



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 71 OF 2013

JOSEPH GIKARU KIGONDU.....CLAIMANT

-VERSUS-

STEM HOTEL LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th March, 2014)

JUDGMENT

The claimant **Joseph Gikaru Kigundu** filed the memorandum of claims on 25.03.2013 through Oumo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **One month pay in lieu of notice being Kshs.7,269.00.**
- b. **Underpayment of Kshs.92,765.00.**
- c. **Overtime Kshs.674,397.70.**
- d. **Annual leaves for 2004, 2007 & 2008.**
- e. **Compensation under section 49 (1) (c) of Employment Act, 2007 Kshs.87,228.00.**
- f. **Total claim (a) to (e) above of Kshs.873,888.50.**

The respondent **Stem Hotel Limited** filed the memorandum of response on 24.04.2013 through Orina & Company Advocates and prayed that the claimant's cause be dismissed and the claimant is condemned to pay the costs.

The case was heard on 2.12.2013 and on 10.02.2014. The claimant (**CW1**) and his former workmate Enock Mungai Kinyanjui (**CW2**) gave evidence to support the claimant's case. The respondent's 1st witness was the respondent's operation manager Kelvin Karanja Thuku (**RW1**) and the 2nd witness was the respondent's employee Stephen Kiarie.

The claimant was employed by the respondent as a cook on 1.6.2003 and later promoted to serve at the butchery department. The claimant served diligently for about 8 years until, like all other concerned staff, the claimant received the letter dated 23.11.2011 being exhibit **JGK III** on the memorandum of claim. The letter stated as follows:

“Attention: TO ALL THE STAFF MEMBERS OF THE STEM HOTEL NAKURU

REF: EMPLOYMENT REQUIREMENTS

To all staff members at Stem Hotel, in keeping with the management's vision and goals and in order to assist with restructuring of the organization for the year 2012 and beyond, I take this

opportunity to request that each and every staff member submit the following by December 5th 2011.

(The only exempted staff is anyone who joined the hotel in the last 3 months and has met all the listed requirements)

- **An application letter for the position one is currently holding.**
- **Submit all your credentials (CV & Certificates)**
- **A copy of your National Identity Card.**
- **One Passport Size Picture.**
- **A letter of good conduct (by latest March/1st/2012.**

Thank you very much for your cooperation.

Margaret G. Thuku

Director”

The claimant declined to apply for the position he was holding because in his testimony, he was already in employment and he raised his concerns with the respondent. On 22.12.2013, the claimant testified that he was verbally told by the respondent's manager Philip Njoroge to quit employment. The manager told the claimant that the quit directive was as per the instructions of the respondent's directors and he was to report back in January, 2012.

The claimant testified that when he reported back to the respondent in January, he was given the termination letter dated 29.12.2011 being exhibit **JGK V** on the memorandum of claim. The letter addressed to the claimant stated that the claimant had absconded duty on 22.12.2011 and engaged in insubordination by failing to comply in submitting his CV to enable the management to streamline the employment records and updating in the restructuring operation in accordance with labour laws and regulations of 2007. The letter stated that the claimant had thereby committed a very serious offence and accordingly, the respondent's management had been left without an alternative except to dismiss the claimant's contract forthwith after absenteeism for more than 8 consecutive days.

After the termination, the claimant was paid Kshs.4,000.00 being the salary for the 22 days worked up to 22.12.2011. The claimant reported a dispute to the labour officer but there was no amicable solution. He decided to file the suit.

The claimant testified that in 2009, he worked from 7.30 am to 11 pm without lunch break and he wrote to the management the letter dated 30.12.2009 being exhibit **JGK1** for the respondent to consider the polite request to pay the relevant overtime. The claimant's testimony was that he received no response to his request. The claimant in cross-examination admitted that he had no evidence for the overtime as claimed and that the claimant had not required the respondent to produce in court the attendance register that the claimant testified to have been in place.

CW2 testified that he authored exhibit **JGK IV** in his capacity as the worker's representative and submitted it to management confirming that the employees named therein including the claimant had been terminated effective 22.12.2011. CW2 testimony was that the management received the note and thereafter asked the persons named therein to leave the respondent's premises as they were to quit employment.

RW1 testified that the claimant was last employed as a butcher-man in the butchery. The management understood that exhibit **JGK IV** meant that the named persons who included the claimant were going to abscond and they had opted to leave employment because they did not want to apply for the jobs they were performing and to submit the employee details as requested by the respondent.

RW1 further testified that the request for employee details and reapplication for employment had become

necessary following the demise of the respondent's Managing Director Stephen Thuku and the process was about staff audits including constituting employee records which were missing. There were 88 employees in place and they all complied except those listed in exhibit **JGK IV**. RW1 further submitted that the claimant would not have lost the years served by applying and submitting the documents as requested.

RW1 further testified that the claimant never worked overtime as alleged, he worked from 8.00 am to 5.00 pm on weekdays and 1.00 pm to 10.00 pm on weekends with 2 off days every week. At termination, the claimant's salary was Kshs.7,269.00 per month. RW1 stated that the claimant's alleged written request for payment was never received by the respondent as it did not bear a receipt stamp.

RW1 also testified that without records, he could not tell whether the claimant was entitled to annual leave as claimed. RW1's further testimony was that the claimant was entitled to full monthly pay for December, 2011 because he had already worked for over 15 days. The witness did not know if the claimant had been paid for the full month as he needed to refer to the records but did not have the relevant documents. He confirmed that there was a check-in and check-out register but which was not produced in court. The witness further testified that the claimant was never accorded due disciplinary procedure before the termination.

RW2 was in the list of staff in exhibit **JGK IV**. His testimony was that the workmates listed in exhibit **JGK IV** were claiming pay for the years served prior to reapplying for the jobs they held as required by the respondent. He abandoned the claim and resumed employment with the respondent. It was his testimony that all staff worked from 8.00 am to 5.00 pm.

The issues for determination are two:

- a. **Whether the termination was unfair.**
- b. **Whether the claimant is entitled to the remedies as prayed for.**

For issue No. 1, it was submitted for the respondent that the claimant absconded duty after submitting the notice in exhibit **JGK IV** to signify he had terminated his employment. It was submitted that the claimant terminated his employment before the formal termination on account of absence for 8 days as per the termination letter of 29.12.2011. For the claimant, it was submitted that the claimant did not refuse to comply with the new rules of the management but was only seeking audience to address outstanding issues. It was further submitted for the claimant that the RW1 admitted that there were no hearings to accord the claimant due process before the termination. Accordingly, it was submitted for the claimant that the claimant had been unfairly terminated from employment under section 45 of the Employment Act, 2007.

The court has considered the competing submissions. The court finds that the claimant had a legitimate grievance namely, for the respondent to explain the effect of reapplication for the job the claimant already held on the previous service rendered by the claimant. The court further finds that the claimant was not accorded due hearing before termination. As envisaged in section 45(4) of the Act, the court finds that the termination was unfair because it was primarily due to the legitimate grievance which is a precluded reason for termination under section 46(h) of the Act and; in all the circumstances of the case, the respondent did not act in accordance with justice and equity in terminating the claimant's employment and in particular, the respondent did not accord the claimant a hearing as provided for in section 41 of the Act. Accordingly, the court finds that the termination was unfair.

The court has considered the long service the claimant had rendered to the respondent, the claimant's expectation to remain and continue in employment and the claimant's contribution to his termination by purporting to write or participate in authoring exhibit **JGK IV** as though to terminate his employment without any capacity to do so. In the circumstances, the court considers that an award of 9 monthly salaries at last monthly salary of Kshs.7,269.00 under section 49 (1) (c) of the Act making **Kshs.65,421.00** will meet the ends of justice in the case.

The 2nd issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes the following findings:

1. In view of the finding for unfair termination, the court finds that the claimant is entitled to one month pay in lieu of termination notice making **Kshs.7,269.00**.
2. For the claim and prayer for underpayment, the court finds that while the employment subsisted there was no dispute on the pay. Further, it is not disputed that throughout the employment the respondent provided housing accommodation, water, electricity and food for the claimant's benefit. The court therefore finds that the parties were in an amicable arrangement of pay and other benefits throughout the relationship and it would be unfair to unsettle that clear understanding between the parties. The court finds that the prayer for underpayment will therefore fail.
3. The claimant has prayed for pay for overtime. The claimant testified that there was a check-in and check-out register in the respondent's possession detailing the hours worked. RW1 confirmed that there was a check-in and check-out register but which was not produced in court. The claimant testified that in 2009, he worked from 7.30 am to 11.00 pm without lunch break and he wrote to the management the letter dated 30.12.2009 being exhibit **JGK1** for the respondent to consider the polite request to pay the relevant overtime. In the memorandum of claim, the claimant has prayed for overtime with respect to 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011 being the period throughout the employment. The court has considered the evidence against the claimant's pleadings and finds that the evidence does not support the claim and the prayer as made. In the circumstances and on a balance of probability, the claimant has failed to establish and support by evidence the claim and prayer for payment for overtime.
4. Finally, the claimant has prayed for annual leaves for 2004, 2007 and 2008. As submitted for the claimant, the claim and prayer was expressly admitted by the respondent in paragraph 6 of the response to the memorandum of claim. Thus, the court finds that the claimant is entitled to the **Kshs.12,228.00** as prayed for.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.89,918.00** by 1.05.2014, in default, interest at court rates to be payable from the date of the judgment till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 14th March, 2014**.

BYRAM ONGAYA

JUDGE