



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 491OF 2012

FREDRICK ADIKA MUGITA CLAIMANT

-VERSUS-

APPOLO ONYANGO SIGANA T/A

MWANDU EN-KINDA INVESTMENTS RESPONDENT

JUDGEMENT

By Memorandum of Claim dated 22nd March 2012 and filed in Court on 23rd March 2012 the Claimant alleges unlawful termination of his employment by the Respondent and refusal to pay his terminal benefits. He prays for the following orders:-

- | | | | |
|--------|--|---|--------------|
| (i) | One month' salary in lieu of notice | - | Kshs.18,000 |
| (ii) | Salary balance | - | Kshs.18,000 |
| (iii) | Leave balance of 8 days | - | Kshs. 5,538 |
| (iv) | Leave Travelling Allowance | - | Kshs. 9,000 |
| (v) | Public holidays 10 days each year =
10x3=30x2=60 days. | - | Kshs.36,000 |
| (vi) | Overtime 3yrs, 3hrs each day=
3x6x4x36x1.5x87. | - | Kshs.338,256 |
| (vii) | House Allowance for 3yrs=15% of
Basic=2,700x12x3. | - | Kshs. 97,200 |
| (viii) | Twelve months gross salary compensation
for loss of employment. | - | Kshs.216,000 |

(ix) Certificate of Service

Total Amount due

Kshs.737,994

The Respondents filed a Reply Memorandum on 22nd October 2012 in which they admit employing the Claimant but deny the Claims made by the Claimant. The Respondent alleges that the Claimants employment came to an end by exffluction of time.

The parties were heard on 23rd October 2012 and 14th March 2013. The Claimant testified on his behalf while the 1st Respondent testified on behalf of the Respondents.

Mr. Nyabena instructed by Nyabena Nyakundi & Company Advocates appeared for the Claimant while Ms. Bonyo, instructed by Mr. Obura Mbeche & Co. Advocates appeared for the Respondents.

The Claimant testified as follows:-

He was employed by the 1st Respondent who is the Proprietor of the 2nd Respondent as an Assistant/Supervisor on 1st January 2008 at a salary of Shs.14,000/=.

The 1st Respondent sent him home on 15th December 2011 on the grounds that he was carrying out investigations. He was never informed of the outcome of the investigations. He was also never called for a disciplinary hearing. His salary at the time of termination was Shs.18,000/=. His total claim is shs.737,994. Item 2 of the claim is for balance of his salary for December 2012 when he was only paid for 15 days. He further claims 8 days leave. He was never paid leave allowance and claims the same at Shs.9,000/=. He further claims for Public Holidays worked at 60 days. He also claims overtime. He worked from 7 a.m. to 7 p.m. a total of 12 hours every day and was never paid overtime. He also claimed for Certificate of Service, Costs and Interest. He however abandoned the claim for House Allowance as his salary was consolidated.

On cross examination the Claimant said he worked on renewable annual contracts, was in-charge of purchasing, cooking oil and supervising employees. He admitted having received a letter from the Respondents on unaccounted food, that waiters caused shortages to the company and all workers paid for the shortage, that there were incidents of underweight cooking oil and that consumption of cooking oil went down after he was terminated. He testified that his last working day according to the contract was 31st December 2011, that he received a letter dated 12th January 2012 to the effect that his contract would not be renewed. He admitted that the Company used to close in December every year for renovations.

The 1st Respondent **APOLLO ONYANGO SIGANA** testified on behalf of the Respondents, that the Company is a fast food Restaurant in the Central Business District area. The Claimant was employed as an Assistant Supervisor on annual fixed term contract commencing 1st December 2008, on a consolidated salary of Shs.14,000/=. The Claimant was entitled to 21 days annual leave. The Claimant was given a second contract in 2009 and again in 2010. Claimant's duties involved management of supplies and purchases. He would also perform other duties like relieve cooks. His last salary was Shs.18,000/=. That he drew Claimants attention to items lost under his watch which was to be recovered from his salary. Claimant did not protest against recovery. On 7th December 2011 RW1 wrote a letter to Claimant requiring him to explain unusual consumption of cooking oil. The Claimant responded on 8th December stating that he had noted the increase consumption and that potatoes could also contribute to high consumption that the Claimant had not reported to RW1 about the high consumption before he was asked to explain, that his explanation was not satisfactory and the Claimant was suspended to give way for thorough investigations.

