



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1877 OF 2014

GIBSON MAWEU.....CLAIMANT

VERSUS

HOTEL AMBASSADEUR NAIROBI.....RESPONDENT

JUDGMENT

1. The Claimant's memorandum of claim was filed 23rd October 2014 and sought resolution of an issue framed as wrongful and unfair termination of the Claimant's services and failure by the Respondent to pay terminal benefits. The Claimant averred that he was employed by the Respondent on 9th November 2003 as a waiter at a salary of Kshs. 4,500/- which was increased to Kshs. 8,500/-. He averred that he served the Respondent with loyalty and diligence until 25th September 2012 when the Respondent wrongfully and unlawfully terminated the services of the Claimant. The Claimant averred that the Respondent failed to pay his terminal dues which comprised of salary in lieu of notice Kshs. 8,500/-, accrued leave for 2 years Kshs. 11,900/-, 15 days worked in June 2011 Kshs. 4,200/-, holiday worked in June Kshs. 284/- and long service employee allowance Kshs. 22,677/-. He also sought compensation for wrongful dismissal to a maximum of 12 months wages Kshs. 102,000/-, costs of this suit, interest and any other relief the court may deem just.

2. The Respondent filed its memorandum of reply on 17th February 2015. In the defence, the Respondent isolated the issues as termination of probationary contract and non-payment of employee's dues and accrued rights. The Respondent averred that the statement of claim was baseless, frivolous, vexatious, does not disclose any or reasonable cause of action against the Respondent and is indeed an abuse of the Court's process. The Respondent averred that at the time of termination the Claimant was serving as a head waiter but strictly on a probationary contract. The Respondent averred that the Claimant was not wrongfully dismissed as alleged and that he was not entitled to any of the reliefs sought in his claim. The Respondent averred that the hotel had come under new management sometime in the month of November 2011 and that the Claimant had previously been terminated by the old management and it was the new management that re-employed the Claimant sometime in March 2012 on a probationary contract. The Respondent averred that the Claimant's terminal dues had been paid by the previous management. The Respondent submitted that the Claimant's contract was governed by Section 42 of the Employment Act and that the Respondent exercised the power granted under Section 42(4) of the Employment Act 2007. The Respondent averred that at the time of termination of the contract, the Claimant was informed of the reasons for the termination vide a probation report dated 25th September 2012 and the report was damning of the Claimant's tenure as head waiter as there was rampant theft by waiters, malpractices and overcharging of customers. The Respondent averred that the probationary contract was terminated as the Claimant did not meet the expectations of a head waiter. The Respondent averred that the Claimant's suit

was an attempt at unjust enrichment and that it had complied with the provisions of the Employment Act. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant testified on 31st July 2015 and stated that he was not given notice and that he just received a letter at the end of the day. He stated that he was not allowed to return to work and therefore he sought help at Kituo Cha Sheria. He testified that he had worked for 9 years and it was only then that they said he was not a good employee. He thus sought the grant of prayers in his memorandum of claim and stated that if he had been doing his job badly he would have been dismissed in 3 months. He urged the Court to note the cost of living and the fact that he had to travel from Kibwezi to Nairobi at a cost of 1,400/- each time. He sought notice, service for the years worked and that the total claim came to Kshs. 149,611/-.

4. In cross-examination by Counsel for the Respondent, he testified that he was employed from 2003 till 2012. He was shown a letter he had produced dated 16th June 2011. He testified that he was told to go payroll and was asked to sign the letter and return at 2.00pm. He stated that he could recall the letter. He was also referred to the recommendation letter which showed he was employed till 15th June 2011. He testified that he was employed from September 2003 till June 2011. He stated that he signed and was to return at 2.00pm to collect the money and he was not allowed in. He testified that he was later called by Manager Leah Wambugu and worked for some time and his dismissal was by her successor. He testified that when he rejoined the Respondent, Leah was General Manager at the time and that he was recalled 3 months after dismissal. He stated that he was told the time he had been away would not be considered as a time of absence. He testified that he had no appointment letter either for the first hiring or the second engagement.

5. The Court sought to clarify the employment status and the Claimant testified that he was employed, he left then joined the Respondent again after 3 months.

