



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 358 OF 2013**

**FRANKSON KAHINDI NGALA .....CLAIMANT**

**VERSUS**

**OCEAN BEACH RESORT & SPA .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

The claimant has sued the respondent praying for reinstatement to work or alternatively Kshs.842,286/ being his employment benefits plus compensation for unfair termination of employment. The facts of the case are that the claimant was employed by the respondent as a waiter on 26/6/12 for a monthly salary of ksh.14000. He was given a written contract dated 1/8/2012 and continued working until 18/12/2012 when he was promoted verbally to be the Bar and Restaurant Supervisor and his salary increased to ksh.18000.

He was however summarily dismissed on 13/6/2013 for absconding his duty. He however denied the alleged misconduct and accused the respondent of mistreatment and unfair dismissal for failing to accord him a disciplinary hearing before termination.

The respondent denied liability for unfair dismissal and contended that termination was by the claimant through voluntary resignation on 13/6/2013 without notice. She prayed for one month salary in lieu of notice from the claimant. The case was heard on 27/2/2014 when the claimant testified as CW12 but the respondent called no witness after filing her defence on the day of the hearing.

**CLAIMANT'S CASE**

CW1 was employed verbally on 26/6/2012 as a waiter for a monthly salary of Ksh.26/6/2012 as a waiter for a monthly salary of ksh.14000. He produced a written contract dated 1/8/2012 which he said that it was given after he had already started working. On 18/12/2012 he was verbally promoted to Bar and Restaurant supervisor with a new salary of Ksh.18000 per month. In January 2013 the Head of the House (Head waiter) a Mr. Salina left work and the claimant was left doubling both as bar and Restaurant Supervisor and also as the Head of the House which was a very strenuous burden with no extra pay.

He raised his concern with the management and a lady called Gloria Jepkoech was employed as the assistant supervisor but no one was appointed as Head of the House. On 20/4/2013 Jepkoech left work

and again the whole burden of managing the hotel fell on CW1's shoulders again. On 5/5/2013 CW1 fell sick while on duty and informed to the duty manager one Mary who permitted him to seek treatment due to heavy rains he waited until the following day. He reported to the HR manger by SMS and also telephoned his colleagues. He did not go to work on 6<sup>th</sup> 7<sup>th</sup> and 8<sup>th</sup> May 2013 because it was his off days. He did not go on 9/5/2013 due to sickness. He reported on 10/5/2013 but his colleague Maureen and Agnes told him first to call the HR manager before resuming work.

When he called the HRM, he referred him to the General manger who in turn referred him to the Director. The Director told CW1 to go home and wait for 2 weeks. After the 2 weeks the Director called CW1 back to work. He continued until end of May 2013 when he was shocked by the Respondent's failure to pay his salary on allegation that he had been suspended for 2 weeks without pay in May.

After consultation with his seniors it was agreed that he was entitled to his pay because the reason for his absence was sickness and that no formal suspension had been given to him. On 12/6/2013 CW1 raised the issue of unpaid salary with the HRM who assured him that all his money had been deposited in the CW1's account. When CW1 went to his bank he found that no money had been deposited.

On 13/6/2013 he called the HRM and the GM to notify them that the money had not been deposited and that he was having difficulties in travelling to work but they refused to pick his call. Instead the GM send a Mr. Patrick CW1's junior to tell him that he (CW1) should not go to work because he had been summarily dismissed. CW1 reported the matter to his union but no solution was reached.

On cross examination, CW1 confirmed that he was still looking for another employment. He admitted being served with a warning letter dated 18/4/2013 for removing cutlery and caddles from a section of the hotel. According to him that was instructions from the Head of the House which was intended to cut on costs.

He confirmed that he fell sick on 5/5/2013 and went to hospital twice. That the sickness was fever and fatigue. He clarified that he never told HRM or any other person that he wont go to work but that he if he failed to get means of transport, he would not go to work. He contended that although certificate of incapacity from a doctor was required he provided only the treatment notes from the dispensary he attended.

He denied that he resigned voluntarily from work. He however accused the employer of refusing to talk to him over the phone when he requested for assistance of transport after missing money in his account. After the close of the case, the parties agreed to file submissions.

## **ANALYSIS AND DETERMINATION**

The issues for determination arising from the pleadings, evidence and submissions are:

- 1. whether claimant voluntarily resigned from work or was unfairly terminated.**
- 2. Whether the relief sought out to issue.**

### **Resignation or unfair termination**

The issue of resignation was raised on the defence and the submissions by the defence counsel. No evidence was adduced by the defencce in support of the said resignation. The claimant has denied the alleged resignation in his testimony under oath. The court therefore dismissed the defence allegation that the employment was terminated by the claimant through voluntary resignation.

On the other hand court is of view that the claimant was never dismissed for any justifiable reason. The reason for the foregoing is that the defence did not plead that it dismissed the claimant or tried to justify any reason or procedure for dismissing the claimant in response to the suit. Instead the respondent denied the allegation that she dismissed the claimant and counter claimed that it's the claimant who resigned by failing to report to work. She even prayed for one month salary in lieu of notice from the

claimant.

The court therefore believes the evidence by CW1 and finds that the procedure followed in reaching the decision and also in communicating the decision was unfair. Firstly the claimant was not heard on the reason for his absence from work. Secondly the HRM and the GM refused to pick his calls and instead sent a Mr. Patrick who was junior to the claimant to communicate their decision on summary dismissal to the claimant by phone. Section 41 of the Employment Act bars an employer from dismissing an employee for misconduct without according him a hearing. The defence did not prove that she complied with Section 41 *supra* and as such the summary dismissal became unfair within the meaning of Section 45 of the Act.

### **Relief Sought**

The claimant prayed for reinstatement without loss of any benefits. No evidence was led in support of that prayer and it is therefore dismissed. The claimant is however awarded one month salary in lieu of notice being ksh.18000 because he was dismissed without a one month notice as required under the employment contract and Section 35 of the Employment Act. He will also get cash in lieu of leave not utilized which is approximately one year being 24 days hence ksh.14440/.

The claimant prayed for ksh.10,286 and kshs 18400 being 8 public holidays and 115 hours overtime respectively. The respondent in her submissions admitted and offered ksh.26,760 for off days, holidays and overtime. There is no substantial difference between the claimed amount and the admitted sum. The court will award the sum admitted by the defence being ksh.26,760 for the overtime and holidays worked.

Last but not the least the court awards 6 month gross salary for unfair dismissal being ksh.108,000. The reason for the six months salary is because the claimant has not finished 12 months since he was dismissed.

### **DISPOSITION**

In view of the finding above, judgment is entered for the claimant against the respondent for ksh.167,160/ plus costs and interest. The claimant shall be issued with a certificate of service.

Orders according.

**Dated, Signed and delivered this 9<sup>th</sup> day of May 2014**

**O. N. Makau**

**Judge**