



REPUBLIC OF KENYA  
 IN THE INDUSTRIAL COURT AT NAIROBI  
 CAUSE NUMBER 1357 OF 2010

**BETWEEN**

SAMUEL GACHOMO CHEGE

.....  
 CLAIMANT

**VERSUS**

JESSE KANGETHE KARUMA

MR. THIONGO t/a

ROOF TOP  
 OWNER.....  
 ..... RESPONDENT

*Rika J*

*CC. Leah Muthaka*

*Samuel Chege Gachomo the Claimant acting in Person*

*Mr. Karanja Kangiri instructed by Karanja Kangiri & Company Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant instituted the proceedings against the Respondents whom he alleges are his former employers. The Statement of Claim was filed on 1<sup>st</sup> November 2010. The Respondents filed their Statement of Reply on 16<sup>th</sup> December 2010. The Claimant gave evidence on 7<sup>th</sup> February 2012, and called one witness Tirus Mwangi who gave evidence on 25<sup>th</sup> March 2013 when the Claimant’s case closed. Jesse Kangethe Karuma testified for the Respondents on the same date, 25<sup>th</sup> March 2013. The dispute was last mentioned in Court on 3<sup>rd</sup> June 2013 when Parties were advised Award would be delivered on notice.

2. Gachomo told the Court he was employed by the Respondents on or around 3<sup>rd</sup> November 2008 as the Manager of Respondents Pub, based at Thika Town, operating in the name and style of Roof Top. He

started on a monthly salary of Kshs. 14,000. He was employed by word of mouth. The Respondents terminated the Claimant's contract of employment on 13<sup>th</sup> June 2008, without reason or notice. He was denied his salaries for the entire months of May, April and part of June 2010, amounting to Kshs. 42,540. He was denied severance pay of Kshs. 11,250. Kshs. 4,000 was deducted from his salary every month, totaling Kshs. 28,000 by the time the Claimant left. He was not paid house rent allowance at 15% of his basic salary, for 18 months, amounting to Kshs. 40,500. Gachomo also urges the Court to order the Respondents to compensate him for unfair termination, in the equivalent of 12 months' salary calculated at Kshs. 180,000. He prays for costs, interest and any other remedy the Court may find suitable to grant.

3. Cross-examined, the Claimant stated he was employed by Jesse Karanja and his Partner John Ndung'u. He was employed on 3<sup>rd</sup> November 2008. He was not paid salaries accumulated at Kshs. 42,500. There was a disagreement between the two Partners. He used to buy stocks on his own and manage the business. He was the Accountant. He kept the business records. The premises belonged to Jesse. After the Partners disagreed, Jesse asked the Claimant to continue paying the rent for the premises at Kshs. 35,000 per month. The business did not belong to the Claimant. He did not sue John Ndung'u. He intended to call Ndung'u as his witness. He last worked on 13<sup>th</sup> June 2010, but did not prepare the last accounts. He had some information the business would be sold. Roof Top is no longer running. The name changed. Thion'go owns the business. The Claimant could not tell if Jesse had any stake in the new business.

4. The Claimant testified that some employees stole Kshs. 17,732 from the Respondents at the time when the Claimant was the Manager. On 17<sup>th</sup> May 2010, the Claimant indicated on the accounts that his salary was Kshs. 30,000 per month. He was claiming this as of the given date. He left on 13<sup>th</sup> June 2010. He was not supposed to pay what was stolen by the employees. The stolen amounts should have been deducted from the employees. It is not true that the Claimant owes Jesse any money. It was untrue to say the business collapsed due to the Claimant's incompetence. He did not have any room within the premises for accommodation. He did not know what compensation was about, the claims having been put together for the Claimant with the assistance of Kituo Cha Sheria. The Claim is not presented out of malice the Claimant harbours against Jesse.

5. Tirus Mwangi told the Court he is a first cousin to the Claimant. He used to visit the Claimant when the Claimant was working at Roof Top between 2009 and 2010. The witness was aware the Claimant left employment, but did not know the circumstances of the termination of employment.

6. The Respondents hold there was no contract of employment between them and the Claimant. The Claim has no foundation. He was in control of the business. He bought the alcohol stocks; kept records; paid all employees including himself; hired and fired employees; and ran the day to day business activities. He mismanaged the business, leading to losses, and eventual closure. The Claimant advised the Respondents to wind up, prepared the final accounts and handed over to the Respondents. He paid all the dues owed to other employees as well as to himself.

7. Jesse testified Gachomo was his business Partner. The Claimant was running the business and paying himself Kshs. 14,000 per month as salary. After one year, the Claimant was unable to pay himself, and the business collapsed. Jesse closed down the business. Customers were taking drinks without meeting their bills. The arrangement was for the Claimant to pay himself and pay rent from the business he was running. He was unable to pay rent and pay himself. He was unable to pay himself for two months. He conceded customers took off without paying a bill of Kshs. 17,732. The Claimant should pay this amount to Jesse. In the end, the Claimant was not dismissed, but left after the business collapsed.

8. Questioned by Gachomo, Jesse stated John Ndung'u was his former Partner. John's wife was Gachomo's supervisor. It was not true that Jesse would take away money collected from the business. It was not true that Jesse raised the Claimant's salary to Kshs. 15,000. The Claimant was not honest, and Jesse assigned banking to someone else. Thion'go was not the owner of the business, and the premises did not belong to Jesse's family. If the Claimant managed the business well, Jesse would have raised the Claimant's salary. Jesse gave the full mandate to the Claimant. Jesse did not even know who the Claimant employed in the business. It is not true that Jesse would direct his buddies to the business for free beer.

The Respondent urges the Court to reject the Claim.

*The Court Finds and Awards:-*

9. Was Gachomo an employee or business partner of the Respondents? The Court is satisfied the Claimant was an employee of the Respondents, within the meaning of the terms 'employee' and 'employer,' defined under Section 2 of the Employment Act 2007. The business was owned by the Respondents. Jesse testified he paid the Claimant or authorized the Claimant to pay himself Kshs. 14,000 per month from the business proceeds. Jesse's previous partner was John Ndung'u, whose wife supervised Gachomo. Jesse controlled the business, and assigned duties, including the banking duties. He testified on cross-examination that he was ready to raise the Claimant's salary, if the Claimant managed the business well. Jesse determined the rates payable to employees.

10. The donation of management prerogatives by Jesse to Gachomo did not result in Gachomo becoming a business partner. The authority given to Gachomo to recruit employees, supervise them and pay them did not make him a business partner and a co- employer; it was an authority donated by the owners of the business, to whom the Claimant remained answerable. Real decision making power, control of the tools of trade and the finances, remained in the hands of the Respondents.

11. The Respondents do not deny in their evidence that the Claimant was not paid his salary for April, May and June 2010; it was instead explained that the Claimant failed to manage the business properly, and failed to pay his salaries and rent. It is the duty of the employer to pay salary to the employee. This is not a duty that is dependent on the performance of the business. It is not variable form of pay, like commissions or bonuses; it is an invariable form of pay, which is paid by the employer. The Respondents owned or leased the premises from which the business was conducted. They were in all aspects the employers of Gachomo. The Claimant conceded Kshs. 17, 732 belonging to the business was lost under his management. This is an amount that the Respondents should simply have deducted from the Claimant's final dues. Instead, the Respondent's opted to slug it out, raising a 'business partnership' argument that was discounted by the evidence of Jesse. There is common evidence that the business, for whatever reason, closed down or was taken over and rebranded by new owners. The position of Manager held by Gachomo was rendered redundant, and in the view of the Court his claim for severance pay is merited and allowed as prayed. Similarly, his claim for unpaid salaries is well-grounded in fact and law and is granted as prayed. He was entitled to notice of one month, or one month salary in lieu of notice, which the Court allows as prayed in the Statement of Claim. The Respondents did not answer in their evidence to the claim for Kshs. 28,000, alleged to comprise monthly deductions of Kshs. 4,000 made on the Claimant's salary. The claim is allowed. The claim for house rent allowance was not established. The Claimant did not dislodge the explanation of the Respondents that the Claimant was afforded a room within business. This is a common arrangement in hotels and catering establishments industry. An employee who has the benefit of such accommodation has no reason to demand house rent allowance.

12. Having found that there was a collapse of the business, the Court finds the claim for unfair termination unwarranted. The Claimant was the business Manager, and entrusted great latitude in running the business. He contributed to the collapse of the business, and therefore in the termination of his contract of employment. There was a substantive economic reason for the termination, and the Claimant, as Manager was privy to the state of the business. He is said to have advised closure of the business. He did not challenge this statement made by Jesse. It

would be difficult to characterize termination as unfair in the circumstances. The claim for

compensation is rejected. In the end the Court Orders:-

- a. **Termination was on account of closure of business and justified;**
- b. **The Respondents shall pay to the Claimant one month salary in lieu of notice at Kshs. 15,000; unpaid salaries at Kshs. 42,540; severance pay at Kshs.11,250; and deductions made from the Claimant's salary of Kshs. 28,000- total Kshs. Kshs. 96,790;**

- c. ***The Respondents shall deduct the loss of Kshs. 17,732 occasioned the business under the Claimant's management;***
- d. ***The total sum of Kshs. 79,058 shall be paid to the Claimant by the Respondents within 30 days of the delivery of this Award;***
- e. ***No order on the costs***

Dated and delivered at Nairobi this 21<sup>st</sup> day of January 2014

James Rika

Judge