



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2353 OF 2012

SIMON NDUNGU KABAU.....CLAIMANT

VERSUS

HILLOCK COUNTRY CLUB.....RESPONDENT

JUDGMENT

The claim herein was commenced by the statement of claim dated 20th November 2012 and filed in court on 21st November 2012. He alleges that the Respondent unfairly terminated and/or wrongfully dismissed him. He seeks the following orders.

- i. ***THAT a declaration do issue finding that the Respondent termination of the Claimant's employment was bad in law and was in effect an illegal declaration of redundancy.***
- ii. ***THAT an order do issue directing the Respondent to reinstate the Claimant herein to his employment without loss of benefits or position.***
- iii. ***THAT alternatively, an order for payment of all the claimant's terminal benefits as outlined in paragraph 22 above.***
- iv. ***THAT an order do issue directing the Respondent to issue the Claimant with is "certificate of service"***
- v. ***THAT the costs of this suit be provided for by the Respondent.***
- vi. ***THAT any other further and better relief that this honourable Industrial Court may deem fit to grant be granted.***

The Respondent filed its memorandum of defence to the claim on 30th January 2013. The Respondent filed an amended memorandum of defence to the claim on 16th April, 2013.

The Respondent alleges that the Claimant was employed on part time basis from 8.00am to 2.00pm Monday to Friday and was paid wages fortnightly of kshs.3,750/= which had been reviewed to kshs.4,250/= at the time he left service. The Respondent further avers that the claimant's employment was not terminated but he absconded duty.

The case was heard on 26th June and 1st October 2013. The Claimant appeared in person while the Respondent was represented by Mr. Njuguna instructed by Ms. Njuguna and Partners Advocates. Each party called one witness with the Claimant testifying on his behalf while JANE WAMBUI NJUGUNA the Manager of the Respondent's restaurant where the claimant worked testified on behalf of the Respondent.

The Claimant's case is that he was employed on 14th April, 2009 as a chef at a salary of Kshs.15,000/=. He was terminated on 5th August 2012. He was not given a letter of appointment. His last salary was

kshs.17,000/=. He was not paid for days worked in August 2012. He worked from 8.00am to 3.00pm then took a break and reported back to work from 6pm to 11pm. He was off duty on Saturday and worked on Sunday from 11.00am to 11.00pm. He never went on annual leave. On 3rd August 2012 he sought permission to leave work at 11.00am. He was informed that the Director visited the workplace in his absence. On 4th August 2012 he was off duty. He was supposed to report back to work on 5th August which was a Sunday. On that day he got a call from RW1 telling him not to report to work and instead report to the office in Westlands. He went to Westlands severally but never met the Director. He was told by the Secretary that he would be contacted on telephone but was never called. He requested for a certificate of service from the Manager of the Respondent RW1 who told him that she had no authority to use the letter head.

The Respondent through RW1 testified that the claimant who worked under the supervision of RW1 was a buffet chef and reported for duty at 8.00am to 12 noon Monday to Friday. There was no buffet over the weekend. The Claimant worked part time and payment of his wages was made every two weeks. Apart from his wages he was not entitled to any other benefits. He was not entitled to leave because his working hours were from 8.00 to 12.00 noon. He never worked overtime. The Claimant did not report to work on 3rd August 2012 and PW1 called and told him to report to Westlands at the head office. RW1 did not know if the claimant reported to Westlands office. RW1 started working with the Respondent in January, 2011.

I have considered the pleadings, the documents attached thereto, the evidence submitted in court, the parties written submissions and the law.

In my opinion the issues to be determined are the following.

1. Whether the claimant was a part time employee.
2. Whether the claimant was unfairly terminated.
3. Whether the claimant is entitled to the prayers sought.

1. **Whether the Claimant was a part-time employee.**

The Claimant's case is that he worked from 8.00am to 3.00pm then again from 6.00pm to 11.00pm from Monday to Friday and from 11.00am to 11.00pm on Sundays. The Respondent in the pleadings and in the written submissions stated that the Claimant worked from 8.00am to 2.00pm on Monday to Friday and was off duty on Saturdays and Sundays.

RW1 in her evidence stated that the Claimant worked from 8.00am to 12.00pm. RW1 admitted calling the Claimant on 4th August, 2012 and asking him to report to the head office in Westlands.

The Respondent did not submit any employment records to prove that the Claimant worked from 8.00am to either 12.00pm or 2.00pm as alleged by the Respondent or from 8.00am to 3.00pm and again from 6.00pm to 11.00pm as alleged by the Claimant. **Section 9 of the Employment Act** requires all employers to issue contracts to employees who work for more than three months. The Claimant worked continuously for more than three years. One of the particulars to be provided for in the **Contract of Employment** is working hours. **Section 10(6)** requires such records of employment to be kept by the employer for five years after termination of employment. **Section 10(7)** provides that:-

“If in any legal proceedings an employer fails to provide a written contract or the written particulars prescribed in Sub-section (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

In this case the employer has given contradictory evidence on hours of employment and has not provided any records of the same. This means that the employer has failed to disprove the allegations by the Claimant that he worked from 8.00am to 3.00pm then again from 3.00pm to 11.00pm.

The foregoing notwithstanding the Respondent has not denied that the Claimant worked continuously. Indeed the Respondent has submitted that the Claimant worked for 40 hours a week. All civil servants work 40 hours a week. A person who works 40 hours a week cannot therefore be a part time employee. The law prescribes maximum working hours but does not set the minimum. An employer can therefore not assume that a person who does not work for maximum hours is a part time employee.

From the foregoing I find that the Claimant was a full time employee of the Respondent.

2. Whether the Claimant was unfairly terminated

The Claimant testified that he was given permission to leave work at 11.00am on 3rd August 2012 by RW2 who was the Manager. 4th August was his off day. He was supposed to report back to work on 5th August, 2012 at 11.00am. This was on a Sunday. He testified that he was called by RW1 and told never to report back to work and instead to see the Director at the head office in Westlands. RW1 denied calling the Claimant on 5th August 2012 but admitted calling him on 4th August 2012 and telling him to report to head office in Westlands.

The Claimant testified that he reported to the head office severally but did not manage to see the Director. He wrote a note for the Director but never received any response. He was told by the secretary that he would be called but was never called. This amounts to unfair dismissal as he was never informed of the reasons for dismissal or given any opportunity to be heard. He was not even paid salary for the days worked in August 2012.

I therefore declare that the termination of the Claimant employment was unfair.

3. Whether the Claimant is entitled to the remedies sought.

I will now consider each of the remedies sought by the claimant.

i. Pay for 5 days worked in August, 2012.

The Claimant alleges that his salary was Kshs.17,000/= per month. The bank slip he submitted as annexure 2 to his claim which is a statement from Equity Bank shows that his account was credited with salary of Kshs.8,400/= on 28th October 2011, Kshs.8,500/= on 10th November 2011, Kshs.8,500/= on 23rd November, 2011, Kshs.7,934/= on 10th December 2011, Kshs.8,000/= on 22nd December 2011 and kshs.5,400/= on 11th January, 2012 and kshs.8,500/= on 27th January 2012. This confirms that his salary was about kshs.17,000/= per month as there were regular payments of about kshs.8,500/= twice every month paid into his account as salary from Hillock Country Club.

5 days salary is therefore $17,000/30 \times 5 = 2,833.30$

I award the claimant kshs.2,833.30

ii. Overtime

The Claimant has prayed for both normal overtime and double overtime for Monday to Thursday and all Sundays.

He is not entitled to double overtime for Sundays as Sunday was his working day. He could also not have worked on all Mondays to Thursdays. I further do not understand where he got the figure 44 hours per week as the law provides for 52 hours.

I find that the Claimant has not proved the claim for overtime and dismiss the same.

iii. **Accrued Annual Leave**

The Claimant was in employment of the Respondent from 14th April, 2009 to 5th August 2012, a period of 38 months. According to the Regulations of Wages (Hotels and Catering Trades) Order, he was entitled to 24 days annual leave each year or two days per month worked. RW1 confirmed that the Claimant never took leave. He is therefore entitled to 76 leave days. Based on a salary of kshs.17,000/= per month this amounts to kshs.43,066.70. I award the Claimant the said sum of kshs.43,066.70 on account of annual leave not taken.

iv. **Accrued Travelling Allowance**

Having not gone on leave and therefore drawn leave travelling allowance, the Claimant is entitled to the same. The Regulation of Wages (Hotels and Catering Trades) Order provides for kshs.150/= per year. The Claimant did not go on leave for three years and is therefore entitled to kshs.450/= which I award him accordingly.

v. **Accrued Housing Allowance**

The Claimant has prayed for housing allowance of kshs.132,600/= being house allowance at the rate of kshs.3,400/=. The law provides for housing allowance at the rate of 15% of the basic minimum wage. The Claimant's salary was above the consolidated minimum wage as at the date of termination of his employment and he is therefore not entitled to payment of a separate house allowance.

The claim is dismissed.

vi. **Severance Pay**

The Claimant was not declared redundant and is therefore not entitled to severance pay. However **Section 35(5) of the Employment Act** as read with **Section 26** provides for payment of service pay for any employee whose services have been terminated provided that the employee is not a member of a registered pension or gratuity scheme or the National Social Security Fund. The rate of pay though not in the Act has been set by decisions of this court at 15 days salary for each year worked. I therefore award the Claimant the sum of kshs.25,500/= being service pay for 3 completed years of service.

vii. **Compensation for unfair termination**

Having ruled that the claimant's employment was unfairly terminated, he is entitled to compensation as provided under **Section 49(1)(c) of the Employment Act**. I have taken into account the factors enumerated in **Section 49(4)** and specifically his length of service, the manner in which his employment was terminated and the fact that he was subjected to casual terms of employment for the entire period worked for the Respondent. It is my opinion that six months salary will be reasonable compensation. I therefore award the Claimant kshs.102,000/= as compensation.

viii. **Three months pay in lieu of notice.**

The Claimant has prayed for three months salary in lieu of notice. He however had no employment contract providing the same and is only entitled to one months salary in lieu of notice as provided by the law.

I award the Claimant the sum of kshs.17,000/= being one months salary in lieu of notice.

ix. **General damages**

The Claimant seeks general damages for emoluments (contingencies at the discount of 15% of the total amount at kshs.2,705,040.00). This head of damages is unknown to the employment regime as provided under our laws. The Claimant has not justified why the same should be paid to him.

I accordingly dismiss the claim.

Summary

In summary, I order as follows:-

1. The termination of the claimant's employment by the Respondent is hereby declared unfair.
2. The Claimant is awarded the sum of kshs.190,850.00.
3. In addition the Claimant is awarded kshs.10,000/= to cover his expenses for filing, service and travelling in relation to the court case.
4. The said amount to be paid within 30 days from the date of judgment failing which execution to issue.

Read in open court this 7th day of March, 2014.

HON. LADY JUSTICE M. ONYANGO

JUDGE

In the presence of

Simon Ndungu in person Claimant

No appearance for Respondent