



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 4 OF 2013.**

**TIMOTHY ANYIKA MUNYAKA ..... CLAIMANT**

**VERSUS**

**M/S NAIROBI PACIFIC HOTEL LIMITED ..... RESPONDENT**

**JUDGEMENT**

This is a claim filed on 4<sup>th</sup> January 2013 by the claimant Timothy Anyika Wanyama for unfair termination and non-payment of terminal dues by the respondent M/S Nairobi Pacific Hotel Limited. The respondent filed their response on 7<sup>th</sup> March 2013 where they admit that the claimant was their employee but voluntarily retired and hence no claim is due from the respondent.

In the claim, Mr Wanyama stated that he was employed by the respondent on 4<sup>th</sup> January 2007 as the General Manager at a monthly salary of Kshs.20, 000.00 per month without house allowance. This was increased to Kshs.30,000.00 but no house allowance was paid and this was contrary to the law regulating hotels and catering trades that provided housing pay at 15% of the basic pay and thus he should have been paid Kshs.4,500.00 per month for housing. That his work hours were from 6 am to 11 pm daily from Monday to Saturday giving rise to 102 hours overtime per week all amounting to kshs.1,698.40 for the entire period served overtime.

The claimant further states that he used to work over public holidays, he worked over weekends, he was owed leave travelling allowance, and that in October 2012 he worked for 18 days but was never paid nor was he given notice and claim for payment herein. That for 5 years he worked and no pension scheme was put in place and thus claims severance pay together with 12 months pay as compensation for unfair termination. His total claim is computed as kshs.4, 038,499.70.

The demand notice to the respondent was done by a labour consultant and the respondent failed to pay and thus the claimant is seeking the payment of costs of the suit together with interest.

In evidence the claimant gave his sworn statement that as the General manager of the respondent he would oversee all the operations at the respondent business as the directors were not able to employ managers to help him and thus he would oversee duties in the rooms, front office, security, personnel, cashier, sales and guest relations, all at the same time. He was also the night manager on call. He did all these duties as the respondent refused to employ department heads.

That he never received a contract of service but had agreed to start his salary at kshs.23, 000.00 and then was to be increased to kshs.50, 000.00 and a house allowance at Kshs.5, 000.00 but these were never given. He was entitled to transport or an assigned taxi as he would work late into the night but the respondent failed to provide these.

Mr. Wanyama further stated that he was terminated after he went on leave from 15<sup>th</sup> July 2012 to September. He requested for leave and when he resumed he was terminated. That he was told to retire. He was given a retirement package of kshs.232, 757.00 but he declined as this was low compared as what he had claimed.

In cross-examination, the claimant confirmed that he was sent on leave for 3 months as he had pending issues at home that required to be resolved. He was entitled to leave. That he was terminated 3 days after he resumed duty on 18<sup>th</sup> September 2012 and thus claims for payment for the 18 days worked in September 2012. That when he went on leave, John was left in charge. After leaving the respondent he started work at Bon Appétit in November 2012 as well as being a consultant. He further confirmed that he worked for a hotel along River Road as a consultant but could not remember the details.

The respondent on the other hand admitted that the claimant was employed by an oral contract in January 2007 and this was terminated by mutual agreement of the parties on 18<sup>th</sup> October 2012 for the claimant to retire voluntarily. That the claimant was given a consolidated pay and therefore cannot claim for house allowance separately and as a senior manager, he was not eligible to claim overtime. That he never worked on public holidays and when he took leave for 3 months, he was paid as well and received a travelling allowance. There was no agreement to pay the claimant retirement dues.

In evidence the respondent 1st witness Ishmael Warorua Macharia stated that he was working with Arizonas Hotel in 2012 as the Accountant and knew the claimant who worked there in June to August 2012 and he made payments to him through vouchers as directed by the Manager. He paid Kshs.40, 000.00 on 3<sup>rd</sup> July 2012 and the claimant acknowledged receipt. There was the shift hand over reports signed by the claimant for Arizonas and while they held their management meetings, the claimant was introduced to them by the manager.

The second witness was John Mbuitu the respondent Assistant Manger who joined them in February 2012 and before him there was Moses and at this time the claimant had been promoted to work as the Marketing Manager and would report to work in the morning, and then leave to undertake his marketing duties and return by 5 pm at the end of his day. Work at the respondent was for 6 days a week, employees take public holidays off and a rest day each week and he would alternate rest days with the claimant.

Mbuitu was responsible for housekeeping, restaurant and cash handling. There was an assistant manager, Moses before he was employed. The claimant left employment with the respondent on 18<sup>th</sup> July 2012 with his last day being 17<sup>th</sup> July 2012. He took 60 days leave and before his exit, he was doing marketing. After the leave the claimant came back and had a meeting with the director. He was not aware that the claimant was working in another place; he would report in the morning and leave after taking breakfast. As the assistant manager, he would seat at management meeting but they never discussed the director's private account. He was aware of Hotel Arizona which was 6 minutes walk from the respondent hotel along Tom Mboya Road. That in all departments there is a manager to ensure that each department was running smoothly. Each department had a responsible person.

**In assessing the issues herein there are several questions;**

**What were the circumstances leading to the termination of the claimant?**

**Whether he was fairly termination;**

**Whether the remedies sought can be granted.**

Section 8 of the Employment recognise oral and written contracts but section 9 stipulate how written contract is to be drawn as the best mode of entering into an employment relationship that would enable the parties put down in written form the terms and conditions of work and where there is a dispute, to refer to the written document. Section 10 goes further to outline that where parties enter into an employment contract, particulars of such a contract should be given to the employee within two months, a

further emphasis on the need for written contracts that spell out the terms and conditions, any policies and human resource particulars that enable the employee undertake their duties diligently and with the understating as to the terms and benefits.

Both parties herein admit that the claimant was employed through an oral contract. However, even where there is an oral contract, termination of such a contract must be in writing as stipulated under section 35 of the Employment Act. This is a mandatory provision as in this written termination or dismissal notice; the reason or reasons for termination must be stated. This is important as the employee has a right to dispute the reasons for such termination or dismissal.

*41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make. [Emphasis mine].*

The procedure of termination or dismissal is not optional; the same must be in writing. The employee, even in circumstances of gross misconduct must get the summary dismissal notice in writing.

In this case, both parties were in agreement that the claimant went on leave in June to September 2012, when he resumed; the respondent stated that he opted to retire but this was disputed. The claimant stated that he was called to the office and terminated on 18<sup>th</sup> September 2012. However, I note on 24<sup>th</sup> September 2012, the claimant wrote to the respondent as follows;

*24<sup>th</sup> September 2012*

*ATT: MR. CORNELIUS MUTHURI*

*THE DIRECTOR*

*NAIROBI PACIFIC HOTELS*

*P.O. BOX 211113-00505*

*NAIROBI*

*DEAR SIR,*

*Further to my letter of final guidelines, I would like to guide you again in calculations as under:*

*...*

Again, on this date, the claimant wrote;

*24<sup>th</sup> September 2012*

*THE DIRECTOR*

*NAIROBI PACIFIC HOTELS*

P.O. BOX 211113-00505

NAIROBI

DEAR SIR,

RE: TERMINATION OF GENERAL MANAGER SERVICE IN YOUR COMPANY

*Following our discussion with you in your office that you would like to terminate my services in your company The Nairobi Pacific hotels ltd as the General Manager on 18<sup>th</sup> September 2012, I will like you to calculate my final dues on the following guidelines;*

...

There is no response by the respondent to these communications from the claimant. There is no evidence that the reasons for the termination as inferred by the claimant as outlined above were given to him in writing otherwise he could have attached but the respondent did not. What the court is left with is the evidence of the claimant and the respondent witnesses.

Ishmael Macharia stated that in June to August 2012, the claimant was working with him at Arizonas Hotel which was not far away from the respondent business, suggesting that the claimant was moonlighting and or working for a competitor as against the respondent's interests. I noted that this evidence was not challenged by the claimant in any material way. However, even with this evidence as available to the respondent, this does not seem to have been the reason for the termination of the claimant as the respondent stated that the claimant voluntarily retired. We have nothing in writing to this effect. On the balance of probabilities I will believe the claimant in this respect and take it that he was terminated by the respondent and no written notice was issued.

Was the termination of the claimant fair? In the circumstance of this case, in the absence of any written notice or reasons for the termination of the claimant despite the respondent being in possession of evidence that the he was moonlighting in other establishments that were in the same business as they were, they took the oral path to communicate the decision to terminate. This is contrary to the law as outlined in section 35(1) as read together with section 41(1) of the Employment Act. Where there is an omission of a mandatory provision and the same operates to the detriment of an employees, then that will be deemed as an unfair labour practice. With this finding, the termination was therefore unfair.

