. The two told the Claimant to expect a warning letter arising from that incident.

12. The following day on 11th August, 2012, the Claimant instead received a letter of termination. The Claimant told the court that the meeting was not a disciplinary hearing. He did not receive any charges or a show cause letter. The Claimant concluded that he was simply lynched and wrongly removed from employment. That the letter of termination contains no valid reasons for the termination since the general allegations made against him were not substantiated.

13. In the letter of termination, the Respondent offered to pay:

i. 11 days salary for the days worked in August, 2012;

ii. twenty six (26) days salary in lieu of leave not taken;

iii. prorated travelling leave allowance for 12 months during the period;

- iv. one month's salary in lieu of notice, less;
- v. deductions by the company of any loans, advance and shortages.

Response

14. The Respondent filed a Memorandum of Reply on 1st March, 2013 in which it admits that the Claimant was employed on 12th May, 2008 and worked until 11th August, 2012, a period of four years. The Respondent adds that the Claimant was lawfully terminated from employment and was given the reasons for that.

15. That management was dissatisfied in the way the health club was being managed by the Claimant. That a meeting was held on 9th August, 2012 to discuss these issues.

16. That it emerged that the entire department and team was dissatisfied with the style of management by the Claimant hence the termination. That the Claimant covered up wrong doings by staff and conducted shylock business with the staff at the workplace. The staff had to pay the money he lent them with interest contrary to house rules and regulations. The Respondent annexed a bundle of acknowledgement from staff who transacted business with the Claimant.

17. The Respondent states that it paid the Claimant all terminal dues owed to him as stated in the letter of termination. The Respondent failed to call any witness in support of its case.

18. Determination

- a. Was the Claimants employment terminated for valid reasons?
- b. Was the termination effected in terms of a fair procedure?

Issues

19. The testimony by the Claimant remained largely uncontroverted, the Respondent having failed to call any oral testimony in rebuttal. The averments in the Statement of Response remain just that, there being no consent by the parties in terms of the Rules of the Employment and Labour Relations Court, 2010 to dispense with oral testimony.

20. It is apparent that the Claimant was not given a show cause letter with charges against him to answer prior to the termination. The Claimant was not called to a disciplinary hearing with a notice to bring a representative of choice from the staff to accompany him. These are mandatory requirements in terms of **Section** 41 of the Employment Act, 2007.

21. The Letter of termination gives general reasons for the termination of the employment of the Claimant, which reasons remain largely unsubstantiated.

22. The Claimant has ably defended himself against the averments by the Respondent in the Statement of Response.

23. The Court is satisfied on a balance of probabilities that:

- a. the Claimant worked continuously for a period of four (4) years for the Respondent.
- b. during his tenure he fulfilled his mandate to attract membership to the health club by providing good services.
- e. that the membership grew from 30 persons to 170 persons during the tenure of the Claimant.

d. that there were no complaints from customers at the health club during his tenure.

e. to the contrary, the court is satisfied that the Customers received good services by the team led by the Claimant.

f. that what emerges from the testimony by the Claimant is internal conflicts which were perpetuated by the Human Resource Manager and the Operations Manager for personal reasons.

g. therefore the Court has arrived at the conclusion that the Claimant's employment was terminated due to extraneous reasons unconnected with his performance at the work place.

24. The said termination was therefore unlawful. The termination was also unfair because it was not effected in terms of a fair procedure.

25. Accordingly, the final finding by the Court is that the Claimant has proved his case on a balance of probabilities and the court awards him;

a. one month's salary in lieu of notice in the sum of Kshs 52,500

b. payment in lieu of leave in the sum of Kshs 64,500

26. The letter of appointment does not provide for payment of service gratuity. The payslips to the contrary show that the employer contributed NSSF and NHIF for the Claimant. This claim is therefore refused.

Compensation

27. The Claimant served the Respondent diligently and caused the membership of the club to grow from 30 members to 170 members in a period of four (4) years.

28. The Respondent ought to have rewarded this service rather than punish the Claimant without any valid reason. The Claimant lost his employment without any notice to prepare himself for the immediate financial loss occasioned by the unlawful termination.

29. The Claimant suffered loss and damage as a result. The court awards the Claimant eight (8) months salary as compensation for the unlawful and unfair termination in terms of **Section 49(1)c** as read with **Subsection 49(4)** of the Employment Act, 2007 in the sum of Kshs 420,000.

30. In the final analysis the Respondent is to pay the Claimant;

a. Kshs.52,500 (in lieu of notice);

b. Kshs.64,500 (in lieu of leave);

c. Kshs.420,000 compensation;

Total award is Kshs 537,000.

In the event, the notice pay and payment in lieu of leave has already been paid, the Respondent only to furnish the evidence of payment in Court.

d. The Award is payable with interest at Court rates from the date of this judgment till payment in full.

e. The Respondent to meet the costs of the suit.

Dated and Delivered at Nairobi this 26th day of June, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE