



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 2078 of 2011

KENYA UNION OF DOMESTIC, HOTELS

EDUCATIONAL INSTITUTIONS, HOSPITALS

AND ALLIED

WORKERS.....CLAIMANT

VERSUS

CHARLES WAITHAKA GOKO t/a

APPLE BEES PUB AND RESTAURANT RESPONDENT

Rika J
CC. Elizabeth Anyango

Mwari Stephano Njiru instructed by KUDHEIHA for the Claimant.

Gacau Kariuki and Company Advocates for the Respondent.

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION.

AWARD

1. This dispute was initiated by the Claimant, a registered trade union, acting for its member Joel Kipserem Kisior [hereinafter referred to as the Grievant]. The Statement of Claim was filed on 8th December 2011. The record shows the Respondent entered appearance through the Law Firm of Gacau Kariuki and Company Advocates, on 13th February 2012. No Statement of Reply was filed. There was a procedural order given on 15th February 2012 to the Respondent to file its Reply on or before 29th February 2012. Hearing was fixed for 11th June 2012. On this date the Respondent did not appear and had not filed any Reply. Hearing was rescheduled for 25th October 2012. Mr. Njiru for the Claimant attended ready to proceed. Mr. Gachie holding brief for Mr. Kariuki informed the Court that Mr. Kariuki was attending a funeral. No Reply had been filed then. The Court allowed the adjournment and pushed the hearing forward to 13th February 2013.

2. On this date, neither the Respondent nor his Advocate attended Court, or communicated to the Court or Mr. Njiru on their inability to attend hearing. No Reply had yet been filed. The dispute proceeded *ex parte*. The Grievant testified he was employed by the Respondent on 18th June 2004 as an Assistant Chef,

based at Nairobi. His first salary was Kshs. 6,000. On 18th May 2009, he was suspended from work without any reason. He was suspended for one week. On resumption, he was informed that his contract of employment had been terminated. He approached his Union KUDHEIHA, who called for a consultative meeting with the Respondent on 16th June 2009. Upon this intervention the Respondent recalled the Grievant. The Respondent assigned him to a bar in the South B Estate. The bar did not have a kitchen. The Grievant could not exercise his calling as a Chef. There was nowhere to cook from. The Claimant sought a meeting with the Respondent. The Respondent disowned the Grievant, saying the Grievant was unknown to the Respondent. The dispute was referred to the Minister for Labour who appointed a Conciliator under Section 62 of the Labour Relations Act Number 14 of 2007. The Respondent did not attend the conciliation meetings; neither did he file any proposals. The dispute was filed in Court upon the Respondent's failure to submit himself to conciliation. The Claimant urges the Court to Award the Grievant:-

§ 1 month salary in lieu of notice at Kshs. 8,000;

§ Annual leave of 3 years at Kshs. 24,000;

§ Service pay at 15 days' salary for each of the 3 years at Kshs. 30,000;

§ Salaries for May and June 2009 at Kshs. 16,000;

§ Overtime on all public holidays for 3 years at Kshs. 11,988

§ Normal overtime of 7 hours 1 month for 3 years at Kshs. 251,748; and

§ Certificate of service.

The Court Finds and Awards:-

3. There is no evidence, pleadings or submissions to contradict the Claimant. The oral evidence of the Grievant is without challenge. The only question the Court has to answer is whether on the material placed before it by the Claimant, the Claimant has established a satisfactory evidential threshold, to merit the remedies sought. In a situation where the employer keeps away from the proceedings, it becomes much easier for the employee to establish claims such as this one. It is to be noted that in any form of termination, it is the duty of the employer to show that there was valid reason, or there were valid reasons, underlying the termination decision, and that the process was fair. By keeping away from the proceedings, the employer assists the employee in no small measure, because the presumption is made that no valid reason or reasons exist for termination, and that the procedure was not fair. All the employee has to do is show the Court that he was employed by the Respondent on certain terms and conditions of employment; that the employer initiated termination; and that remedies comprising compensation and/ or terminal benefits are merited.

4. The Grievant told the Court he was employed by the Respondent as an Assistant Chef on 18th June 2004. His first salary was Kshs. 6,000. This was later improved to Kshs. 8,000. He was suspended, and eventually forced out of employment by the Respondent. These are uncontested facts. He claims termination was not fair. There is nothing to demonstrate that termination was founded on substantive justification or fair procedure; the party to show this was absent from the proceedings. The Court finds termination was unfair, and the Grievant is entitled to compensation. **The Court Awards him 10 months' salary at Kshs. 80,000 in compensation for unfair termination.** The last question is whether the Claimant has laid a foundation for grant of the terminal benefits, listed in the prayers at paragraph 11 of the Statement. The Grievant was paid his salary periodically at intervals of, or exceeding 1 month. He was entitled to notice or notice pay of 1 month, under section 35 as read together with section 36 of the Employment Act. **The Court allows 1 month salary in notice pay at Kshs. 8,000.** The Act, under section 28, guarantees an employee after every 12 consecutive months of service with his employer, not less than 21 working days of leave with full pay. Employees who do not take their leave may with the

agreement of their employers sell their leave days, for the equivalent of their full leave pay. Where the employer has withheld the leave entitlement, the employee has the right to receive the equivalent of his full pay in lieu of leave. The Grievant testified he was denied annual leave for the 3 years worked. **He is granted annual leave pay of Kshs. 24,000.** He has prayed for service pay under section 35[5] of the Act. The Respondent did not offer any evidence to show that the Grievant was a member of a registered provident fund scheme; gratuity or service pay scheme established under a CBA; any other scheme established and operated by the employer which conferred on the employee greater advantage than the service scheme established under section 35 of the Act; or a member of the National Social Security Fund [N.S.S.F]. The Regulation of Wages [Hotel and Catering Trades] Order, provides that employees whose contracts are terminated on grounds other than gross misconduct, are entitled to 15 days' salary for every year completed in service, in the absence of the N.S.S.F social security facility. Both the Act and the Subsidiary legislation justify the claim for 15 days' salary, each year completed in service. The computation of the Claimant, of service pay at Kshs. 30,000 is nonetheless, farfetched. **The Court computes and allows service pay at Kshs. 13,846.** The Claimant seeks his salary for the months of May and June 2009. Section 17 and 18 of the Employment Act require that employees' salaries are paid promptly. Withholding of an employee's salary is a criminal offence which attracts penal consequences for the defaulting employer. Salaries and wages are protected by statute. **The Claimant will have his salaries for the months of May and June 2009, at Kshs. 16,000.** The last 2 claims relating to overtime worked on normal and public holidays, were not properly elaborated to this Court through the evidence of Kisior, or the legal argumentation of Mr. Njiru. Figures, hours and days were thrown at the Court, without proper substantiation. There is a tendency for Claimants seeking overtime pay, to just throw all the public holidays in a calendar, all the hours beyond the agreed working hours on the clock, and all the years served, in the face of the Court and hope they make a credible case for overtime. Claimants of overtime pay must make a greater effort in directing the mind of the Court to a mathematically defensible, legally justifiable, and factually credible system of overtime pay. The Claimant did not do this to the satisfaction of the Court. The prayer for overtime pay is declined. The certificate of service is issued as a legal obligation on the part of the employer, and as a legal right on the part of the employee, under section 51 of the Employment Act 2007. It is not something that should be part of the other day to day disputes, between the employer and the employee.

It is issued regardless of the manner of the employee's exit. In the end, the Court Orders:-

[a] Termination was unfair;

[b] Respondent shall pay the Grievant compensation at 10 months' salary of Kshs. 80,000; 1 month notice pay at Kshs. 8,000; annual leave pay at Kshs. 24,000; service pay at Kshs. 13,846; and salaries for May and June 2009 at Kshs. 16,000- all added up at Kshs. 141,846.

[c] The full amount of Kshs. 141,846 shall be paid by the Respondent to the Grievant through the Claimant, within 30 days of the delivery of this Award;

[d] Certificate of service be released to the Grievant by the Respondent forthwith;

[e] Costs to the Claimant.

Dated and delivered at Nairobi this 12th day of April 2013.

James Rika
Judge