



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1132 OF 2010

ALBANUS KIENDI KITUUCLAIMANT

-VERUS-

SWAN CARRIERS LIMITEDRESPONDENT

Mr. Ongwanyo Advocate for the Claimant.

Mr. Gathu for Respondent

JUDGMENT

The suit was filed by the Claimant ***Albanus Kiendi Kituu*** on 24th September, 2010 by a Memorandum of Claim dated 16th September, 2010. The Claimant seeks payment:

- a. *for salary for the month of August and September, 2010 in the sum of Kshs.25,000/=;*
- b. *in lieu of leave days not taken for 12 years in the sum of Kshs.20,000/=;*
- c. *for accrued overtime in the sum of Kshs.300,000/=; and*
- d. *for service gratuity in the sum of Kshs.453,600/=.*

Total claim Kshs.980,400/=.

The Claimant further seeks damages for wrongful termination, refund of National Hospital Insurance Fund (NHIF) dues deducted but not remitted, certificate of service, interest and costs of the suit.

The facts giving rise to the claim are that the Claimant was employed by the Respondent as a chef in the year 1993 receiving a gross salary of Kshs.12,000/=. That he worked continuously until the 14th August, 2006. He reported to work at 8 a.m. in the morning until 6 p.m. in the evening. He was not given lunch break because he served the rest of the workers and worked six (6) days a week from Monday to Saturday. On Saturdays however, he worked up to 4 p.m.

On Sundays he massaged the managing director at his home. That he was never paid overtime and was not granted leave for the entire period of 12 years.

That he introduced his brother-in-law to the company and he was employed as a turnboy. He died in the

course of duty. The insurance paid out the claims but the money was not given to his brother-in-law's estate.

The Respondent accused the Claimant of leaking information to the family of his brother-in-law and his employment was terminated verbally by **Mr. Kiran Shah** the Managing Director.

The Claimant testified that he was not given a Certificate of Service upon termination. That the Respondent deducted National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues from his salary and the same was not remitted from 1994 until 2006.

The estate of the brother-in-law also never got compensated for his death though the insurance had paid out the claim.

He claims payment of terminal benefits and compensation for unlawful termination.

The Respondent called **Mr. Shanta Vekaria** head of administration to testify in support of its case.

He told the court that the Claimant was employed as a chef by the Respondent in 1994 and worked continuously until the 24th August, 2006. That he absconded from work on that day and has never gone back to collect his salary for August 2006 and his terminal dues.

That he absconded because he was reprimanded for keeping the kitchen in unclean and unhygienic state. He was unable to accept the reprimand from his superior and therefore did not return to work.

The witness told the court that the Respondent did not terminate the service of the Claimant and therefore it is ready and willing to pay his terminal dues as follows:

0. Net salary for August 2006 in the sum of Kshs.7,440/=;	
0. 1 and $\frac{3}{4}$ days salary for 8 months worked in lieu of leave in the sum of Kshs.4,850/=;	
0. Severance pay for 12 years worked at the rate of Kshs.5,200/= per year in the sum of <u>Kshs.62,400/=</u>	
Total	74,690/=
Less 1 month's salary in lieu of notice	<u>10,400/=</u>
	64,290/=

The witness added that all statutory deductions remitted were sent to the relevant authorities and denies that the Respondent retained any of the statutory dues deducted.

He prays the court to dismiss this claim with costs.

The Respondent relied on the pay slips for the month of May to August, 2006 to show the gross salary for the Claimant as Kshs.10,000/= and that all statutory deductions were made.

The Respondent also produced a letter dated 28th August, 2006 by the **Kenya Union of Commercial Food and Allied Workers** wherein it claimed on behalf of the Claimant, service gratuity for 13 years in the sum of Kshs.49,000/=, payment in lieu of leave for one year in the sum of Kshs.12,000/=, travelling allowance for 7 years in the sum of Kshs.8,400/= and overtime for 2 hours per day for 24 months in the sum of Kshs.106,640/=.

The Respondent submitted this letter as evidence of inconsistency in the claims made by the Claimant. The Respondent urged the court to dismiss the same since they were unfounded.

Furthermore another letter dated 28th August, 2006, written by **Morara Ariithi and Company Advocates** on behalf of the Claimant was produced by the Respondent which was a notice to terminate employment in 30 days time from the date of the letter. He requested the payment of his terminal dues accordingly.

The court has carefully considered the evidence adduced by the Claimant with regard to his termination *vis a vis* that adduced by the Respondent and found that the version told by the Claimant is inconsistent with the documentation presented to court, especially the letter from the Claimant's advocates dated 28th August, 2010.

It is clear from that letter that the Claimant gave notice to the Respondent that he would leave the employment upon 30 Days notice.

Clearly his testimony that his employment was terminated on 24th August, 2010 by the Respondent is unsustainable on the face of this letter whose contents were not contested by the Claimant before court.

The court finds that the Claimant voluntarily left the employment of the Respondent but had the intention to serve one month notice which he did not serve.

Since neither party explained why the one month notice was not served, the court finds that the Respondent is liable to pay the Claimant one month's salary in lieu of notice which he had clearly intended to serve.

Accordingly the court awards the Claimant the terminal benefits offered by the Respondent with amendments as follows:

0. Gross salary for the month of August, 2006 in the sum of Kshs.12,000/=;
0. Payment in lieu of one year's leave in the sum of Kshs.12,000/=;
0. Payment of severance pay for 12 years calculated at the rate of 15 days salary for each completed year of service (6,000 x 12) in the sum of Kshs.72,000/=;
0. One month's salary in lieu of notice in the sum of Ksh.12,000/=;

Total award Kshs.108,000/=;

- v) The Respondent to issue the Claimant with Certificate of Service immediately.

The court finds that the claim for overtime is unsubstantiated and therefore unproven. Not a single letter was produced by the Claimant seeking payment of overtime while he worked for the Respondent. The Claimant did not produce a statement from NHIF to show that the deductions made by the Respondent were not remitted. This claim accordingly fails.

Having found that the Claimant voluntarily terminated his services to the Respondent the claim for payment of damages and/or compensation for unlawful dismissal is also dismissed. The Respondent is to pay costs of the suit.

It is so ordered.

Dated and delivered at Nairobi this 27th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE

