



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 957 OF 2013

ONESMUS MUNYALO.....CLAIMANT

VERSUS?

TINNETTE ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT?

1. The Claimant filed suit on 24th June 2013. He pleaded that he was employed by the Respondent in April 2009. The Claimant averred that his employment was unlawfully terminated by the Respondent in November 2012 and that the Respondent failed and/or refused to explain orally or in writing in a language understandable to the Claimant the reasons for which the Respondent was considering termination. The Claimant averred that there was failure and/or refusal to allow another employee of the Claimant's choice to be present at the meeting where the explanation above was tendered if at all and that there was failure by the Respondent to allow or accept any representations to be made by the Claimant. The Claimant thus claimed salary in lieu of notice Kshs. 10,000/-, service pay for three years Kshs. 15,000/- overtime pay Kshs. 162,000/-, compensation for unlawful termination Kshs. 120,000/-, costs and interest of the suit plus a certificate of service.
2. The Respondent filed a defence on 24th July 2013. The Respondent pleaded that the Claimant was its employee and was paid Kshs. 10,000/- inclusive of house allowance and that the Claimant was provided with food in the course of his employment. The Respondent averred that the Claimant was lawfully terminated as provided for under the Employment Act. The Respondent averred that the Claimant was paid one month salary in lieu of notice and upon payment of the notice the Claimant left employment without acknowledgment of receipt of the sums. The Respondent further averred that it was not practical to maintain the Claimant at work as the Claimant had continuously threatened the other employees with dire consequences that included death induced either by black magic or unseen power thus severely making it impossible for him to continue working with the Respondent. The Respondent thus averred that the Claimant was not owed any monies at all and that this should be dismissed with costs.
3. The Claimant testified on 11th May 2015. He stated that he was presently unemployed and that he had worked for the Respondent from April 2009 as a chef. He stated that his pay was Kshs. 10,000/- a month and that he worked until November 2012. He stated that what led to the termination of his services was that he was asking for a raise from the boss. He testified that he

was asked to leave as he would incite the others to seek a raise like him. He testified that he asked his boss Tina Chepkurui who was the owner of the business for the raise. He testified that he worked from Sunday to Sunday and reported at 7.00 am and worked till 9.00 pm. He stated that other than the salary for the month he had worked he was not given anything else such as notice, service or overtime. He testified that he used to go on leave and upon dismissal sought legal assistance. His lawyer wrote a demand letter seeking the dues he now sought. He stated that he sought the assistance of the Court to recover these dues.

4. In cross-examination by Mr. Onyango, counsel for the Respondent, the Claimant testified that he was terminated when he sought a salary increase. He was asked why he had not pleaded this and he stated that he had not stated the cause of his termination in his claim. He testified that he was working as an employee and that he was given someone to train and show them how to work.
5. The Respondent called Tina Juliet Chepkurui the managing director of the Respondent. She testified that she knew the Claimant who had worked for the Respondent, a fast food restaurant selling chips, chicken and sausages in the name Kenchic Inn. She stated that the Claimant was a cook and he joined in April 2009 and left in November 2012. She testified that the Claimant had for some time claimed that since he came from Ukambani, he had come from a lineage of witchcraft and that he was dangerous. She testified that she used to overhear the conversations as these were in the kitchen not far from where she sat when she was at the restaurant. She testified that she had an employee named Veronica who died of breast cancer and another who died abruptly in a road accident. She testified that occasionally the employees would have tiffs and she would mediate. She stated that the Claimant begun saying that he is the one who was responsible for the deaths. She did not agree as the death of Veronica was due to cancer and not due to black magic. The death of the cashier was due to overspeeding. She testified that unfortunately her staff took these things to heart. She stated that she sent her cook to Nakumatt Prestige and he almost got hit by a Citi Hoppa and on return said the Claimant wanted to finish him. She testified that this took a toll on their service and the staff wanted to leave and she called the Claimant and told him that until then the matter had not had any effect on the business but because the staff wanted to leave she had to let him go. She paid him notice as the Respondent dealt with food which is very sensitive. He was paid for the month though he never worked in the month and that the payment was in presence of other employees. She testified that the Claimant worked from 9.00am to 7.00pm 6 days a week with an annual paid leave. at 9.00am the staff would begin cleaning and preparing food. She offered breakfast, lunch and dinner to her employees and they had 3 breaks during the day. She testified that there was no overtime due. She stated that she went to the labour office to ask the Labour Officer what was expected on her side in respect to terminal dues.
6. In cross-examination by Mr. Musili, counsel for the Claimant, she testified that she went to the Labour office to seek help and confirmed that she had not attached any documents on the same. She testified that she paid the Claimant salary in lieu of notice. She stated that she had heard him severally speak of black magic. She testified that she did not know this thing called black magic or witchcraft and did not believe in it. She testified that it was a question of the loss of one employee versus 3 employees. She called the Claimant and advised him she would dismiss him.
7. In re-examination she testified that she paid one month in lieu of notice in cash. She stated the 3 employees had threatened to quit and she would not be able to sustain the business. She testified that it was not humanly possible to work every day for 4 years. That marked the end of oral testimony.
8. The Claimant filed his submissions on 18th May 2015 while the Respondent filed its submissions on 26th May 2015. The Claimant submitted that he worked as a chef/cook earning a salary of Kshs. 10,000/- at the time of dismissal. He submitted that he was dismissed for agitating for higher pay and that the Respondent, being a fast food joint, used to operate 7 days a week and that he worked 7 days a week. He thus submitted he was entitled to overtime pay of Kshs. 162,000/-. The Claimant submitted that guided by Section 10 (7) of the Employment Act, the Respondent had failed to prove the hours of work. He further submitted that his employment was unfairly and unprocedurally terminated in total violation of Section 41 and 45(2) of the Employment Act. The

