



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAKURU

Cause No. 113 Of 2013

[Formerly Cause No. 965 of 2012 at Nairobi]

LINUS CHIRCHIR.....CLAIMANT

- VERSUS -

MIDLANDS HOTEL LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th April, 2014)

JUDGMENT

The claimant **Linus Chirchir** filed the memorandum of claims on 06.06.2012 through Kiplenge & Kurgat Advocates. The claimant filed the amended memorandum of claims on 21.05.2013 and prayed for judgment to be entered against the respondent for:

- a. Kshs.2,508,316.70 together with interest from 17th October, 2011 till payment in full being 4 months' salary in lieu of notice Kshs.370,687.20; 17 days worked in October 2011 being Kshs.52,514.00; and gratuity Kshs.2,085,115.50.**
- b. Damages for unfair termination equivalent to 12 months salary.**
- c. The respondent to issue a certificate of service as per law.**
- d. Cost of the claim.**
- e. Interest in (a) above.**

The respondent **Midlands Hotel Limited** filed the statement of response on 20.11.2012 through Mukite Musangi & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The case was heard on 25.02.2014. The claimant testified to support his case and the respondent did not call any witness.

The claimant was employed by the respondent on 18.12.1996 and confirmed in appointment on 6.11.1997. On 7.08.2000, he was promoted to the position of restaurant manager and the claimant testified that from time to the time of termination he worked as the acting hotel manager.

On 17.11.2011, a termination letter was delivered to the claimant without a notice, a hearing and any allegations of prior misconduct, poor performance or reason. The letter dated 17.10.2011 and addressed to the claimant stated as follows:

“REF: TERMINATION

I regret to inform you that your employment at Midland hotel is hereby terminated. You will receive your dues per contract. Kindly hand over hotel property in your possession to the undersigned.

Yours sincerely

Signed

Kiptoo Chesire

Director”

At termination, the claimant’s gross monthly pay was Kshs.92,672.00. The claimant testified that the respondent’s accountant calculated his terminal dues of Kshs.2,508,316.70 and the claimant provided his bank account for the payment to be effected. He was not paid the dues and he opted to file the suit.

The issues for determination are whether the termination was unfair; and whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

1. The claimant testified that he was not given a notice, hearing or reason for termination. The respondent at paragraph 4 of the response alleged that the termination was due to poor conduct, capacity and the compatibility of the claimant that occasioned the respondent hefty losses. First, the respondent did not provide evidence to establish the allegations. Secondly, the claimant testified that he did not engage in misconduct or poor performance and at all times he implemented the respondent’s instructions including the instructions by the respondent’s director to terminate employment of some employees. Thirdly, it is obvious that the respondent did not afford the claimant a notice and hearing as envisaged in section **41 of the Employment Act, 2007** and no valid reason for the termination was established as at the time of termination as provided for in section 43 of the Act. The court finds that the termination was unfair. The claimant is awarded **Kshs.1,112,064.00** for unfair termination as prayed for. In making the award, the court has considered the claimant’s long service, his expectation to remain in employment and that he did not in any way contribute to his termination.
2. The claimant testified that he worked for 17 days in October, 2011. That testimony was not rebutted and the court finds that the claimant is entitled to **Kshs.52,514.00** as prayed for.
3. The court finds that at termination, the claimant was not a member of the union and was a member of the National Social Security Fund (NSSF). The court finds that the claimant is not entitled to the gratuity and pay in lieu of the termination notice under the provisions of the collective agreement. As submitted for the respondent, the claimant is entitled to **Kshs.92,672.00** being one month pay in lieu of the termination notice under sections 35(1) (c) and 36 of the Employment Act, 2007. The court finds that the claimant is not entitled to severance pay because it was not a case of redundancy and is not entitled to service pay because he was a member of NSSF as is not entitled under section 35 (6) of the Act.
4. The court finds that the claimant is entitled to the certificate of service as prayed for.

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

- a. A declaration that the termination of the claimant's employment by the respondent was unfair.
- b. The respondent to deliver to the claimant the certificate of service by 1.05.2014.
- c. The respondent to pay the claimant **Kshs.1,257,250.00** by 1.5.2014, failing, interest to be payable from the date of the judgment till full payment.
- d. The respondent to pay costs of the suit

Signed, dated and delivered in court at **Nakuru** this **Friday, 4th April, 2014.**

BYRAM ONGAYA

JUDGE