



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 221 OF 2014

BETWEEN

JOHN CHARO NGUMBAO..... CLAIMANT

VERSUS

AMANI TIWI BEACH RESORTRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

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

*Ms. Mboko Advocate, holding brief for Mr. Oloo Advocate, instructed by Menezes, Oloo & Chatur
Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

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

1. Mr. John Charo Ngumbao filed this Claim against his former Employer Amani Tiwi Beach Resort, on the 5th March 2014. He claims he was employed by the Respondent on 1st September 2012, in the position of Executive Sous Chef, initially earning a monthly salary of Kshs. 50,000. He states the contract was for 3 months, expiring 30th November 2012. Upon expiry however, the Respondent retained the Claimant and paid him a new salary at Kshs. 78,418. He worked for 5 months after which the Respondent terminated his contract. He feels termination was unfair and unlawful, and seeks the following Orders against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 78,418.
- b. 12 months' salary in compensation at Kshs. 1,019,434.
- c. Costs and interest.

2. The Respondent filed its Statement of Response on the 16th June 2014. It conceded the Claimant was

its Employee, on an initial contract of 3 months, working as Executive Sous Chef. It is agreed the Claimant continued working after the 3 months expired. Parties continued to be governed by the contract executed on 12th September 2012. Termination was fair and lawful. The Claimant improperly performed his duties. He served apples and mini butter to the Management Staff contrary to the instructions of the Respondent; he baked focaccia bread poorly and missed to prepare several dishes; and served meals late. These anomalies were pointed out to the Claimant verbally and in writing. Clause 10 of the contract allowed the Respondent to summarily dismiss the Claimant. The decision was fair and lawful. He was paid his dues comprising 15 days' salary in lieu of notice; and 11 days' salary for work performed in May 2012. The Respondent prays for dismissal of the Claim.

3. Ngumbao testified, and closed his case on 1st December 2014. The Respondent testified through its Human Resource Assistant Manager Tima Salim Kikombe on the 5th March 2015, when hearing closed. The dispute was last mentioned in Court on 11th May 2015 when Parties confirmed the filing of their Final Submissions.

4. The Claimant testified he was essentially the Assistant Manager Food Production. He was employed for 3 months, and continued for an additional 5 months. There was no formal renewal of the contract. His new salary was Kshs. 78,418- comprising basic pay of Kshs. 70,000 and house rent allowance of Kshs. 8,418.

5. He was not issued a letter of termination. Respondent's e-mails attached to the Response as A1, A2 and A3 suggested the Claimant had been warned by the Respondent. There was no indication these were sent to the Claimant. Annexure B is a letter of termination. The Claimant never received it. It is true he received Kshs. 16,000 from the Respondent. This was holiday pay for November, December 2012 and January 2013. He also received Kshs. 61,834 in his Bank Account. This was salary for May 2013. He made demand through his Advocates to the Respondent for remedial action before filing the Claim. The Respondent did not reply favourably.

6. He confirmed on cross-examination that his contract was for 3 months. He did not sign another contract after the initial contract expired. His net pay as shown in the May 2013 pay slip was Kshs. 60,440. He did not receive the letter of termination. He was not told the reason for the decision. He signed the Petty Cash Voucher on receipt of Kshs. 16,519. He acknowledged the amount as the full and final payment. This was in June 2013. He was paid an additional Kshs. 61,834 through his Bank. He was not sacked for non-performance. Clause 10 of the contract provided for termination. Termination could be done through 15 days' notice or 15 days' salary in lieu of notice. The Claimant prays for 1 month salary in lieu of notice. The contract expired. The new terms were not the same as the first. He testified on redirection that the Voucher for Kshs. 16,619 related to public holiday pay. He does not claim holiday pay. There were no complaints against him. He continued working after November 2012. He does not rely on the termination clause in the contract in demanding for 1 month salary in lieu of notice. He prays the Claim is allowed.

7. Ms. Tima Salim Kikombe testified the Claimant's contract could be terminated under clause 10 for gross misconduct. The Respondent could do this by issuing the Claimant 15 days' notice. The Claimant failed to reduce costs; he did not present the food well; and brought the food out late. He was cautioned in the e-mails attached to the Response. He did not change. His contract was terminated in accordance with clause 10. He was paid Kshs. 16,519 in full and final payment. He acknowledged receipt and discharged the Respondent. His old contract was renewed on the same terms. There was no letter of renewal. Termination was lawful, and the Claimant was fully compensated.

