



REPUBLIC OF KENYA

INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 251 OF 2013

(Before D.K.N. Marete)

ALFRED MMBOLO MFOYONGOCLAIMANT

Versus

KARIM RAJAN T/A SMOKEYS RESTAURANT..... RESPONDENT

JUDGEMENT

By a memorandum of claim dated the 25th February, 2013 this matter was brought to court. The issue in dispute is cited as

‘Wrongful and unfair termination of the claimant’s services and failure by the Respondent to pay terminal benefits to the claimant’

The respondent in his written statement of defence denies the claim and prays that the same be dismissed with costs.

The claimant’s case is that on or about the 15th August, 2008, he was employed by the respondent as a cook at a monthly salary of Kshs.9,000.00. He was not given an appointment letter. He commenced employment and served with loyalty and diligence until the 22nd January, 2012 when the respondent wrongfully and unfairly terminated the claimant’s services and refused to pay his terminal dues. He prays for;

- a. *Salary in lieu of notice* *Kshs. 9,000.00*

- b. *Leave for 3 yrs*
(9000/30 x 21 x 3 years) *Kshs.17,100.00*

- c. *House allowance for 3 years a 15%*
on the basic(9000 X 15% X12 x3) *Kshs.48,600.00*

Total

Kshs.74,700.00

The respondent's case is that the claimant is not owed a farthing having deserted employment on 22nd January, 2012 without notice to the management. The respondent thereon discovered that the claimant had secured another job with another company. His submission is that the claimant was a casual labourer who deserted duty and took up another employment and therefore is not deserving of any attention or remedy.

The matter came for hearing on 27th June, 2012 where the claimant testified and reiterated his claim. On 27th June, 2013, the respondent called one, Danson Kakono, DW 1, who testified and reiterated the case. The other defense witness also Wilfred Metobo, DW 2 testified on the next hearing on 12th July, 2013 and also clearly stated the case of the claimant's absconding as underlined in the defence.

The issues for determination therefore are;

- i. Was the claimant's employment wrongfully, unfairly and illegally terminated?
- ii. Is the claimant entitled to the relief sought?
- iii. Who bears the costs of the case?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. A determination of this issue would call for the employment of Section 45, Employment Act, 2007 which sets out the criterion for unfair employment. The next move would be to establish whether there is any nexus between the provisions of the law and the facts of the case as established by the evidence of the parties. From the evidence of the parties I do not see or find anything that fits into the provisions of S.45 to bring out a case for unfair dismissal. It would appear that the claimant was not dismissed and the evidence of the respondent points out to misconduct as per S.45(2)(b) (1) and S.45(5)(b).

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason-*
 - i. ***related to the employees conduct, capacity or compatibility; or***
 - ii. *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

a. *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an*

employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-

a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*

e. *the existence of any previous warning letters issued to the employee.*

The evidence of the parties is clear and succinct. It flows in opposing directions. However, the respondent's version holds sway and is the more convincing of the two. On a balance of probabilities, this is the more likely scenario and I hold and find as such. I am therefore inclined to dismiss the claim with no order as to costs. And this answers all the issues at one blow.

Dated, delivered and signed the 4th day of March, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mrs. Gulenywa Jonathan instructed by Gulenywa Jonathan & Company Advocates for the claimant.
2. Mr. Gaita instructed by Gaita & Company Advocates for the respondent.