



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
INDUSTRIAL CAUSE NO. 684 OF 2012

AS CONSOLIDATED WITH

CAUSE NO. 1002 OF 2012 AND CAUSE NO. 1092 OF 2012

GILBERT ODANGA1ST CLAIMANT

FAITH MOENGA2ND CLAIMANT

BENJAMIN BIKO MONGATTE.....3RD CLAIMANT

-VERSUS-

KENYA COMFORT HOTELRESPONDENT

Mr. Job Nyasimi for the 1st, 2nd and 3rd Claimants.

Mr. Omuga for the Respondents.

JUDGMENT

Gilbert Ondanga filed **Cause No. 684 of 2012** by a Memorandum of claim dated 3rd April, 2012 on 24th April, whereas *Faith Moenga* filed **Cause No. 1002 of 2012** via a Memorandum of claim dated 13th June, 2012 and *Benjamin Biko Mongatte* filed **Cause No. 1092 of 2012** by a Memorandum of claim dated 25th June, 2012 on 25th June, 2012.

The three matters are against the same defendant and the cause of action arose from similar circumstances hence the three were consolidated by the court upon application by the parties. The primary file is Cause No. 684 of 2012.

The facts on which the three cause of actions are founded are as follows;

On or about the 13th day of January, 2012, the General Manager of the Respondent went to the bar and did an abrupt stock taking and thereafter he found 9 bottles of beer and three (3) tots of whisky missing. He demanded an explanation from Gilbert Odanga (hereinafter the 1st claimant) who worked as a bar tender, Faith Moenga (hereinafter the 2nd claimant) who worked as a waitress and cook and Benjamin Biko Mongatte (hereinafter 3rd claimant) who worked as a waiter and thereafter terminated their services.

The claimants' state that the termination was wrongful and unlawful and they claim payment of terminal benefits and general damages as follows;

1ST CLAIMANT

1. Notice pay Kshs.14,156/=;
2. Outstanding leave pay Kshs.27,276/=;
3. Service pay Kshs.21,000/= being the balance after receipt of Kshs.17,000/=;
4. Severance pay being Kshs.113,248/= for every year of service and;
5. Damages for wrongful and unfair termination.

The evidence supporting this claim is as follows;

1st Claimant was initially contracted in various capacities between March, 2004 and May, 2007 and was employed on permanent and pensionable terms on 15th May, 2007. He was summarily dismissed on 14th January, 2012 on grounds of theft which he denies as the allegations were not based on any facts. The General Manager did a stock take without the opening stock which was to be done by the barman and had not yet been done. He used the closing stock for the previous day. This way the stock taken could not be accurate. The 1st Claimant states that it was not in his job description to stock take as he was serving food and drinks to guests and staff. He however took stock before closing the bar and upon opening before starting the sales for the new day.

No proper investigations were done and the Claimant was not given opportunity to defend himself. He was instead coerced to admit liability so as to receive part of his terminal benefits.

The 1st Claimant was kicked and humiliated by one **Mr. Teji** in front of the customers and his colleagues.

He was not issued with a letter of dismissal nor was he given a Certificate of service.

The Respondent during the hearing offered to pay the now contested terminal benefits to the 1st Claimant in the sum of Kshs.20,788/= as per the computation on page 20 of the Memorandum of defence as follows;

Basic pay.....	Kshs. 7,920/=
House Allowance	Kshs.11,188/=
Travelling Allowance.....	Kshs. 1,000/=
Leave days accumulated.....	Kshs.13,156/=
Gross pay.....	Kshs.23,264/=
Less PAYE.....	Kshs.1,956/=;
NSSF.....	Kshs. 200/=;
and NHIF	Kshs.320/= (Kshs.2,476/=)
Total Net	Kshs.20,788/=.

Judgment by consent was entered on 13th November, 2012.

The Claimant still seeks 22 days unpaid leave being leave days not taken in 2008 and 2010. He said he was entitled to 24 days annually. He added that he had applied to be paid in lieu of leave but the application was refused. He testified that he was entitled to service charge as claimed for January, February and November, 2004. He was using an average of Kshs.3,000/= per month. He said that whenever service charge was paid, it was reflected in the payslip and clearly it was not reflected. He further claims service charge for the months of February, July and October, 2011.

He denied any stock went missing in the bar and states that the three of them were victimized and there was no good reason to terminate their services.

He admitted that he had previous warnings regarding his conduct at the work place and had written letters to explain the various incidents in respect of which he was warned. He however insisted himself, the 2nd and 3rd Claimants were not given a hearing prior to their dismissal. He admitted also the dismissal letter gave reasons for his dismissal but says the reasons given are not true as no stock got lost and that he was not given the letter at the time he was dismissed.

2nd Claimant filed her written submissions dated 26th February, 2013 wherein she confirmed the circumstances leading to her dismissal were as narrated by the 1st Claimant. She worked on a two year contract commencing 1st July, 2011 and was due to end on 1st June, 2013. She worked as a bar/coffee shop waitress at a gross salary of Kshs.11,960/=. She claims payment of three month's salary in lieu of notice in the sum of Kshs35,880/=. The court however finds that she ought to have claimed for payment of one month's salary in lieu of notice in the sum of Kshsl.11,960/=. She also claims payment in lieu of leave days not taken. She was entitled to 21 days annually and did not go on leave for three (3) years. She received a cheque of Kshs.13,712/= during the hearing pursuant to the consent entered upon by the parties out of which Kshs.6,440/= was in respect of accrued annual leave. She now claims the balance of Kshs.29,440/=.

The Claimant submits also that she did not get service pay for the months of March, May and December, 2007 at Kshs.3,200/= per month; for January, June and September, 2008 at Kshs.3,500/= per month; for June, July and November, 2009 at Kshs.3,700/= per month; for March, June and November, 2010 at Kshs.3,700/= per month and for January and July, 2011 at Kshs.3,700 per month. Total claim Kshs.49,700/=.

The Respondent did not produce any records to counter the claims for leave and service pay.

The 2nd Claimant has made a claim for severance pay but the court notes that she was duly registered with NSSF and the dues were duly remitted by the employer. The claim is therefore disallowed.

She also claims compensation for unlawful termination based on the unexpired term of contract and calculated at the rate of Kshs.11,960 x 18 months, total Kshs.215,280/=.

The 3rd Claimant Benjamin Biko Mong'atte filed his written submissions dated 26th July, 2013. He confirmed that he was dismissed in same circumstances as narrated by the 1st claimant. He worked as a waiter as from 16th April, 2011 on a twenty one and a half months contract to January, 31st 2013.

He worked as a waiter at a gross salary of Kshs.8,671/= per month. He too was registered with NSSF and the dues were deducted and remitted. He claims payment of one month's salary in lieu of notice in the sum of Kshs.8,671/=.

He makes a claim for twenty one (21) days leave not taken for the year 2011 in the sum of Kshs.7,843/=. The employer did not produce leave records to counter this claim.

The 3rd Claimant also claims service pay for the months of April, 2011 in the sum of Kshs.3,700/= and Kshs.4,000/= for January, 2012. No documents was produced to counter this claim.

The claim for severance pay is disallowed because the Claimant was registered with NSSF and the deductions were duly remitted.

The 3rd Claimant claims payment of compensation based on the amount he would have earned had he served the fixed term contract at Kshs.7,761 x 18 months, in the sum of Kshs.105,132/=.

The claim for the payment of remuneration based on the unexpired terms by the 2nd and 3rd Claimants is based on the Authority in the case of **Ruth Gathoni Ngotho – Kariuki vs. Presbyterian Church of East Africa and Presbyterian Foundation [2012] e KLR** where the court found;

“Compensation for the reasonably expected future employment would adequately cover for the otherwise unfair termination. In the instant case, the court finds that the claimant is entitled to Kshs.3,704,844 being 36 months gross salary at monthly rate of Kshs.104,579 for loss of reasonable expectation of employment for three years.”

The 1st Claimant on the other hand was employed on permanent and pensionable basis and claims maximum compensation for unfair dismissal in terms of **Section 49 (1) (c)** of the Employment Act.

