



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 90 OF 2012

(Originally Nairobi Cause No. 1353 of 2010)

DENNIS ONYANGO MULLOW.....CLAIMANT

v

SPIRE PROPERTIES KENYA LTD t/a

DIANI REEF BEACH RESORT AND SPA.....RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim against the Respondent on 1 November 2010 and the issue in dispute was stated as *wrongful dismissal of the Claimant Dennis Onyango Mullow from his employment by the Respondent*.
2. On or around 9 November 2011, V A Nyamodi & Co. Advocates filed a Notice of Appointment of Advocate on behalf of the Respondent.
3. On 2 May 2013, I ordered that the Cause be heard on 17 June 2013 and that the Claimant do serve the Respondent with a hearing notice. On 20 May 2013 the Claimant filed an affidavit of service deposing to the fact that the Respondent's Advocate on record had been served with a hearing notice on 17 May 2013, a copy of which was attached to the affidavit.
4. When the Cause was called up for hearing on 17 June 2013 only the Claimant's Advocate was in Court. Having satisfied myself that the Respondent's Advocate had been served with a hearing notice and an affidavit of service to that effect filed in Court, I allowed the Cause to proceed to hearing in the absence of the Respondent or its Advocates on record.

Case for the Claimant.

5. The Claimant gave sworn testimony. The Claimant was employed by the Respondent through a letter dated 10 October 2004 as a chef de party/kitchen supervisor. In 2005 he was promoted to sous chef/senior supervisor.
6. On 10 January 2010, the Claimant testified, he was stopped at the Respondent's gate when reporting to work and was given a letter dated 9 January 2010 summarily dismissing him. The summary dismissal according to the Claimant was wrongful and unlawful.
7. The Claimant contended that the dismissal was wrongful and unlawful because he was not invited to show cause why he should not be dismissed, the Respondent did not explain to him in a language he understood why it wanted to dismiss him and that he was not accompanied by a shop steward/representative and that this was contrary to rules of natural justice.
8. The Claimant further asserted that the reasons given for his dismissal were not valid.
9. The Claimant therefore seeks one month pay in lieu of notice, service gratuity, 10 days salary for January 2010, leave for 2009, 12 months' compensation and overtime less Kshs 55,745/- which he

acknowledged the Respondent paid him.

Statutory burden in wrongful dismissal claims

10. Section 47(5) of the Employment Act has set out the statutory obligation to be discharged by a party claiming unfair termination or wrongful dismissal. For purposes of clarity I will set out the said provision.

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

11. Sections 41, 43 and 45 of the Act on the other hand require employers to notify and hear employees before termination, to prove the reasons for termination and that the reasons were valid and fair reasons.

Evaluation

12. The Claimant annexed a copy of the summary dismissal letter to the Statement of Claim. The dismissal was stated in the letter to be based on article 9(d) of the Collective Bargaining Agreement and the reasons given were the Claimant's extortion activities involving a casual employee, unleashing unwarranted intimidation to anyone who did not comply with your demands, unethical actions, storytelling at the expense of assigned duties and three warning letters within one month.
13. In his oral testimony, the Claimant denied each of the reasons set out in the summary dismissal letter but admitted he was served with three warning letters. This according to the Claimant was a ploy designed to have him sacked.
14. According to the Claimant, he was not told who his accusers were or given a chance to respond to the accusations. He was not aware of any investigations carried out or the results of such investigations.
15. The only evidence I have is that given by the Claimant. Section 41 of the Employment Act obligates an employer contemplating dismissing an employee on the grounds of misconduct, poor performance or physical incapacity to explain to the employee the reasons contemplated for the dismissal and to hear any representations to be made by the employee. The employee is entitled to have a representative. The obligation created by section 41 of the Act is what is called procedural fairness. There is no indication that the Respondent complied with the law. Based on the material placed before me I am satisfied that the dismissal of the Claimant was not procedurally fair.
16. Sections 43 and 45 of the Act deal with what is called substantive fairness in employment law. The two sections require an employer to prove the reasons for dismissal and that the reasons were valid and fair reasons. The Respondent by not participating in the hearing has failed to discharge the statutory burden placed upon it.
17. I do find that the summary dismissal of the Claimant was unfair. I now consider the heads of relief sought by the Claimant.