6. Mr. Otieno, counsel for the Respondent did not call any witness and wished to rely on the witness statement on record and proposed to file submissions. Neither the Claimant nor the Respondent filed submissions and the decision is thus rendered in the absence of final submissions by the parties.

7. The Claimant was an employee of the Respondent. No contract was exhibited either by the Claimant or the Respondent. His employment application form was exhibited as was the Respondent's Rules and Regulations to be observed whilst on duty. The Claimant attached a document headed FINAL DUES dated 16th June 2011. The letter had indicated the sums due to the Claimant for the period of service of 8 years 8 months. The Claimant's services were terminated on 25th September 2012 and the Respondent submitted a document it termed as the end of probation report. The report was to the effect that the management had been observing how the Claimant had been performing his duties and stated that under the Claimant's tenure, theft by waiters had occurred, guests were overcharged and service had not improved as a result of malpractices of staff under his watch. He was advised that he did not meet the expectations of management as head waiter. The Respondent advised that the last working day would be 25th September 2012 and that he would be paid salary for that month.

8. The Claimant was stated to be on a probationary contract ostensibly from March 2012. Probationary contracts are dealt with under Section 42 of the Employment Act. Section 42(4) provides that in terminating a probationary contract notice of the termination of the probationary contract is 7 days notice or payment in lieu of notice.

9. The Respondent submitted in its pleadings that the Claimant's contract was terminated during probation and that the provisions of Section 42 and in particular Section 42(4) of the Employment Act applied. The law on this aspect of employment has been expounded by decisions of the Court. In the case of **Danish Jalang'o & Another v Amicabre Travel Services Ltd Cause [2014] eKLR** Rika J. held that procedural fairness does not apply in the case of employees on probation. In the case of **Mercy Njoki Karingithi v Emerald Hotels and Resorts Limited [2014] eKLR** Radido J. held that protections against unfair and unlawful dismissal under Section 43 and 45 of the Employment Act are available in full to

employees on probation. I agree with my brother Radido J. that even where a contract of probation is terminated there must be a proper termination of the contract. There is no proof that the Claimant was given notice or paid in lieu of notice. It is curious that the Claimant was blamed for poor management decisions in hiring people who lacked integrity or were incompetent. If theft by other wait staff occurred, that was surely the problem of poor management in recruiting thieves instead of waiters. It was also inconceivable how there could be overcharging if the hotel was run competently. The bills have elements that attract VAT and there ought to be an ETR receipt which is never issued by the waiter but by the cashier. It would indicate the Respondent also had incompetent cashiers who could not properly bill clients. That surely was not the Claimant's responsibility. The Claimant was in the letter of 16th June 2011 stated to have proved beyond doubt to be a hard worker, diligent and very dedicated to his duties. He was described as being a very industrious person and performed his duties with dedication and diligence. Leah Wambugu's statement filed alongside the Respondent's memorandum of reply was therefore dishonest to the extreme. I find there was no reason for the termination and the Respondent merely looked for an excuse to dismiss the Waiter upon whom it had heaped accolades on 16th June 2011. The Regulation of Wages (General) (Amendment) Order 2012 provided the salary per month for a waiter to be Kshs. 10,563.60. The Claimant was therefore grossly underpaid.

10. Section 12(3) of the Industrial Court Act, 2011 provides as follows:-

12 (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders —

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;?

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

11. The Employment Act provides that the employer shall have a burden to discharge in respect to the termination of any contract to which a dispute emerges. Section 43 of the Employment Act provides as follows:-

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

12. Section 74 of the Employment Act places a burden on the employer to keep records. No records were availed in respect of leave and as such there was no counter to the Claimant's claim on the leave not

taken.

13. There were no reasons availed to Court why the contract had to be terminated as pointed out above. The Court therefore finds and holds that the Claimant was dismissed unfairly and without basis in terms of Section 43 of the Employment Act. The upshot of the foregoing is that the Claimant succeeds in his suit against the Respondent and I award him the following reliefs:-

- a. One month salary in lieu of notice Kshs. 10,563.60
- b. Kshs. 31,690.80 as compensation.
- c. Kshs. 12,381.60 as salary underpayment for 6 months.
- d. Leave pay Kshs. 5,281/-
- e. Costs of the suit assessed at 25,000/-
- f. Certificate of service in terms of Section 51 of the Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this **8th** day of **October 2015**

Nzioki wa Makau