



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 2007 OF 2012

BETWEEN

ALBERT MARAKA WAFULACLAIMANT

VERSUS

CALYPSO RESTAURANT LIMITEDRESPONDENT

Rika J

CC. E. Kidemi

Claimant in Person

Mr. Mwilu instructed by Mwilu & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNLAWFUL SUSPENSION

AWARD

1. Albert Maraka Wafula filed his Statement of Claim in Person on 5th October 2012. The Respondent Restaurant, which is registered as a Limited Liability company, filed its Statement of Response on 2nd November 2012. The Claimant gave evidence on 24th April 2013 and 4th July 2013 when he rested his case. The Respondent gave evidence through its Marketing Manager Dishon Masila on 27th January 2014 when hearing closed. The dispute was last mentioned on 26th February 2014 when Parties confirmed the filing of their Closing Submissions and were advised Award would be read on notice.

2. Wafula testified he was employed by the Respondent Restaurant as a General Labourer on 1st August 2008. He earned an all -inclusive monthly salary of Kshs. 6,600. His problems with the Employer started on 6th September 2012 when he asked to be paid house rent allowance; overtime; and adjusted salary to meet the applicable minimum wage level. He also demanded the Respondent pays to him annual leave

pay of 2 years. He was asked by the Management to remove his uniform and leave the premises, because he allegedly was inciting other Employees.

3. He claims he was logged-out. Logout, in the particular workplace lexicon, was suspension. The Claimant demanded the Respondent lift the suspension and pay him his dues; the Respondent declined, opening the way for initiation of this litigation.

4. He asks the Court to order the Respondent to pay to him arrears of house rent allowance; overtime; back salaries; underpaid salaries; 2 months' salary in lieu of leave; and that the logout/ suspension be lifted and he is reinstated to his previous position. He prays for costs.

5. Wafula told the Court in cross-examination that he worked from August 2008 to September 2012. His salary was adjusted, and by the time he was logged out, it was at Kshs. 10,500 per month. He was a General Worker. The minimum wage for General Labourer was Kshs. 5,195 in 2008 and Kshs. 6,130 in 2009. He worked from 7.00 a.m. to 5.30 / 6.00 p.m. There was no break. He was never issued with a warning letter. There is a letter of warning attached to the Statement of Response. It mentions that the Claimant incited other Employees to strike. Wafula testified he did not receive this letter. He was not issued a letter of termination. The pay roll indicated there was house rent allowance of Kshs. 1,500 paid to the Claimant by the time he left. He insisted he was not paid in accordance with the Labour Laws. He prays the Court to uphold his Claim.

6. The Respondent conceded the Claimant was its Employee from 1st August 2008, working in the position of General Labourer at a monthly salary of Kshs. 6,600.

7. He was found inciting Workers on 6th September 2012. He told them they were being underpaid, and overworked, doing 10 hours instead on 8 hours per day. He was sent home by the Director on this day, and given a written warning the following day. He declined receipt of the letter. He was paid in accordance with the statutory monthly minimum wage guidelines. His work hours conformed to the law. He is not owed any money by the Respondent. He was not logged out

8. Masila testified that the Claimant was paid above the applicable minimum wage. The amount paid to him was all-inclusive. He was not underpaid. He worked for about 4 years. His salary was reviewed favourably every year. At the time of his exit, he earned Kshs. 8,500 basic salary and Kshs. 1,500 house rent allowance. There were no arrears of salary, underpayments, overtime or leave pay owing at the time he left employment. The hours of work were 7.00 a.m. to 5.00 p.m. with a lunch-break of 1 hour. He left employment after complaining about the hours of work. He absconded after he was warned. Masila testified on cross-examination that the Claimant was paid above the minimum wage. He incited Employees. The warning letter issued on 7th September 2012. It was the first warning. There was no other letter. There was no letter of termination. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

The Court Finds and Awards:-

9. The Claimant was employed by the Respondent Restaurant as a General Labourer on 1st August 2008. He worked up to 6th September 2012. His last salary, according to his own evidence, was Kshs. 10,500. There is no agreement on the manner of his exit. The Claimant alleges he was logged out/ suspended, after the Respondent alleged he was inciting other Employees. The Respondent through Masila stated the Claimant was not suspended, but left work on his own volition, after complaining about the work hours. Both Parties agree there was no termination letter given to the Claimant.

10. There is adequate evidence contained in the relevant minimum wage schedules, to support the Respondent's position that the Claimant received a monthly salary consistent with the statutory minimum. This is so for the entire period in service between 2008 and 2012. There is additional support from the pay roll, which also confirms the housing element was included in the rate paid to the Claimant. The hours of work were in accordance with the Regulation of Wages [Hotels and Catering Trades] Order, and

no case was established for payment of overtime. The Court is satisfied the Claimant is not owed salary arrears, underpayments, house rent allowance, and overtime.

11. The Respondent did not supply the Court with the Claimant's leave records, and the Court has no reason to disbelieve the Claimant's assertion that he did not take leave for 2 years, and was not paid in lieu of leave. The ***Court grants him 42 days of leave pay at Kshs. 16,961 in annual leave pay.*** The Court is persuaded the Respondent initiated the termination of the Claimant's contract of employment. The ostensible justification in doing so was that he had incited other Employees by advising them, that they were being overworked and underpaid. He was warned, which was a first warning. There was no second warning. The Claimant wrote to the Management on 12th September 2012, asking the Management to lift suspension. He complained the decision by the Respondent was not given in writing. There was no response to this letter from the Respondent. Why would the Claimant desert work, and write this letter asking to return to work? The Court is satisfied the Respondent terminated the Claimant's contract of employment. There was no hearing, no justification of the decision as demanded by Section 41, 43 and 45 of the Employment Act 2007. ***Termination was unfair, and the Claimant is granted 6 months' salary in compensation at Kshs. 63,000.*** The Court does not think an order for reinstatement is reasonable, given that the Claimant was making demands on his Employer which had no legal or factual support, and may have destabilized the enterprise in doing this. He caused the erosion of mutual trust and confidence. IT IS ORDERED-:

[a] The Respondent terminated the Claimant's contract unfairly;

[b] The Respondent shall pay to the Claimant within 21 days of the delivery of this Award, annual leave pay at Kshs. 16,961 and 6 months' salary in compensation at Kshs. 63,000- total 79,961; and

[c] No order on the costs.

Dated and delivered at Nairobi this 1st day of July 2014

James Rika

Judge