On the facts of this case regarding circumstances under which the three (3) employees were dismissed, it is clear that they were dismissed based on unfounded allegations of loss of 9 bottles of beer and 3 tots of whisky by the General Manager.

The evidence by the 1st Claimant that the abrupt stock take by one Mr. Teji was based on the wrong stock since it was based on the stock take done the previous night yet the 1st claimant had done another stock take that morning and some sales had already taken place.

No evidence has been produced to link the three Claimants separately or jointly to the loss or theft of the stock. No fair enquiry and hearing was afforded the Claimants to explain their case before the abrupt, and immediate dismissal was taken against them on 13th January, 2012.

The General Manager testified in this matter stating that he wrote the letters of summary dismissal based on the surprise stock take done by a Director of the Respondent Mrs. Shriti.

He was not there when this happened and therefore his evidence was largely hearsay and of little value.

He told the court, contrary to the evidence by the 1st Claimant that no stock take was done before the bar was closed on 13th January, 2012 by the 1st Claimant who was on duty. He said this was dismissible offence. He said that the 1st Claimant had several warning letters for misconduct and missing stock.

The witness said nothing regarding the claims for the 2nd and 3rd Claimants.

With regard to specific claims, the General Manager admitted that the 1st Claimant was not paid service charge for several months and he offered payment in respect thereof. However some arrears which he was unable to explain fully are still claimed by the 1st Claimant.

Leave Pay.

The General Manager produced a record of leave days taken and leave days owed to the 1st Claimant. He admitted 25 days were still outstanding as of 14th January, 2012 when the Claimant was

dismissed. The Claimant was paid for 26 days.

Notice Pay.

The witness told the court that no notice pay was owed as the 1st Claimant was summarily dismissed.

Service Pay.

The General Manager continued that the employees were registered with NSSF and dues were duly remitted and so none of them was owed severance pay as they were not entitled to.

The General Manager insisted that the dismissal was fair because the employees had either stolen or caused loss of 3 tots of whisky and 9 beers and the 1st Claimant who was the bar tender was on duty.

He was shown during cross-examination the closing stock take sheet for 13th January, 2011. He now revised his position and said the closing stock was there but it was the opening stock for the day which was not there and so they did it. He took the court through the figures of the stock take.

He said that they took stock take between 1 o'clock and 3 o'clock but had no book for 4th January, 2011 to confirm how many beers and stock of whisky had been sold prior to the stock taking. He claims he did so between 1 o'clock and 3 p.m.

He said he had not seen the opening stock take sheet done by the 1st Claimant on the morning of 14th January, 2011.

He insisted he dismissed the 1st Claimant based on his past record.

He said that the 1st Claimant had not committed a similar stock theft before.

The warning letters to the 1st Claimant were related to issues of stock taking and not loss.

At the close of the Respondent's case the parties agreed that the 2nd and 3rd Claimants were dismissed based on same facts but only their terms of service and respective claims differ.

A consent was entered into for the three Claimants to file written submissions with respect to the three claims touching on the specific claims and the Respondent to provide details of payments already made to each of the Claimants.

These submissions on facts and law applicable were filed by the Claimants and the Respondent filed written submissions in response to the three claims on 16th July, 2013.

The Respondent confirms that Certificates of service were given to the Claimants on 21st November, 2012.

Supplementary list of documents were filed on 14th December, 2012 to illustrate schedule of payments and leave days taken.

In terms thereof, the Respondent refutes payment in lieu of notice based on summary dismissal and admits that it owes 1st Claimant Kshs.17,000/= service charge. Insists 1st Claimant was lawfully dismissed and is not entitled to any compensation or payment of damages.

Respondent's written submissions with respect to the 2nd Claimant.

The 2nd Claimant received Kshs.13,712/= and Certificate of service pursuant to a consent in court to pay what was not in contention. This covered the claim for salary for January, 2012 and annual leave days not taken in the sum of Kshs.6,440/=. Notice payment is denied as she was summarily dismissed.