On 13th January 2012 RW1 wrote to inform Claimant that his contract which expired on 31st December would not be renewed. He stated that the Claimant is not entitled to leave traveling allowance as it was not provided for in his contract. He was not entitled to balance of salary for December 2011 as he was on

suspension at half salary, that the Claimant's outstanding salary was about Shs.4,500/=. That the Claimant is not entitled to 1 month's salary in lieu of notice as his contract expired on 31st December 2011. Further that the Claimant was no entitled to overtime as no employee worked beyond the agreed working hours. The Claimant had outstanding leave of 8 days. RW1 further stated that there was no unfair loss of employment and the Claimant is not entitled to compensation.

On cross examination RW1 stated that the Claimant started working in July 2007, that reporting time was 7.30 a.m. and time for leaving was about 7.00 p.m., that the restaurant was closed on most public holidays but if any employee worked they were compensated by an off day, that the claimant did not work overtime, that investigations were carried out during Claimants suspension which revealed that the Restaurant was supplied with underweight oil, that the outcome of the investigations were never communicated to the Claimant as his contract had by then expired, RW1 testified that he signed Certificate of Service for the Claimant.

I have carefully considered the pleadings, evidence on record and the testimony of the witnesses. The issues for determination are:-

- i. Whether the Claimant was terminated or his contract expired.
- ii. Whether the Claimant is entitled to the terminal benefits as claimed.

1. Whether the claimant's employment was unfairly terminated.

The Claimant alleges he was unfairly terminated while the Respondent's position is that he was not terminated but his contract expired.

I find that although the Claimants contract expired on 31st December 2011, he remained in employment under suspension until 13th January 2012 when he was informed that his contract would not be renewed. I also find that the suspension was unlawful as neither his employment contract nor the law provide for suspension. The termination of employment was however not unfair in terms of the provisions of Section 45 of the Employment Act.

2. Whether the Claimant is entitled to the prayers sought.

The Claimant prays for the following:-

a. 1 months' salary in lieu of notice

The Claimants contract expired on 31st December 2011. He was however not informed that his contract would not be renewed until on 13th January 2013. I have looked at the renewal date for the Claimants contracts and note that his first renewal was on 8th January 2009, the 2nd one on 14th January 2010, the 3rd on 12th January 2011. The Claimant therefore had a reasonable and legitimate expectation of renewal of contract on 13th January 2012. For this reason he was entitled to notice before termination of employment.

I therefore award him shs.18,000/= being 1 months' salary in lieu of notice.

b. Salary balance

As I have already found, the suspension of the Claimant on half salary was unlawful as his contract did not provide for suspension. I therefore award him the half salary withheld during the period of suspension in the sum of Kshs.9,000/=.

c. Leave balance

The Respondent admitted that the Claimant is entitled to 8 days annual leave which translates

to Kshs.4,800. I award him the same.

d. Leave Travelling Allowance

Claimant's contract did not provide for leave travelling allowance. The claim is therefore dismissed.

e. Public Holidays

The claimant's contract provide for work on public Holidays. RW1 stated that any employee who worked on public holidays was compensated by an alternative day off. I find that the Claimant has not made out a case for payment of 60 days public holidays. The claim is dismissed.

f. Overtime

According to the Regulation of Wages and Conditions of Employment (General) Order, Maximum working hours per week is 52 hours. According to the Claimant's contract, he worked 67.5 hours per week. He therefore worked for 15.5 hours overtime every week or 806 hours every year. According to the General Oder, the hourly rate is salary divided by 225 hours which is the number of working hours per month. The Claimant's hourly rate of pay was therefore $18,000 \div 225 = 80$. This multiplied by 806 and further multiplied by 1.5 which is the rate of payment of overtime, translates to Kshs.96,720.00. I award the Claimant Shs.96,720 being overtime for 12 month's based on Section.90 of Employment Act which provides that a claim for a continuing injury must be made within 12 months from the date of the act, neglect on default complained of.

g. House Allowance

This claim was dropped by the Claimant

h. 12 months compensation

I already found that the Claimant's employment was not terminated unfairly in terms of Section 45 of the Employment Act. The claim for compensation is therefore dismissed.

i. Certificate of Service

The Claimant is entitled to a Certificate of Service in terms of Section 51 of the Employment Act.

The upshot is that judgment is given to the Claimant against the Respondent in the sum of Kshs.128,520 and Certificate of Service. The Claimant shall also be paid costs in the sum of Kshs.50,000/=.

Orders accordingly.

Read in open Court and signed on this 7th day of June 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:-

No appearance for Claimant

No appearance for Respondent