



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

**AT NAIROBI**

**CAUSE NO 1580 OF 2013**

**BENARD A. KAGASI.....CLAIMANT**

**VS**

**FOR YOU CHINESE RESTAURANT.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by Statement of Claim dated 1<sup>st</sup> October 2013 and filed in Court on even date seeks relief for unfair termination of employment. In spite of due service, the Respondent did not offer any defence. The Court therefore heard the Claimant *ex parte* on 8<sup>th</sup> April 2014.

**The Claimant's Case**

2. According to the Claimant he was employed by the Respondent by oral agreement in the position of Chef effective 3<sup>rd</sup> July 2003. His initial monthly basic salary was Kshs. 10,000 which was progressively increased to Kshs. 17,000 as at the time he left the Respondent's employment.

3. The Claimant was not issued with a letter of appointment nor a payslip. He however produced a staff identification card as proof of his employment. The Claimant claims that during the entire period he worked for the Respondent he did not go on leave and that he worked on public holidays without compensation. On 17<sup>th</sup> February 2013, the Claimant's employment was terminated owing to low business.

4. The Claimant claims the following:

a. Reinstatement without loss of benefits or in the alternative;

b. Salary for 17 days worked in February 2013.....Kshs. 13,634.00

c. Accrued house allowance:

i) July 2003-December 2006.....Kshs. 63,000.00

ii) January 2007-December 2011.....Kshs.135,000.00

- iii) January 2012-February 2013.....Kshs 35,000.00
- d. Overtime compensation.....Kshs.182,205.00
- e. Accrued leave.....Kshs. 160,009.25
- f. Leave traveling allowance.....Kshs. 38,000.00
- g. Severance pay.....Kshs. 114,292.30
- h. 3 months' pay in lieu of notice.....Kshs. 58,650.00
- i. 12 months' pay for unfair termination.....Kshs. 234,600.00
- j. General damages.....Kshs.867,643.80
- k. Loss of income at Kshs. 19,550 per month from 17.2. 2013 to date of judgment
- i. Certificate of service
- m. Costs
- n. Any other relief the Court may deem just to grant

### **Findings and Determination**

5. The issues for determination in this case are as follows:

- a. Whether there existed an employment relationship between the Claimant and the Respondent;
- b. Whether the termination of the Claimant's employment was lawful and fair;
- c. Whether the Claimant is entitled to the reliefs sought.

### **Employment Relationship**

6. The Claimant told the Court that he was employed by oral agreement and produced a staff identification card as proof of his employment by the Respondent. Section 9(2) of the Employment Act, 2007 places the responsibility of drawing a contract of employment on the employer and where the employer fails to discharge this mandate the Court will adopt the Claimant's account on the terms and conditions of employment as per Section 10(7) of the Act. The Court therefore finds that there was indeed an employment relationship between the Claimant and the Respondent and adopts the Claimant's evidence on the terms and conditions thereof.

### **Termination of Employment**

7. The Claimant told the Court that his employment was terminated because of low business. In my view, that form of termination would fall under what is commonly known as redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

***“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”***

8. Section 40 of the Employment Act, 2007 sets the conditions to be met by an employer before terminating an employee's employment on account of redundancy as follows:

- 1. Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
- 2. Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
- 3. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
- 4. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***
- 5. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
- 6. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***
- 7. the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

## **Reliefs**

9. There was no evidence that in terminating the Claimant's employment, the Respondent complied with any of the conditions set out in Section 40 of the Employment Act, 2007 and I therefore find the termination of the Claimant's employment unfair within the meaning of Section 45 of the Act. I consequently award the Claimant six months' pay in compensation plus one month's pay in lieu of notice. I further award him severance pay at 15% of his monthly pay for every completed year of service.

10. The Claimant claims that he was paid a basic salary but no house allowance. Section 31(1) and (2) of the Employment Act provides that:

***(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service-***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).***

11. In the absence of any evidence that the salary paid to the Claimant was inclusive of house allowance, I award him house allowance at 15% and adopt the resultant figure of Kshs. 19,550 as his monthly salary for purposes of this claim.

12. The Claimant testified that he was paid salary for 17 days worked in February 2013 and that he was paid in lieu of leave. I therefore find no basis for these claims. The claims for overtime compensation, leave traveling allowance, general damages and loss of income were not proved and are dismissed.

13. Ultimately I make an award in favour of the Claimant as follows:

- a) six months' pay in compensation.....Kshs. 117,300
- b) One month's pay in lieu of notice.....Kshs. 19,550
- c) Severance pay (9 completed years).....Kshs. 87,975
- d) House allowance (108 months 20 days).....Kshs. 277,100
  
- Total.....Kshs. 501,925**

14. I direct the Respondent to issue the Claimant with a certificate of service and pay the costs of this case.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2014**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Bernard A. Kagasi (Claimant in person)

No appearance for the Respondent