8. On cross-examination, Tima testified she was employed in June 2014. She was not there when the Claimant worked. She familiarized herself with his employment record. She was aware the Claimant was employed on a 3 month contract, commencing 1st September 2012, lapsing November 2012. He worked another 5 months. Renewal was made verbally. A1, A2 and A3 did not have the e-mail address of the Claimant. One could not be sure that the Claimant received these e-mails. The termination letter does not have the Claimant's signature. It was not a fabricated document. The Respondent wrote to the Claimant's Advocates a letter dated 14th August 2013, confirming the Claimant would be paid 1 month salary in lieu

of notice. The Respondent does not issue fresh letter of employment on renewal of contracts, the Witness testified on redirection. The e-mails A1, A2 and A3 are word documents; that is why they do not have the Claimant's e-mail address. The pay slip attached to the Claim is inauthentic. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards:-

9. The Claimant was employed by the Respondent as its Executive Sous Chef. The Claimant clarified to the Court this is just another name for Assistant Manager Food Production. He was employed for 3 months, starting 1st September 2012 to 30th November 2012. This contract was a standalone document, establishing an employment relationship which was not meant to be renewed after expiry. Clause 1 states:

‘‘ The Management has decided as a special case to offer this contract which may not be renewed on expiry of this period.’’

10. Any renewal in the view of the Court, after the expiry of the first contract, should be seen independent of the first contract. Parties did not intend there would be continuity.

11. It is the wrong approach therefore, to adopt the terms and conditions of employment obtaining in the first contract, to the second contract of 5 months which was made orally.

12. The Court is not able to discern any aspect of the dispute, which should turn on the contract made on 12th September 2012 and which contract ended without dispute or misunderstanding of any sort, on the 30th November 2012.

13. The Parties entered into the second contract orally, some time after the 30th November 2012. The terms and conditions are blurred. The only aspect that seems to the Court clear is the Claimant's new gross salary of Kshs. 78,418. This is shown in the pay slip for the month of May 2013. The Respondent offered the Court no other pay slip to discount the one produced by the Claimant. It is the duty of the Employer under the Employment Act 2007, to avail Pay Statements to Employees, and in general maintain proper employment records.

14. It was upon the Respondent to prove the reason for its decision terminating the oral, 5 month contract. The Respondent was required under Section 43 and 45 of the Employment Act to show fair and valid reason.

15. There were e-mails variously warning the Claimant about poor or improper performance of his role. There is no doubt these e-mails were received by the Claimant. The Court did not believe him when he alleged not to have received these e-mails from the General Manager, just as it did not believe him when he denied receipt of the termination letter. Why would a General Manager of a reputable Hotel write e-mails and termination letter- on 4 separate occasions and fail to pass them on to the addressee?

16. The Claimant was warned about service of apples and mini butter to Management Staff; he did not prepare food to specification and the food was poorly presented; and he failed in his supervisory role. These accusations were spelt out in the e-mails. Lastly the Respondent issued the termination letter dated 15th May 2013, justifying its decision on the Claimant's lack of professionalism. Termination was effective from 22nd May 2013.

17. The allegations against the Claimant contained in the chain of warnings; his inability to change things; and the eventual ground about lack of professionalism gave the Respondent adequate justification in terminating the Claimant's oral contract. Lack of professionalism was just another way of saying the Claimant performed his role carelessly, negligently and improperly and would justifiably be dismissed for gross misconduct under Section 44 [4] of the Employment Act 2007.

18. The Respondent however, did not accord the Claimant procedural justice as required under Section

41. There is no evidence the Claimant was heard in the manner prescribed under Section 41 of the Employment Act 2007. The charges were not formally put to him. He was not required to defend himself. The Respondent appears to have taken the warning letters as a form of hearing, and therefore issued the termination letter dated 15th May 2013, without further ado. The procedure was glaringly deficient.

19. The Court is satisfied termination was on valid ground. The Claimant is not entitled to notice pay, there having been shown valid grounds as to justify summary dismissal under Section 44 [4] of the Employment Act 2007. The prayer for 12 months' salary in compensation for unfair termination is disproportionate to the injury inflicted on the Claimant by denial of procedural justice. He performed his role in a manner likely to damage the Respondent's sensitive food and drink business. He was severally warned. There was substantive justification in the Employer's termination decision. The Claimant has no basis to ask for 12 months' salary. He had worked for only 5 months. He is granted 1 month salary in compensation for the procedural misstep. IN SUM, IT IS ORDERED:-

- a. ***Termination was based on valid ground, but lacked on procedural fairness.***
- b. ***The Claimant is granted 1 month gross salary at Kshs. 78,418 in compensation for breach of fair procedure***
- c. ***No order on the costs and interest.***

Dated and delivered at Mombasa this 19th day of June 2015

James Rika

Judge