



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NYERI

CAUSE NO.81 OF 2014

PASCASIO MUTHURI MUKIRI.....CLAIMANT

-VERSUS-

PACIFIC THREE STEERS HOTEL EMBU.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th November, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 25.06.2014 in person. He prayed for a sum of Kshs. 271, 114.00 including one month pay in lieu of notice; days worked and not paid; one year annual leave; housing allowance for 14 months; severance pay; and compensation.

The respondent filed the memorandum of response on 18.07.2014 and prayed that the suit be dismissed with costs.

The claimant testified that he was employed by the respondent as a cook from 1.1.2013 to 23.04.2014. The contract of employment was verbal with an agreed monthly pay of Kshs.15, 000.00. At employment the claimant testified that he disclosed that he had the diabetic condition. He testified that on 17.02.2014 he had an accident and fractured his knee and he went to hospital on 20.02.2014. The respondent's general manager gave him two weeks off duty in line with the medical prescription for the claimant to rest. The claimant was unable to resume duty after the lapsing of the two weeks and could not report as summoned on 28.02.2014.

The claimant reported at work on 4.03.2014 and the respondent's general manager advised the claimant to sign the sick leave forms. The claimant testified that he was forced to sign the leave forms with effect that he lost his 2 years' annual leave days because he was denied sick leave. It was his case that he ought to have been given the sick leave then the annual leave. Thus, he claimed pay in lieu of annual leave he urged had been denied in the circumstances that the sick leave had been converted to annual leave.

The claimant resumed work on 08.04.2014 and worked up to 13.04.2013. He testified that his regular off day was on 14.04.2014 and he was keen to take the rest because his leg was in pain after removal of the plaster on 3.04.2014. However, at end of his work on 13.04.2014 the claimant testified that his supervisor conveyed that he would not take the off duty. The claimant was distressed in view of his bad and paining leg as it was a painful decision that he continues to work without taking the off day as was scheduled. On 14.04.2014 the claimant send a short text message on the cell phone to the general manager stating that he would take his off because he could not work in view of the pain and therefore the need to rest.

The claimant reported at work on 15.04.2014 and his supervisor advised him to see the general manager. The general manager told the claimant to go home and to report back at work on 16.04.2014. The supervisor and the general manager raised the issue of claimant's absence from duty on 14.04.2014 and the claimant produced the medical prescription for light duties. The kitchen supervisor said he was not ready to work with disabled persons like the claimant that is, referring to the claimant's sick leg. The general manager then advised the claimant to start looking for a job elsewhere. The claimant received the show cause letter dated 17.04.2014 to explain his absence on 14.04.2014 and the claimant replied by his letter of 22.04.2014. The respondent decided to summarily dismiss the claimant from employment by the letter dated 23.04.2014 and on account of the absence on the disputed rest day and failing to obey lawful orders by the respondent.

The respondent's witness (RW) was the general manager, James Githinji. He testified that absenteeism was different from the claimant's health issues and the claimant was expected to comply with the order to work on 14.04.2014 in view of the changes in the work schedules for the cooks. Further, the claimant was summarily dismissed for failing to report on duty on 14.04.2014.

The court has considered the pleadings, evidence and submissions on record and makes the following findings on the issues in dispute:

1. The reason for termination is said to be the claimant's refusal to report on duty on 14.04.2014. However, the claimant had a valid complaint about the need to rest in view of the accident and the pain in his afflicted limb. Instead of invoking the grievance management procedure, the respondent moved to invoke the disciplinary procedure. The court finds that the claimant was entitled to initiate the complaint about the unilateral change of his rest day especially that the respondent had several cooks and an alternative amicable arrangement was viable in the circumstances. The court finds that such valid complaint by the claimant was not a fair reason for disciplinary action and dismissal because it was an unfair reason under section 46 (h) of the Employment Act, 2007. The court finds that the dismissal was unfair for want of a valid reason. The court has considered that after the show cause letter the claimant was not accorded a hearing as envisaged in section 41 of the Act. The court finds that the dismissal was unfair. The court has considered that the claimant had served for a relatively short period of time and the expected period of service prior to separation was not established. In the circumstances, the court finds that six months' salaries at Kshs. 15, 000.00 per month will meet the ends of justice making **Kshs 90, 000.00** for the unfair termination.
2. As the dismissal was unfair, the court finds that the claimant is entitled to one month pay in lieu of the termination notice making **Kshs. 15, 000.00** under section 35 of the Act.
3. The respondent admitted that the claimant was entitled to earn for the 23 days worked in April 2014 and the claimant is awarded **Kshs.11, 500.00**.
4. The claimant was entitled to 7 days sick leave with full pay then 7 days sick leave with half pay as per section 30. The respondent accorded the claimant 14 days sick leave with full pay and then accorded him the due leave days for annual leave. Accordingly, the court finds that the respondent complied with the law and there was no justification for the claimant's prayer for pay in lieu of annual leave.
5. The respondent has established that the parties agreed on the consolidated pay of Kshs. 15, 000.00 and there was no underpayment in view of the prevailing wage orders. The prayer for housing allowance will therefore fail.
6. The claimant did not provide evidence for the medical costs of Kshs.10,000.00 as claimed and the court finds that the prayer will fail for want of due evidence.
7. The claimant has prayed for severance pay of Kshs. 8, 653.00. The respondent has opposed and stated that the severance pay would be due only in event of redundancy under section 40 of the Employment Act, 2007. The court agrees with the respondent's submissions and the prayer will fail.

The claimant has substantially succeeded in his claim and the court finds that he is entitled to the costs of the suit fixed at **Kshs. 25,000.00** only.

In conclusion judgment is entered for the claimant against the respondent for:

- 1. The declaration that the summary dismissal was unfair.**
- 2. The respondent to pay the claimant Kshs.141, 500.00 by 1.01.2015 failing interest to be payable at court rates from the date of this judgment till full payment.**

Signed, dated and delivered in court at Nyeri this **Friday, 28th November, 2014.**

BYRAM ONGAYA

JUDGE