



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 272/2013

(Before Hon. Justice Hellen Wasilwa on 9th July, 2014)

JOSEPH OMOLLO CLAIMANT

-VERSUS-

PALMERS HOTEL RESPONDENT

JUDGMENT

The claimant Joseph Omollo filed his memo of claim in person on 7.10.2013. It is his claim that he was unlawfully terminated from employment by the respondent and was never paid his severance pay and leave allowance was further underpaid. He also seeks damages for breach of employment contract.

The claimant gave evidence before this court and he stated that he was employed by the respondent on 4.4.2011 as a waiter. He did his work well and his gross pay was salary of Ksh 11,500 per month. He was later promoted to be head of house keeping after five months. He stated that his gross salary was however reduced to Ksh 9,880/= as per his payslip which he exhibited in court. He exhibited his bank statement as **App JO-1** and it shows that in June he was paid Ksh 2,665, July Ksh 4,260, August Ksh 4,548, September Ksh 4,192, October Ksh 8,734, and in November Ksh 8,000. He kept complaining of the underpayment. On 27.3.2013 he saw his payslip indicating that he had been given an advance of Ksh 4,482 which he had not been given. He refused to sign the payslip. He also reported to the director who told him to tow the line. His claim against the respondent is for refund of alleged advances, underpayment, 1 week off day deducted from his salary which is for 92 days, house allowance, notice fee and severance pay. He told court that he reported to the labour office when he was sacked and then brought the matter to court. In cross – examination, the claimant informed court that he was never given any appointment letter and there were no deductions of NSSF, NHIF. He denies absconding duty. He denies signing for Ksh 25,000/= as full and final settlement of the claim. He admits he was paid Ksh 25,000/=.

The respondent filed their memorandum of reply on 24.10.2013 through the firm of Ajuoga & Co. Advocates. They also called 2 witnesses who stated that the claimant was never sacked but absconded duty. The witness RW2 when asked to prove the claimant took salary advance, informed court that the vouchers were in the office. He was asked to explain “other” deductions in the claimant's payslip and stated that that could have been salary advances. The respondent deny that claimant is owed any leave days as he always went on leave, and on house allowance, the respondent responded that claimant was paid the same. On severance pay, it is respondent's position that claimant is not entitled to it as he was a NSSF contributor. They say the 92 unpaid days were deducted when claimant was off duty and is therefore not payable.

Upon hearing the parties herein, the issues for determination are:-

1. **Whether claimant was sacked or he absconded duty.**
2. **Whether the claimant is entitled to remedies he has sought.**

On 1st issue, there is no evidence that claimant was given an appointment letter when employed in 2011 which is contrary to the provisions of S. 9(1) & (2) of Employment Act 2007 which states as follows:-

“(1) A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).”

The contract between claimant and respondent having been for more than 3 months ought to have been in writing and with details provided for under S. 10 of Employment Act 2007.

In the contract under consideration, the only evidence or semblance of the existence of the contract is the payslip that claimant was given. The payslip for January 2013 shows that he was paid Ksh 8,341 basic pay, Ksh 1,539 house allowance with gross pay being Ksh 9,880. Other deductions were PAYE, NSSF, NHIF, advance, others and welfare. The explanation of what welfare means was given in evidence but there is no explanation as to what “others” means. These “others” were also deducted in December 2012, November 2012, July 2012, April 2012, February 2012, September 2011, August 2011, July 2011, June 2011 and May 2011, as per annexures of payslip shown to court all amounting to Ksh 19,148. The reason for this deduction has not been explained to the claimant nor to court.

On the issue of whether claimant was sacked or absconded, this remains as the claimant's word against respondent and vice versa. There is no evidence that respondent sought out the claimant to refund 1 months salary for absconding until the claimant wrote through counsel demanding his dues. The issue of claimant absconding is therefore an afterthought and I do not find it plausible. It is therefore the finding of this court that the respondent terminated services of claimant verbally just as he had engaged him in an oral contract.

Concerning the prayers sought by claimant, the claimant has submitted that he was underpaid. It was however his duty to prove the same. According to his bank statement produced in court, he was paid as per what was indicated in the payslip. It would have been prudent for claimant to explain to court where the underpayment arises from whether in relationship to a gazette notice or minimum wage notice which he has not proved to court. The claim on underpayment cannot therefore succeed. He also claimed payment of house allowance but there is proof he was paid this money in his payslip. This claim cannot therefore succeed. On leave, there is no proof that he sought and was denied leave. This claim is also not proved.

His claim for severance pay cannot be payable too by virtue of S. 35(6) of Employment Act which states that:-

“(6) This section shall not apply where an employee is a member of—

- (a) A registered pension or provident fund scheme under the Retirement Benefits Act;**
- (b) A gratuity or service pay scheme established under a collective agreement;**

(c) Any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) The National Social Security Fund.”

What remains of claimant's claim is as follows:-

1. 1 months notice in lieu of notice; = Ksh 9,880
2. 92 off days for which respondent admitted he was not paid as he was off duty; = $92/30 \times 9880$ = Ksh 30,299
3. The “others” deducted from his pay not

explained for; = Ksh 19,148

4. I also award him 6 months pay as damages

for unlawful termination; 9880×6 = Ksh 59,280

GRAND TOTAL = Ksh 118,607 —

Less 25,000

already paid

KSH 93,607

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The respondent will also issue him with a certificate of service and pay costs of this suit.

HELLEN WASILWA

JUDGE

9/7/2014

Appearances:-

Claimant in person present

Ajuoga for respondents

CC. Wamache