



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 203 OF 2013

LUKA MATARA SEREMANI.....CLAIMANT

VS

HANELIS RESTAURANT LIMITED.....RESPONDENT

AWARD

Introduction

1. Luka Matara Seremani, the Claimant in this case was a long serving employee of the Respondent having been employed on 31st January 1992 and working until 1st April 2011 when his employment was terminated. He brought a claim by a memorandum of claim dated 8th February 2013 seeking relief for unfair termination of employment.

2. The Respondent filed a response on 12th April 2013 and the matter was heard on 10th March 2014. The Claimant testified on his own behalf and the Respondent called its Personnel Manager, Daris Ndili Mutisya. Only the Claimant filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as a waiter on 31st January 1992 . He rose through the ranks to the position of Assistant Manager as at the time he left the Respondent's employment. Between 24th March and 30th September 2005, the Respondent assigned the Claimant as an Assistant Branch Manager at Haandi Restaurant in London, United Kingdom at an agreed monthly allowance of 1,000 Sterling Pounds. Contrary to this agreement, the Respondent paid the Claimant 400 Sterling Pounds promising to settle the balance upon the Claimant's return to Nairobi, a promise the Respondent did not honour.

4. On 1st April 2011, the Respondent terminated the Claimant's employment without assigning any reason for the termination. The Claimant states that he was not given an opportunity to be heard and was not paid his terminal dues.

5. He claims the following:
 - a. A declaration that the termination of his employment was unfair and unlawful;
 - b. 12 months' salary in compensation for unfair termination.....Kshs.
361,380
 - c. Salary arrears for period he worked in the UK.....Kshs.
496,800
 - d. 3 months' salary in lieu of notice.....Kshs.
90,354
 - e. Service pay for 19 years @ ½ month's salary per year.....Kshs.
286,093
 - f. Costs and interest
 - g. Any other relief the Court may deem just to grant

The Respondent's Case

6. In its response filed on 12th April 2013, the Respondent admits having employed the Claimant effective 31st January 1992. On 31st October 2005, the Claimant was assigned to visit the Respondent's restaurant in the United Kingdom for training purposes. While in the United Kingdom, the Claimant was paid his salary in full. The Respondent paid for the Claimant's accommodation and meals in the United Kingdom at 300 Sterling Pounds. In addition, the Claimant was paid an allowance of 400 Sterling Pounds.

7. The Respondent avers that on several occasions, the Claimant had been accused of sexual harassment of female employees. On 1st April 2011, the Respondent terminated the Claimant's employment on grounds of negligence of duty. The Respondent further states that the Claimant was paid all his terminal dues.

Findings and Determination

8. The issues for determination in this case are as follows:
 - a. Whether the Respondent has established a valid reason for termination of the Claimant's employment;
 - b. Whether in effecting the termination the Respondent used fair procedure;
 - c. Whether the Claimant is entitled to the reliefs sought.

Reason for Termination

9. Section 43 of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

10. On 1st April 2011, the Respondent wrote to the Claimant as follows:

“We have terminated your services at Haveli Restaurant Ltd, with effect from 01st April 2011. The management does not require your services any more.

Meanwhile we are working out your final dues, which will be ready in two weeks.

Thanking you.

Yours faithfully,

DARIS NDILI MUTISYA

HUMAN RESOURCE DEPARTMENT”

11. The Respondent then issued a second termination letter dated the same day citing negligence of work and failure to perform duties as the reasons for the termination of the Claimant's employment. The Claimant however told the Court and the Respondent's witness, Daris Ndili Mutisya confirmed that this second letter was not delivered to the Claimant. Mutisya further testified that the second letter was written four days after the first one but was backdated to 1st April 2011.

12. From the evidence presented to the Court it is clear that at the time the Claimant's employment was terminated, the Respondent did not avail any reason for the termination. It seems to me that the second letter was issued in a bid to justify the termination after the event.

13. In its response, the Respondent accuses the Claimant of sexual harassment. In this regard, two letters dated 8th June 2005 and 22nd August 2005 cautioning the Claimant against incidences of sexual harassment were produced. The Claimant however denied ever receiving these letters and there was no evidence that the Claimant was ever required to respond to these serious allegations. The Court therefore finds that the Respondent failed to establish a valid reason for the termination of the Claimant's employment rendering the termination unfair within the meaning of Section 45 of the Employment Act, 2007.

Termination Procedure

14. Section 41 of the Employment Act, sets out the procedure for handling cases of misconduct, poor performance or physical incapacity as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

15. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases. There was no evidence that the Claimant was subjected to any disciplinary procedure and the Court therefore finds the termination of his employment unfair for want of due process as well.

Reliefs

16. Having found the termination of the Claimant's employment both substantively and procedurally unfair, I award him 12 months' salary in compensation for unfair termination. In making this particular award, I have taken into account the Claimant's long service with the Respondent as well as the Respondent's failure to afford the Claimant an opportunity to respond to any charges made against him. I further award the Claimant two month's salary in lieu of notice as admitted by the Respondent in its

document dated 21st April 2011.

17. In support of his claim for salary arrears for the period he was in the United Kingdom, the Claimant produced a visa application form in which the Respondent had committed itself to avail up to UK Pounds 1000 as sponsorship to the Claimant during his stay in the UK. The Court did not however find any evidence that this money or any part thereof was available to the Claimant as monthly salary. This claim therefore fails and is dismissed.

18. Although the Claimant was a contributing member of the National Social Security Fund (NSSF) the Respondent paid him service pay for the first 12 years of his service. I therefore allow the claim for the remainder of his service period. In tabulating the Claimant's claim, the Court has adopted the figure of Kshs. 22,465 as the Claimant's salary made up of basic salary and house allowance.

19. The final effect of this award is as follows:

- a. 12 months' salary in compensation for unfair termination.....Kshs. 269,580
 - b. 2 months' salary in lieu of notice.....Kshs. 44,930
 - c. Service pay (Kshs. 22,465/26 days x15 days x7 years).....Kshs. 90,724
- Total.....Kshs. 405,234**

20. The Respondent will meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JULY 2014

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JUDGE

Appearance:

Mr. Mbugua Mureithi for the Claimant

Mr. Mutiso for the Respondent