### **Remedies**

On the claims as outlined by the claimant, house allowance is indicated as due with regard to the entire duration of his employment from 4<sup>th</sup> January 2007 to 18<sup>th</sup> September 2012. Where there is no contract to outline how an employee's benefits that include housing are to be enjoyed, the applicable provisions of the law will apply. The right to housing is provided as under section 74(1) (i);

- i. *where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;*

There was no written contract for the claimant indicating how the housing benefit was to be enjoyed. The claimant was in management and hence this as a benefit should have been subject to agreement between him and the respondent. He was not unionised to claim a house allowance at the rate of 15% of his basic salary and his current claim at the rate of Kshs.4, 500.00 has no justification. In the absence of any agreed amount for housing, I will put this in the context of my assessment of the compensation due herein for unfair termination.

Overtime claimed relate hours indicted as ranging from 6 am to 11 pm, being over 17 hours a day. This

evidence was contested with the respondent witness Mr. Mbuitu noting that the claimant would report in the morning, take his breakfast and leave only to return before 5 pm. This was not contested by the claimant. Even where he may have worked for long hours, it is humanly impossible for one to work throughout the year for a period of over 5 years for 17 hours as indicated. From the records submitted by the respondent, the claimant took several leave days and off days. He therefore could not have worked as outlined. I will not award this claim.

Public holidays are gazetted days every year. They are not constant and change each year due to religious or some days falling on what would be rest days. Where a party fails to confirm as to how the public holidays arise, the court will not grant in this regard. I decline this claim.

Rest days arise as outlined under the provisions of section 27(2) of the Employment Act. This is one day for every 7 days worked. Mbuitu gave evidence that he would alternate off days with the claimant. The court has declined the overtime hours as computed noting that the claimant could not work for 17 hours daily without a break for the entire duration of his employment with the respondent. The claim for rest days is also based on this calculation of 17 hours which then translates to misapplication of the hours worked. This will therefore not be granted.

On 26<sup>th</sup> July 2012, the claimant acknowledged receipt of kshs.39, 906.00 as annual leave pay off two months. On this same date he received and acknowledged leave pay off of this amount which was noted to be for leave allowance. The amount of Kshs.39, 906.00 was broken down as kshs.30, 000.00 for salary, Kshs.2, 000.00 for leave allowance and kshs.3, 000.00. On 1<sup>st</sup> June 2010, the claimant received a similar amount that included leave allowance and leave travelling allowance. For Leave travelling allowance. The Leave travelling allowance in the claim does not address these received payments and do not indicate for what durations the same are claimed for. For lack of clarity, the court will not grope into the darkness and this will be declined.

Severance pay is due as under section 40 of the Employment Act. This did not stand out as a case for redundancy and even if the claimant's intention was to claim for service pay, this is only due as under section 35(6) of the Employment Act. I note the claimant was registered with NSSF and NHIF and remittances made by the respondent to this effect. The claim for severance pay will be declined.

One month notice is due where there is no notice of termination. As outlined above, there is no evidence that notice was given for the termination of the claimant and I will award one month pay in lieu of notice at kshs.30, 000.00

From the evidence, the claimant worked until the 18<sup>th</sup> of September 2012, he was owed this salary and I will grant pay for 18 days amounting to Kshs. 23,845.00.

I have outlined that the claimant was unfairly terminated. He was never given any housing or an allowance for housing, which was a legitimate expectation. He has since moved on to other employment and was able to even find employment with the respondent's competitor hotel Arizonas during his leave days. He has made efforts to mitigate his circumstances and I will award compensation amounting to two month pay.

Demand herein was made by A.O. Jacob Kenya Labour Consultants. This was not indicated to be a Union representative of the claimant or a legal representative. I take it then a third party and a stranger to the claim herein sent this notice to the respondent. I will therefore not award costs.

**In conclusion, I enter judgement for the claimant as against the respondent in the following terms;**

- 1. A declaration that the claimant was unfairly terminated by the respondent from his employment**
  - a. Compensation awarded at Kshs.60, 000.00.**
  - b. Notice pay at Kshs.30, 000.00.**

**c. Pay for 18 days worked in September 2012 at Kshs. 23,845.00**

**2. Each party to bear their own costs.**

Delivered in open court this 19<sup>th</sup> day of September 2013

**M. Mbaru**

**Judge**

In the presence of

Jacob kipkirui: Court Clerk

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