



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 192 OF 2013

WILLIAM MENTA NYAMOKOCLAIMANT

VERSUS

JURGEN FUKS t/a SHAKATAK NIGHT CLUBRESPONDENT

J U D G M E N T

BACKGROUND

The claimant employed by the respondent from 2003 and was summarily dismissed on 1/10/2013. His salary was ksh.16800 per month plus allowances. During his tenure of service he was never allowed off days and even worked during holidays for normal pay. He was dismissed in connection with fake receipts used by clients to illegally enter discotheque in the respondents premises.

He has hereby sued the respondent seeking declaration that his dismissal was wrongful and unlawful. In addition, he prays for payment in lieu of notice, compensation for unlawful dismissal, unpaid off days, public holidays paid at normal rate plus overtime all totaling to ksh.1,129,100. He also prays for issuance of certificate of service, costs and interest and any other relief the court may deem fit to order.

The respondent has admitted that the claimant was her employee since 2003 as Night Club supervisor earning ksh.700 per day. The wage was paid in arrears at the end of the week. The defence contends that on 7/9/2012 fake receipts were found in the floor of the discotheque which were used by the clients to enter the discotheque while the claimant was on duty as the supervisor.

On the same day the claimant was asked to explain the discovery of the fake receipts in the discotheque, but he failed to give a satisfactory answer and the matter was reported to the police. The police arrested the claimant for investigation and for over 2 weeks the claimant absented himself from work prompting the respondent to dismiss him for deserting duty. The respondent admitted the claimants' claim when he secured a demand letter through his lawyers. The admitted claim included the days worked (ksh.2800), one month salary *exgratia* (Ksh.21000/), 52 days pay in lieu of unpaid off days (ksh.36,400), 4 public holidays worked but unpaid (ksh.5600) less NHIF (320), NSSF (200) and PAYE (13,432) leaving a net of ksh.52847. The said net pay was deposited with labour office on 14/5/2013 for collection by the claimant under Section 18(5) (a) of the Employment Act.

The parties never gave any testimonies but opted for filing of written submissions which the court has carefully considered.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings and submissions are:

- a. **whether the dismissal of the claimant was wrongful and /or unlawful.**
- b. **Whether the claimant is entitled to the reliefs sought.**

Was the dismissal wrongful and/or unlawful

Dismissal is wrongful if it is done in breach of a contractual obligation to serve notice. On the other hand, dismissal is unlawful or unfair if it is done in breach of statutory obligation relating to the procedure or justification of the reason for dismissal. If the employer cannot justify the reason for the summary dismissal, even if fair procedure was followed it renders the dismissal both unfair and wrongful.

In the present case the defence admits that she dismissed the claimant on 1/10/2012. There is no termination letter served on the claimant to show the reason for the dismissal. Paragraph 10 of the defence herein states that the reason for dismissal was desertion of duty contrary to Section 44 of the Employment Act. The uncontested evidence by the claimant however is that the dismissal was on ground of negligent performance of duty and commission of criminal offence against the respondent. That the dismissal was done after the claimant declined to sign a settlement agreement to amicably end his services in exchange for termination of criminal charges against him.

To that extent, the employer has failed to prove the reason for dismissing the claimant from his services. Secondly, the respondent has failed to prove that she complied with Section 41 of the Employment Act which requires that a disciplinary hearing be accorded to the employee before termination of his service. The respondent has contradicted herself by pleading that she gave a hearing to the claimant to explain the issue of fake receipts but dismissed him without hearing on ground of absenteeism from duty. The court finds that the allegation that the hearing could not have been possible because the claimant was away as baseless because there is no evidence to show that he was not reachable. The respondent has not contradicted the claimant respecting the settlement Agreement (WN-3) dated 1/10/2012 which had he signed possibly the matter could have ended outside court.

In view of the foregoing, the court finds that the procedure followed to dismiss the claimant was in breach of Section 41 of the Employment Act and therefore unfair within the meaning of Section 45 of the said Act. Consequently, due to lack of valid and justifiable reason for dismissal in addition to violation of Section 41 of the Employment Act the dismissal of the claimant without prior notice under Section 35 read with Section 37(1) (a) of the said Act rendered the said dismissal also wrongful. Section 37(1) (a) provides for the conversion of casual employment to a term contract where the employee is engaged for a period or continuous working days of one month in aggregate.

RELIEFS AVAILABLE

In view of the courts findings above, the claimant is entitled under Section 49 of the Employment Act

- a. **one month salary in lieu of notice. The defence computed the amount at ksh.21000 and deposited the same with the labour office. The court however awards him kshs.16800 only as pleaded in the suit.**
- b. **12 months gross salary for unfair dismissal being Kshs.252000 but the court awards him ksh201,600 as pleaded in the suit.**
- c. **4 off days per month for 3 years prior to dismissal. Stretching back the period to 10 years would be to aid an indolent party and also tantamount to entertaining time barred claims. That means that he will get 4 days X 12 months X 3 years X ksh.700 per day = Ksh.100,800/.**

The prayer for holiday was not properly explained. In the absence of particulars of the alleged holidays, the court will only award what the defence admitted being 4 public holiday assessed at ksh.5,600/.

In addition to the foregoing the claimant prayed for any other relief which the court deems fit. The court awards the claimant Kshs.2800 being salary for days worked and not paid. The said sum was pleaded under paragraph 17 of the defence and the money deposited with the labour officer. The above award shall accrue interest at court rates from the date of dismissal until payment in full less statutory deductions. The claim for overtime was not proved and is disallowed.

DISPOSITION

In view of the foregoing, judgment is entered for the claimant against the respondent as follows:

- a. **The dismissal of the claimant from the respondent was wrongful and unlawful.**
- b. **The respondent is ordered to pay to the claimant ksh.327,600/ plus interest at courts rate from 1/10/12.**
- c. **the respondent to issue claimant with certificate of service.**
- d. **The claimant will have costs and interest.**

Orders accordingly.

Dated, Signed and delivered this 24th day of February 2014

O.N. Makau

Judge