Claimant submitted that the Respondent's director called the Claimant and at the meeting the only purpose was to convey the decision to terminate the Claimant without affording him an opportunity to defend himself. He submitted that this was in express violation of Section 41 of the Employment Act. On the issue of unlawful and unfair termination the Claimant relied on the case of **Harrison Meshack v Mareba Enterprises Ltd [2013] eKLR**.

9. The Respondent's submissions were to the effect that the Claimant was dismissed on account of continuous threats to co-workers that he would use powers of black magic to harm them as he had harmed the 2 workers who had tragically died while in the employ of the Respondent. The Respondent submitted that it's witness testified that the workers threatened to resign altogether and she decided to let go of the Claimant by paying him Kshs. 10,000/- in lieu of notice. The Respondent submitted that in line with Section 41 of the Employment Act the Respondent's managing director had made an effort to talk to and explain to the Claimant. The Respondent submitted that the Claimant had a right to have another worker present but he did not request for one to be present and that all along though, the other workers of the Respondent were present. The Respondent submitted that in line with Sections 43 and 45 of the Employment Act, it had proved that the reason for the termination was valid and justifiable in the circumstances. The Respondent thus submitted that the termination was proper and effected within or as envisaged under the law and as per Sections 45 (2)(b) & (c) of the Act the reasons were fair as they related to the employees conduct and was done in accordance with fair procedure. The Respondent submitted that the Claimant was not entitled to the remedies sought.

10. The case can be surmised to be one on unlawful termination. The Claimant asserts that he was dismissed without adherence to the provisions of the Employment Act. The Respondent on its part asserts that the dismissal was in accord with the law. The employment of the Claimant is not disputed. It is alleged that the Claimant was one given to engage the powers of the occult to the detriment of his co-workers. It was his claim that he was dismissed for agitating for higher pay. This was not pleaded in his claim and is apparently an after thought. He did not file a reply to the Respondent's defence and it can be surmised that he knew the reason for termination was as stated by the Respondent. The Claimant had been heard threatening the other employees with dire consequences on account of his prowess in black magic. As much as black magic is hogwash, this led to apprehension on the other staff who were gullible and believed that the Claimant had such powers. The Claimant was dismissed and was stated to have been paid notice after the end of the month. Neither the Claimant nor the Respondent pleaded the exact date of dismissal leaving it open to guesswork as to when in November the Claimant's services were terminated. It is alleged the Claimant received the notice pay at the end of November.

11. Section 41 of the Employment Act 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 the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

12. Section 41 sets out what has now become the procedural fairness. The Court in assessing if there was procedural fairness would subject the facts to the test in Section 41. When the Claimant was summoned by the Respondent's director and advised he would have to leave, did this amount to procedural fairness? The Section provides that the employee would be provided with reasons for the termination and at the time of receiving the reasons the employee is entitled to have an

employee of his choice or a union representative present during the explanation. The Claimant was told he was being dismissed and the reason was made clear to him. He did not however have an employee of his choice present at the time of the explanation. Was this unfair? In the circumstances of the case, the Claimant could not anticipate this safeguard as the other employees were terrified of his purported powers of darkness. The Respondent made the explanation and that sufficed for purposes of the law. The Respondent has provided reasons for the termination and these were justifiable in the circumstances. Be that as it may, it is clear the Respondent did not pay terminal dues. The Claimant denied receipt of notice pay. Notice pay is payment made in lieu of notice and the fact that the Claimant was told of the termination and let to go home for some time before his payment there was no payment in lieu of notice. It is not contemplated that payment in lieu of notice would be paid after service of one month. The Respondent had no proof of payment of the sums due. The Claimant is entitled to receive the Kshs. 10,000/- he was entitled to as notice. He also claimed severance pay and this was at the rate of 15 days for each year worked which comes to Kshs. 5,000/- a year. He served for 3 years taking his emoluments to Kshs. 15,000/- under this head. The Claimant made a claim for overtime. It is not possible for him to have been at work 7 days a week every week until the periods he would go on annual leave. It is also not feasible that he reported to work and worked from 7.00am to 9.00pm each day. It was the testimony of the Respondent's witness that the establishment only served lunch and dinner. It therefore would not be possible that the Claimant, who was a chef, would be at work from 7.00am. In the premises I find that the claim on overtime is unmerited. There is no letter or document showing he sought overtime pay and he did not disown the payment slip that was produced as an exhibit. If indeed there was a payment due, would he not have raised it somewhere in the 3 years?

13. The upshot of the foregoing is that the Claimant is successful in part and is entitled to the following:-

- a. Kshs. 10,000/- as notice pay
- b. Kshs. 15,000/- as service
- c. Certificate of service.

14. Each party will bear their own costs for this suit.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of July 2015

Nzioki wa Makau

JUDGE