



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 56 OF 2011

DUNCAN OBIERO OBIERO CLAIMANT

VERSUS

FAIRVIEW HOTEL LIMITED RESPONDENT

JUDGMENT

1. This suit was brought by way of a statement of claim dated 6th December 2010.
2. The Claimant seeks reinstatement to his job and payment of salary arrears for the entire period he has been out of employment.
3. In the alternative, the Claimant seeks payment of terminal benefits to wit:
 - i. loss of income from April 2010 to December 2010 at the rate of Kshs.42,000/= per month – Kshs.336,000/=;
 - ii. payment in lieu of leave for the year 2010;
 - iii. service pay for 3 years at the rate of ½ month salary Kshs.108,500/=
 - iv. value of confiscated mobile phone – Kshs.12,000/= and release of the Sim card and compensation for the unlawful and unfair termination.

Facts on which the claim is based.

4. The Claimant was employed as a waiter at the Fairview Hotel owned by the Respondent on 1st January 2005. He rose through the ranks to the position of Restaurant Supervisor earning a monthly salary of Kshs.42,500/=.
5. It is common cause that the Claimant served the Respondent continuously until the 3rd May 2010 when he tendered his resignation from the employment of the Respondent citing frustration at the work place.
6. The resignation letter was produced by the Respondent. In the said letter, the Claimant lamented that on the 11th April 2010, about three weeks ago from the date of the said letter, he received a telephone call from St. Peters Academy Homabay where his son was schooling. While he was conversing with the Principal of the school regarding a hospital bill following treatment of his son, his phone was confiscated by his superior, **Daniel Szlapak**.

That he later on went to his office to explain why he received a telephone call while on duty but as at the time of writing the resignation letter, he had failed to return the telephone to him. He told him that he had donated the telephone to **Charity**.

7. He gave a month's notice effective 3rd of June 2010 to the employer.

8. According to the Claimant, by a letter dated 23rd April 2010, the employees of the Respondent had raised a grievance with the employer through their union representative on matters concerning staff welfare. One of the issues raised was the use of telephones while on duty especially in the presence of guests at the Hotel. The employees decried the practice by the Respondent to confiscate their phones when an employee was caught receiving a call.

9. The employees lamented that it was necessary to be allowed to take emergency calls from the family members. They demanded the confiscated phones to be returned. The issue was however not resolved up to the time the Claimant tendered his resignation.

Other complaint was surcharging of employees for broken utensils yet this was covered by the service charge.

The employees also complained of rampact issuance of warning letters to employees without involving the workers council and subjecting employees to polygraph test which the employees objected to.

10. The Claimant states that the Respondent refused to engage the employees on these grievances and as a result, he felt frustrated and suffered mental anguish as a result of which he resigned from his employment with the Respondent Company.

11. The Claimant in his testimony states that the resignation was involuntary and therefore amounted to constructive dismissal. He claims damages for the unlawful and unfair loss of employment.

Response

12. In its statement of Response and in the sworn testimony of RWI, **Catherine Mwangi**, the Respondent admits that the Claimant resigned from his employment following confiscation of his mobile telephone by the Respondent.

13. The Respondent insists that taking of mobile calls by staff in front of guests was not permitted and violated the regulations of the Respondent. That this was a matter well known to all the employees including the Claimant who was a (supervisor) and ought to have led the other staff by example.

14. The Claimant was issued with a warning letter dated 13th April, 2010 following the confiscation of the phone. The Claimant tendered his resignation on 3rd May 2010 which resignation was accepted by a letter dated 3rd May 2010.

15. The management waived the three months' notice the Claimant ought to have served and was paid his final dues as follows:

1. service gratuity for five (5) years at the rate of 1/3 months salary in the sum of Kshs.35,217/=;
2. salary up to 10th June 2010;
3. six (6) days in lieu of leave days not taken plus leave allowance; and
4. payment for public holiday worked.

The gross pay was Kshs.100,916.05 less 62,867/= owed to Jembe Sacco. He received a net payment of Kshs.18,512.45.

16. The Claimant admitted receipt of the terminal dues stating that he did so under protest and prays to be paid as per his claim. The Claimant was given clearance certificate which he signed for and the payment received in full and final settlement.

17. The Respondent states that the Claimant was not owed any further terminal benefits and since he quit his employment he is not entitled to any compensation and or payment of damages.

18. According to RWI, it is not unreasonable to expect an employee in a high end hotel not to use a mobile phone while attending to guests. It was not appropriate for the Claimant therefore to receive a call at the workstation but should have excused himself or dashed out for the purpose.

19. She told the Court that the Claimant could not be reinstated to a job from which he had voluntarily resigned, after all he had been paid all terminal benefits due to him.

The witness further told the Court that when the Claimant explained the reason for receiving the call, the warning was revoked in writing. The Respondent had also bought the Claimant another phone but he had declined to take it.

20. The witness noted that the telephone was taken in an open area, whilst the Claimant who was a supervisor walked amongst the hotel guests.

This was a matter which was still under discussion pending resolution and the Claimant should not have blatantly violated hotel regulations.

Determination

21. Constructive dismissal is a situation where the conduct of the employer towards an employee is such that even though an actual termination of the employment contract has not occurred, same may be legally implied because all elements of repudiation of the contract of employment exists.

In other words, a fundamental breach of the employment contract must be evident taking all circumstances of the case into account. Examples where this may be implied is where an employee is not allocated work for a long time but continues to report to work; is not given tools to perform his duties; is not paid his salary for no good reason for a considerable period of time; is subjected to physical or psychological environment such that it would be unreasonable to expect the employee to continue in employment of the Respondent inter-alia.

22. It is the Court's considered view that the legal threshold for constructive dismissal has not been met from the facts of this case.

The Claimant's resignation was voluntary. He had a choice to remain at work pending resolution of a collective grievance which was being handled on behalf of all the staff by the union.

23. Accordingly the claim that he was unlawfully and unfairly dismissed from work has no basis and is dismissed.

The Claimant was paid all terminal benefits except that the service gratuity paid should comprise ½ monthly salary and not 1/3 monthly salary.

The Claimant should therefore be paid;

- i. the balance of unpaid gratuity in the sum of Kshs.71,033/= calculated as follows: $(42,500 \times \frac{1}{2} \times 5 -$

35,217);
ii. Kshs.12,000/= being the value of the confiscated telephone.

Total Award Kshs.83,033/=.

The Award is to be paid with interest at Court rates from the date of this judgment until payment in full.

The Respondent is also to pay the costs of the suit.

Dated and Delivered at Nairobi this 20th day of June, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE