



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2015 OF 2012

THOMAS MBULOCLAIMANT

VERSUS

CEDARS RESTAURANT COMPANY LIMITEDRESPONDENT

Judgement

By a Memorandum of Claim dated 1st October 2012 and filed in court on 8th October 2012 the Claimant alleges wrongful and unlawful termination by the Respondent and prays for the following orders:-

1. The claimant be paid 12 months wages as full compensation for loss of employment as provided for under section 15 (c) of the labour Institutions Act 2007 Kshs. 15,200/- - Kshs 182,400.00
2. One month pay in lieu of Notice - Kshs. 15,200.00
3. Annual leave for 4 years 84 days x 584.60 - Kshs 49,106.00
4. Severance pay for 4 years 60 days - Kshs 30,400.00
5. Public Holidays for 4 years 44 days x 584.60 - Kshs. 25,722.40

Total

Kshs.302,828.80

6. Any other award or benefit which the Honourable court deem fit to grant in the circumstance of this case.
7. The Respondent to pay the costs of this suit.

The Respondent filed a Defence and Answer to the Memorandum Claim on 21st June 2013 in which it denies the Claimant's averments in the claim and states that the claimant was summarily dismissed as he was found stealing customer's properties where he had been sent for outside catering and further that he had been given several warnings prior to the summary dismissal.

The case was heard on 10th October 2013. The Claimant was represented by Mr. Kandere instructed by S.K Opiyo & Company Advocates while the Respondent was represented by Ms. Sang instructed by Kale Maina and Bundotich Advocates.

The Claimant testified on his behalf while the Respondent called CYRUS NGARI KARIUKI, a Supervisor (RW1). The parties thereafter filed written submissions.

The uncontested facts of the case are as follows.

The Claimant was employed by the Respondent the Cedars Restaurant Ltd, in Nairobi on 6th June 2008 as a waiter at a gross Salary of Shs. 8980 (Refer to Claimant's Salary voucher for September 2008 at page 2 of Respondent's bundle of documents). He was dismissed from employment on 1st July 2012. His last salary as at June 2012 was a gross of Shs 15640 (Refer to Salary voucher at page 44 of Respondent's bundle of documents).

The circumstances leading to the Claimant's dismissal are that on 30th June 2012 he was sent together with other employees to undertake an outside catering job at a client's home in Runda. They were supplying food and the client was responsible for drinks. They arrived at about 12.30 pm and worked until about 11.00 pm . Just before they left the client complained that they had stolen his drinks. The client, his wife and guards searched their car and even the rubbish but no bottles of drinks were found. The client called the office and reported the theft.

According to the Claimant, when they arrived at the office at about midnight they found two supervisors waiting for them. The supervisors Cyrus Kariuki (RW 1) and Gregory Muli (deceased) together with the guards at the Restaurant also searched for evidence but did not find any. The following day on 1st July 2012 the Claimant reported to work as usual. At around 11.00 am he was called by the Manager Bouloss Lalous to his office. In the office, he found the manager with RW1. He was told to take off his uniform and go home. He was not allowed to explain anything. He complied and left. On 3rd July 2012 he went back to work and was told that he will be called. He was never called. His colleagues who worked with him on 30th June 2012 were never dismissed. He was never paid any terminal benefits.

RW1 testified that he was called by the Client who reported his drinks had disappeared. The Claimant was in charge of the team. He was not at the restaurant when the Claimant and his colleagues arrived from Runda. He was not present when the Claimant was called by the Manager on 1st July 2012.

I have considered the pleadings, the testimony of the witnesses, the written submissions and the relevant law. The issues for determination are the following:-

1. Whether the summary dismissal the Claimant's employment was unfair.
2. If the Claimant is entitled to the prayers sought.

1. Was the summary dismissal of the Claimant justified?

The Claimant alleges that the termination of his employment was unfair because he was not given an opportunity to defend himself. RW1 in his evidence stated he was not in the office when the Claimant was summoned by the manager and did not know what transpired.

No records have been produced by the Respondent to prove what transpired when the Claimant was summoned to the manager's office on 1st July 2012. The Claimant was never issued with a letter of dismissal giving the grounds of his dismissal.

This leaves the testimony of the Claimant to the effect that he was not given a hearing unchallenged.

Section 41 of the Employment Act requires an employer to explain to the employee the reasons for which the employer intends to terminate his employment. The Section further requires that the employee should be given an opportunity to be accompanied by either a fellow employee or a shop floor Union Official during the explanation. The Act further requires the employer to consider representations made by both the employee and the person accompanying him before summarily dismissing the employee.

Section 43 of the Act requires the employer to prove the reasons for dismissal failing which the dismissal is deemed to be unfair.

Section 45 required the employer to prove both validity of reason and fair procedure failing which the dismissal is deemed to be unfair.

In this case the Respondent has not proved that the procedure prescribed in Section 41 of the Employment Act was complied with. The Claimant was dismissed on the grounds of alleged theft without a hearing.

The Respondent alleges that the Claimant had been issued with final warnings. According for the documents attached to the Respondents bundle of documents the Claimant received warning letters on 8th January 2010, 23rd February 2010, 24th January 2011 and 13th August 2011. The last warning letter was about 11 months old. A warning letter which is 11 months old cannot form the basis for a summary dismissal.

Even with a warning letter an employee is still entitled to a hearing as provided in Section 41 of the Employment Act.

Having failed to prove valid reason and fair procedure, the Respondent is liable for unfair dismissal of the Claimant.

2. Is the Claimant entitled to his prayers?

I will consider each of the prayers of the Claimant.

1. 12 months compensation

Section 49 (1) (c) provides that an employee whose summary dismissal is unjustified is entitled to compensation equivalent to a number of months wages or salary not exceeding twelve month's based on the gross monthly wage or salary at the time of dismissal.

Section 49 (4) provides for the grounds to be considered before awarding remedies for unfair dismissal.

I have considered the circumstances under which the Claimant was dismissed and his length of Service. I find that compensation of 8 months' salary would be reasonable in the circumstances of this case and award the claimant Shs. 125,120 as compensation for unfair dismissal.

2. One month's pay in lieu of Notice.

In accordance with Section 49 (1) (a) I award the Claimant one month's salary in lieu of notice in the sum of Kshs. 15640/-

3. Annual leave for 4 years.

The Claimant alleges he never took leave for the entire period of four years that he worked for the Respondent.

The Respondent has however produced leave forms accounting for 64 leave days of which the Claimant was paid in lieu of 30 days while he took leave for the other 34 days. Having worked for a total of 49 months, he was entitled a total of 98 leave days at the rate of 24 days leave per year or two days per month as provided in the General Order (Hotel and Catering Trades) Order formerly under the Regulation of Wages and Conditions of Employment, (Act) repealed and now under Section 63 (2) of the Labour Institutions Act.

I award the Claimant Shs. 17,725.30/- (being 15,640/30 x 34).

4. Severance Pay

Severance pay is payable to an employee who has been declared redundant under Section 40 of the Employment Act. The Claimant was not declared redundant as is therefore not

entitled to severance pay.

The Claim is dismissed.

5. Public Holidays

I have checked the Claimant's salary vouchers attached to the Respondent's bundle of documents and note that they include payments for public holiday.

The Claimant did not pinpoint an specific public holiday when he worked and was not paid.

I find that the Claimant has not proved this head of claim and dismiss the same.

6. Any other Benefit

The Claimant produced his NSSF statement which shows that there was no remittance for the period June to December 2008, part of 2009 and 2010. The Respondent is directed to regularize the position as the Claimants salary vouchers show that the Respondent deducted Kshs 200 per month on account of NSSF for the entire period that he worked for the Respondent. This should be done within 30 days from the date of this award.

The Claimant also appears not to have been issued with a Certificate of Service which is mandatory under Section 51 of the Employment Act. The Respondent is directed to issue the same within 30 days from the date of judgment.

7. Costs and Interest

The Respondent shall pay the Claimant's costs for this claim. Interest will be charged at court rates from date of judgment.

Orders accordingly.

Dated and Delivered on 9th of April 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Judgment delivered in

In the presence of:

No appearance for Claimant

No appearance for Respondent