



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 999 OF 2012

WYCLIFFE SHILLE.....CLAIMANT

VERSUS

MERIDIAN PATISSERIE LIMITEDRESPONDENT

RULING

By a Memorandum of Claim dated 11th June 2012 and filed in court on 13th June 2012 the Claimant alleges that he was employed in 1991 as a cook by the Respondent at a salary of Shs.2,700/= per week. That he was issued a letter of termination dated 22nd September 2010 and asked to collect his terminal dues of Shs.25,000/= but continued working until 16th December 2011 when he was issued with a second letter of termination asking him to collect his terminal dues on 17th January 2012. The Claimant alleges that for the entire period he never went on annual leave and was not paid house allowance. He further alleges that he paid NSSF but it was never remitted. He seeks the following orders from court;

1. Gratuity for 28 years kshs.151,200/=.
2. Leave of 21 days for 15 years kshs.113,400/=
3. House allowance for 15 years kshs.24,300.

Total claim Kshs.288,900/=.

He also claims costs and interest.

The Respondent filed a statement of Defence on 3rd August 2012 in which it denied employing the Claimant in 1991 as it was incorporated in 2001. The Respondent further denied the Claim by the Claimant and averred that the Claimant was duly paid all his terminal dues, Leave pay and all allowances due under the Law.

The Respondent filed an Amended Defence on 20th May 2013 in which it avers that the Claimant was employed by the Respondent on 18th March 2006. That he worked until 26th September 2009 when he resigned to avoid legal action after he was caught stealing Respondent's minced meat, that the Claimant was re-employed on 1st October 2009 on humanitarian grounds following his written apology and plea for a job. That in September 2010 the Respondent issued notice of termination letters to all employees including the Claimant with a view to selling the business due to the Director's illness. That the Claimant was duly paid his terminal benefits of Kshs.12,560/= for the period up to 1st October 2010. That the Claimant pleaded for leniency over his gross misconduct of 26th September 2009 and was paid a further kshs.12,560 on 13th November 2010. That the Claimant was retained in employment following Respondents failure to get a buyer up to 25th January 2012 when the Claimant left employment on his

own accord and was paid all his dues for the period worked.

The case was heard on 20th May 2013 when the Claimant appeared in person and testified on his behalf while Respondent was represented by Mr. Kimanda who called one witness.

The Claimant testified that he was employed in September 1983 originally as a cleaner. After 1 year he was promoted to Assistant Cook. His last salary was shs.10,800 and his last position was Cook. That on 14th January 2012 he received a letter extending his notice. That the employer was unwell and was going for treatment. He was told he would be paid by the Clerk on January 24th 2012. He went to the office severally but was never paid. He seeks payment of service for 29 years, leave from 1982 to 2012, Travelling Allowance, House Allowance, Gratuity, NSSF and NHIF, Salary for 2012 and 2013 all totalling Kshs.1,870,800/=. Under cross examination the Claimant stated that he was employed in 1982, that he did not leave employment in 2009, that he does not know about any meat that was stolen from the kitchen, that he did not write a letter of apology to avoid being reported to the Police on 29th June 2009, that he was terminated in January 2012. He admitted having been paid Shs.12,560/= which he claimed was for school fees.

Examined by the court he stated that he was told to continue working till June 2012, while waiting for his terminal dues and that the Company is still in operation.

The Respondent called NATHAMEL MBUGUA, RW1 who testified that he is an accountant in the Company, that the Company was incorporated in 2007 and he has worked in the Company since 2002. He knew the Claimant, that the Claimant was employed in 2006. That in September 2009 the Claimant resigned after he was found stealing meat with 2 other employees, that he was re-employed in October 2009.

He testified that the Director of the Company Mrs. Nurubaru Amirali Madhanu was diagnosed with breast cancer in 2010, and thereafter underwent a mastectomy in 2011. That she is still undergoing treatment. That when the Director was diagnosed with breast cancer she opted to sell the business and served all employees termination notice on 16th December 2011, that all employees were eventually paid all their dues. The company was bought by another person who retained the employees who opted to stay on.

Cross examined by the Claimant he stated that he paid the Claimant who was not satisfied and decided to go to court.

Examined by the court RW1 stated that the Claimant was employed on 1st march 2006 and his last salary was Shs.450/= per day. He was paid weekly at Shs.2,700/=. The Claimant never went on leave. The Claimant was not registered with NSSF and NHIF and no deductions were made from his wages for NSSF and NHIF. The Claimant was paid terminal dues in October 2010. He left employment on 25th January 2012 and was paid salary up to that date. That the terminal dues paid was 15 days salary per year worked and leave pay. The Claimant was paid shs.5025 at 15 days per year based on the rate of Shs.335/= per day. Leave was paid for 21 days at Shs.335/= per day making a total of Shs.7,035/=. The Claimant was paid travelling allowance of Shs.500/=. The Claimant was not paid anything when he left employment on 24th January 2012.

The Respondent filed written submissions on 5th June 2012 in which it is submitted that the Claimant was employed in 2006 and not 1999 or 1982/83 as the Company was incorporated in 2001 as per certificate of incorporation filed in court and therefore could not have employed the Claimant earlier. The Respondent relied on Section 16 of the Companies Act. The Respondent further submitted that the Claimant was a casual employee, that the Claimant was paid terminal dues and there is no money owed to the Claimant as terminal dues or NSSF and NHIF.

I have considered the pleadings, the oral testimony, the submissions of the Respondent and the relevant Law.

I must on the onset comment on the demeanor of the Claimant whom I found to be very unreliable. His testimony was at variance with his pleadings. In his Claim he demanded shs.288,900 while in his testimony he demanded Shs.1,870,800. He also denied receiving payment of terminal benefits at all only to admit it under cross examination and termed the payment as School fees.

That notwithstanding, there is evidence from documents filed by the Respondent that the Claimant was employed long before 2006 when the Respondent alleges that he was employed. In 2004 the Claimant wrote a letter seeking payment of his terminal dues having worked for 11 years. There is evidence that he was paid terminal dues as follows;

20/3/2004 Kshs.20,000

24/4/2004 Kshs.10,000

30/4/2004 Kshs.10,000

There is also evidence that the Claimant was paid terminal dues of Kshs.12,560 on 2nd November 2011 made up of Gratuity (15 days x 335) Kshs.5,025, Leave (21 days at kshs.7,035) and Travel Allowance of Shs.500/=.

There is evidence that Claimant was paid a similar amount on 13/11/2011 which he signed for.

The Claimant was not a casual as submitted by the Responded. He had worked over a long period and was not paid daily. It is his rate of pay that was reckoned on a daily basis.

From the foregoing and based on the prayers in the Memorandum of Claim the court rules as follows;

1. Gratuity

The Claimant was paid gratuity at 15 days salary for the 17 years worked.

2. Leave pay

The Claimant was paid for only 1 year of leave. RW1 admitted that the Claimant never went on leave. He is therefore entitled to payment of leave for the years worked from 2005 since he paid off in 2004 after the request by his letter dated 1st March 2004.

I therefore grant him leave of 6 years less 42 days paid on November 2nd and 11th 2011. This amounts to Kshs.37,800/=.

3. House Allowance

The Claimant has prayed for House Allowance of Kshs.24,300. He was paid a daily wage of Shs.450/=. Daily rates of pay are consolidated and therefore inclusive of house allowance.

The Claim is therefore dismissed.

In summary Judgment is entered for the Claimant in the sum of Kshs.37,800/=.

Each party shall bear its costs.

Orders accordingly.

Read in open Court this 30th day of July 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

W. Shille..... for Claimant

Mr. Kimondo.....for Respondent