Appropriate relief

One month pay in lieu of notice

18. The Claimant's letter of appointment did not make any provision for payment in lieu of notice. The letter of dismissal made reference to article 9(d) of the Collective Bargaining Agreement. Such agreement was not produced in Court. I must therefore turn to the statute. Sections 35(1)(c) and 36 of the Employment Act are relevant.
19. The Sections require a contract where wages are paid periodically to be terminated by the giving of written notice or payment in lieu of notice respectively.
20. The Claimant is entitled to one month pay in lieu of notice because he was not given written

notice. At the time of dismissal the Claimant was earning a gross pay of Kshs 45,000/- and I would award him the same.

21.The Claimant was paid some Kshs 55,745/-.He did not give a breakdown of this figure. It is not clear to me whether pay in lieu of notice was factored into the amount paid to the Claimant.

Service gratuity

22.The Claimant's letter of appointment did not provide for payment of service gratuity. The Collective Bargaining Agreement mentioned in the dismissal letter was not produced. Again I must turn to the statute. The copy of pay slip produced by the Claimant show he was making payments towards the National Social Security Fund. By dint of section 35(6)(d) of the Employment Act, the Claimant is not entitled to service pay.

10 days salary for January 2010

23.The Claimant was dismissed on 9 January 2010.He admitted being paid some Kshs 55,745/-. He did not bother to give a breakdown of what this sum consisted of. I therefore decline to grant this particular head of claim.

Leave for 2009

24.The Statement of Claim indicates that the Claimant is seeking Kshs 45,000/- in respect of leave for 2009.This is the equivalent of one month salary. Section 28 of the Employment Act provides that an employee is entitled to twenty one leave days with full pay after every twelve months consecutive service.

25.Section 10(3) of the Act on the other hand requires an employer to indicate in the contract of service terms relating to entitlement to annual leave including accrued holiday pay on termination, to be precisely calculated on termination.

26.And if an employer fails to produce in legal proceedings a written contract or prescribed particulars the burden of disproving an alleged term of employment falls on it. The Respondent did not participate in the proceedings and because of the statutory provisions I have referred to I find that the Claimant is entitled to Kshs 45,000/- accrued leave.

Compensation for wrongful dismissal

27.Compensation is one of the primary remedies for unfair termination or wrongful dismissal. I have held that the summary dismissal of the Claimant was unfair. The statute has set out some thirteen factors to consider in granting remedies under section 49 of the Employment Act.

28.Considering the length of service of the Claimant (6 years) and that he secured alternative employment in Isiolo, it is my view that an award equivalent to three months compensation would be just. I would award the Claimant Kshs 135,000/- as compensation.

Public holidays/Overtime

29.The Claimant did not plead or testify on how much money he was claiming under this head. He did not lay any contractual basis for the number of hours of work. I decline to make any award under this head.

Conclusion and Orders

30.I do find in the final analysis that the dismissal of the Claimant was unfair and not in compliance with the statute. I award the Claimant

- a. One month pay in lieu of notice Kshs 45,000/-
- b. Accrued leave for 2009 Kshs 45,000/-
- c. Three months' compensation Kshs 135,000/-

TOTAL Kshs 225,000/-

d. Less amount paid Kshs 55,745.10

TOTAL Kshs 169,254/90

31.The Claims for service gratuity, ten days salary and public holidays/overtime are declined.

32.There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 26th day of July 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Nyabena M instructed by Nyabena Nyakundi & Co Advocates for Claimant

V A Nyamodi & Co Advocates on record but did not participate in the hearing