



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 242 OF 2013

MOSES AGUGOCLAIMANT

VERSUS

METRIC ANNEX HOTELRESPONDENT

J U D G M E N T

BACKGROUND

This is a case based on unfair termination and non payment of terminal dues amounting to ksh.601,140. The case arose from the dismissal of the claimant by the respondent on 9/5/2013 without any reason and due process.

The respondent has denied liability and averred that the claimants dismissal was for reason of gross misconduct. The case was heard on 30/10/2013 and 18/11/2013 when the claimant testified as CW1 and Mr. Stephn Rachuonyo testified for the defence as Rw1.

CLAIMANT'S CASE

CW1 stated that he worked for the respondent from 11/10/2009 to 9/5/2013 but the contract was verbal. He started with a salary of ksh.4800 and ended at ksh.6656. Initially the salary was paid by hand but later changed to payment through his bank. On 9/5/2013, he reported to work as usual at 8.00am and at 10.00am he went to collect keys from the receptionist for purposes of cleaning the rooms after the guests left. While he was at the reception as he was collecting the key from a guest who was about to go with the key, the director saw the CW1 and called him and asked why he was talking with the quest. She then ordered the CW1 to change clothes and go home. He tried to explain the circumstances but she could not listen to him

The RW1 tried to intervene but she insisted that CW1 had to leave. He was not given any letter for dismissal even after returning the following day. CW1 then reported to the Labour Officer who summoned the respondent but she did not honour the summons and never responded to the letter. The respondent never also replied to the demand letter from the claimants lawyer. He prays for one month salary in lieu of notice, pay in respect of holidays worked, salary for 9 days worked in may 2013, leave on pro-rata basis for 2012/2013, under payment of salary of ksh.6500 instead of the minimum wage of ksh.9000 arrears of house allowance for 3 years, 12 months, salary for unfair termination and certificate of service. He denied prior warning or hearing before dismissal. He denied ever being served with any letter by the respondent for any purposes.

On cross examination by the defence counsel, he admitted that he agreed to be paid ksh.4800. He further admitted that he did not know what was the minimum salary. He contended that he was promised ksh.170 per day as housing allowance but it was never paid to him. He also confirmed that he never wrote any letter to demand for his house allowance. He confirmed that his NSSF was remitted from 2010 after he complained orally to the respondent. He also confirmed that he was a room steward and nor involved in booking guests at the reception. He denied being served with any warning for being found at the reception prior to the dismissal. He confirmed also that he was never given any payslip to show that the salary was consolidated.

DEFENCE CASE

RW1 is the Manager from the respondent. He confirmed that CW1 was a room Steward employed in 2010. His salary was ksh.6500 and the contract was in writing, he added that the salary included housing allowance but all the public holidays were paid at the end of the day. He contended that the claimant had agreed in the above terms.

He further contended that CW1 went for all his leave. He contended that the claimant was dismissed on 6/5/2013 by the Director when she found him at the reception where he was not supposed to be. That he gave CW1 dismissal letter but after reading it he left it at the RW1's table.

He insisted that prior to the dismissal he had given CW1 several verbal and written warnings. He admitted the claim for salary for may 2013 but denied the claim for notice pay because it was a summary dismissal. He denied the claim for under payment alleging that the CW1 never raised any complaint before dismissal. He also denied the claim for house allowance because the salary paid to CW1 was consolidated. He admitted the claim for certificate of service.

On cross examination by the claimant's counsel, he maintained that he did not keep records of payments for holidays worked. He admitted that he never availed to the labour officer the appointment , dismissal and warning letters. He also admitted that the CW1 was never given any payslips but there was a payroll. He admitted that when the Director found CW1 at the reception she just told him to leave and instructed him (RW1) to talk to the CW1 to collect his dues.

After the close of the hearing both parties filed written submissions which the court has considered in this judgment.

ANALYSIS AND DETERMINATION

The issues arising from the pleadings, evidence and submissions are:

- 1. whether the termination of the claimant's employment was unfair.**
- 2. Whether the claimant is entitled to any remedy.**

Unfair termination

Termination is unfair under Section 45 of the employment Act if the reason for the termination is not justifiable or valid and when the procedure followed is not equitable. Equitable procedure requires that an employee is accorded a disciplinary hearing before summary dismissal on an alleged misconduct in line with Section 41 of the Employment Act.

Section 41 of the Act provides that before an employee is dismissed, the employer shall explain the reason for the intended dismissal and then invite the employee to make his defence. During the said hearing, the employee is entitled to be accompanied by an employee or shop floor representative of his choice who shall also be entitled to make his representations. The said provisions does not give the employer any option or discretion.

On the other hand, a justifiable reason for dismissal is one that is valid. It must be either gross

misconduct, poor performance, or incapacity. Section 43 of the Employment Act puts the burden of proving the reason for dismissal on the employer in proceedings like this.

In the present case, the RW1 contended that the Director of the respondent found the claimant at the reception which was not his designated place of work. The CW1 on his part contended that he went to the reception at 10.00 am to collect the keys for the rooms for purposes of cleaning after guests cleared from the rooms. That piece of evidence was not controverted. It was not denied that the claimant had the permission to collect keys from the reception after guests cleared for purposes of cleaning the rooms.

To that extent, the court finds the explanation by CW1 to be rational. Consequently the reason cited for the summary dismissal of the claimant was not only invalid but was also unjustifiable. No evidence was adduced to show how long he had been at the reception before the Director came there, nor has any evidence been adduced to show that he was not collecting keys for purposes of going to clean up rooms.

As regards the procedure for the dismissal, the evidence of the RW1 in re-examination by his counsel summed it well when he said:

“...when the director found the CW1 at the reception, she told him to leave and called me...”

The foregoing explanation confirms that Section 41 of the employment Act was not complied with. There is no evidence that the Director or RW1 ever invited the claimant to any disciplinary hearing in company of a colleague employee of his choice. For the reasons above stated this court is of the considered opinion, and holds that the summary dismissal of the claimant by the respondent was wrongful and unfair.

RELIEFS AVAILABLE

The salary for days worked in May 2013 was admitted in evidence and is awarded being $9/30 \times 6,650 = \text{ksh.}1996.80$. He is also awarded $\text{ksh.}6,656$ being one month salary in lieu of notice. He also gets $\text{ksh.}3,106.15$, being 1.75 leave days $\times 8$ months on pro rata basis.

Lastly he will have $\text{ksh.}79,872$ being 12 months gross salary for unfair termination. The court declines to award the claim for under payment, wages for holidays worked and housing allowance for the reason that the claimant did not raise them before dismissal nor did he do so before the labour office which fixes such minimum terms. It shows that he was agreeable to the payment and the court will not interfere with it. Secondly the alleged holidays worked were not particularized in the claim or supported by evidence. The claimant will however be issued with a Certificate of Service forthwith.

DISPOSITION

Judgment is entered for the claimant against the respondent for payment of:

1. **ksh.91,630.95**
2. **cost and interest at courts rate from date of filing suit.**

Signed, Dated and delivered this 28th day of February 2014

O.N. Makau

Judge