The Respondent submits that it had reason to believe that three Claimants stole 9 bottles of beer and 3 tots of whisky. No evidence was tendered whatsoever to link the 2nd Claimant to the alleged theft. Respondent admits that it owes the 2nd Claimant Kshs.7,400/= in respect of service charge and not Kshs.52,800/= as claimed. That the balance is arrived at upon scrutiny of payslips and comparing them to those of their colleagues. Respondent notes that payslip of August, 2011, shows that the Claimant was paid Kshs.4,200/= service charge.

Severance pay is not payable as she was registered with NSSF.

The claim for compensation is denied in total, be it for the remainder of the contract or maximum compensation under **Section 49 (1) (c)** of the Employment Act.

With regard to the 3rd Claimant the Respondent filed written submissions on 10th June, 2013.

On 21st November, 2012, they paid Kshs.13,321/= to the 3rd Claimant and granted him a Certificate of service pursuant to a consent in court.

The Respondent submits that this payment covers the salary for January, 2011. That notice pay is not owed as the 3rd Claimant was summarily dismissed for theft.

Respondent admits Kshs.3,700/= with respect to service charge and not as claimed.

Severance pay is not payable because 3rd Respondent was registered with NSSF.

The claim for damages representing the remainder of the contract is also denied stating that the dismissal was lawful taking into account all the circumstances of the case.

Remedies.

With regard to the issue of dismissal the Respondent dismissed the 2nd and 3rd Claimants on no evidence at all given that they were waiters and therefore had nothing to do with stock or stock taking at the counter.

The dismissal was wrongful, unlawful and unfair taking all the circumstances of the case into account.

With regard to the 1st Claimant an evaluation of the evidence tendered shows that the surprise stock take did not take into account the closing stock of 13th January, 2011 and also did not account for the sales already done on 14th January, 2011 between 1 and 3 o'clock.

Clearly there is a high possibility that the finding by the persons who did the stock take had errors.

The persons did not give the 1st Claimant opportunity to explain the discrepancies and to defend himself against dismissal.

The General Manager told the court in any event the 1st Claimant was dismissed for cumulative mistakes. Warnings unrelated to the matter under consideration were produced.

In the final analysis the court finds that the 1st Claimant has established on preponderance of evidence a *prima facie* case that he was unlawfully dismissed and the Respondent has failed to discharge

its onus in terms of **Section 47 (5)** of the Employment Act to show that the reasons for dismissal was justified.

The Respondent also denied the 1st Claimant a fair hearing and therefore did not dismiss him in terms of a fair procedure contrary to **Section 42 (2) (c)** of the Employment Act.

The 2nd and 3rd Claimants were on fixed terms contracts and the court finds it proper to award them compensation equivalent to the gross salary they would have earned for the remainder of their respective contracts as follows;

2nd Claimant.....Kshs.215,280/=

2rd ClaimantKshs.104,052/=.

The 1st Claimant was on permanent and pensionable terms. His means of livelihood was unlawfully and unfairly curtailed. He had minimal contribution to the termination. He was partly paid his terminal benefits whilst the matter was proceeding. He had served the Respondent from 2004 up to 2012 when he was dismissed, a period of over 8 years.

In the circumstances the court awards him 10 months gross salary being compensation for the dismissal in the sum of Kshs.140,156/=.

Terminal benefits payable are as follows;

Notice pay:

1st Claimant Kshs.14,156/=

2nd Claimant Kshs. 12,960/=

3rd ClaimantKshs. 8,761/=

Service charge:

1st Claimant Kshs.17,000/=

2nd ClaimantKshs. 7,400/=

3rd ClaimantKshs. 3,700/=

The court makes no award with respect to the claims for payment in lieu of leave. This is because the Respondent adequately discharged the burden to show that any outstanding leave was paid for.

Total award:

1st Claimant Kshs.171,312/=

2nd ClaimantKshs.235,640/=

3rd ClaimantKshs.116,513/=

The Respondent is to pay costs of the suit to each of the Claimants.

It is so ordered.

Dated and delivered at Nairobi this 29th day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE