



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 159 OF 2013

REUBEN MWAMBOGA.....CLAIMANT

v

BAHNHOF BAR & RESTAURANT.....RESPONDENT

JUDGMENT

1. Reuben Mwamboga (Claimant) filed a Memorandum of Claim on 19 June 2013 against Bahnhof Bar & Restaurant (Respondent) seeking terminal/contractual benefits and costs.
2. The Claim was served upon the Respondent and it filed a Response on 29 July 2013 through the firm of M. Ananda & Co. Advocates.
3. On 31 July 2013 the Cause came up for directions and the hearing was fixed for 25 September 2013 with an order to the Claimant to serve a hearing notice. I also directed the Respondent to file and serve the employment records of the Claimant. This was not done.
4. On 25 September 2013, Ms. Ngige held brief for Mr. Ananda and she applied for adjournment to enable Mr. Ananda file documents. She requested for 15 days. I refused the application for adjournment and directed that the hearing proceeds at 10.15am. By 10.15am Ms. Ngige had left and there was no representation for the Respondent and I directed the matter to proceed at 2.30 pm. There was no representation again for the Respondent and no reasons were given. The Cause therefore proceeded without the Respondent.
5. The Claimant pleaded that he was employed by the Respondent on permanent basis with effect from 1 April 2009 after serving for 4 months on probation and that on 28 September 2012 he was dismissed without any reason or explanation, pay in lieu of notice and without a termination letter. At time of termination he was earning Kshs 9,500/- and had been working for 12 hours without payment of overtime or going on public holiday.
6. He also pleaded that his dismissal was unfair and unjust.
7. The Claimant testified on his behalf and stated that he was employed as a barman on probation on 1 December 2008 until 31 March 2009 after which he was issued with an appointment letter (Exh 1). He was working at the Respondent's Mtwapa branch.
8. Regarding his dismissal, the Claimant stated that on 28 September 2009 he reported to work in the morning and took stock after which the Respondent's managers called Gertrude from Kengeleni branch and a Paul from Mtwapa branch came and started taking stock afresh and then asked for money he had received as sales. Thereafter Gertrude informed the Claimant that Patricia, the Respondent's proprietor did not want him to continue working.
9. According to the Claimant they proceeded to Kengeleni where he asked to see Patricia but he was informed she did not want to see him. On asking further on why he was being terminated, the

Claimant stated that the 2 managers informed him that he had run shortages which amounted to Kshs 6000/- over the previous months. The Claimant testified that such shortages were normally deducted from employee's wages.

10. The Claimant further stated that at the time of termination he was earning Kshs 9,500/- per month but was not being issued with a pay slip. He further stated he would report to work at 8.00am and work until 8.00 am the next day without overtime payment and that he used to work during holidays.
11. The Claimant also testified that he had failed to secure other employment because he had not been issued with a recommendation letter.
12. The Respondent filed a Response in which it denied the claims of the Claimant and put him to strict proof. It was also denied that the Claimant was employed on a permanent basis, was not earning Kshs 9,500/- per month at dismissal or worked overtime.

Issues for determination

13. The issues which arise for determination based on the pleadings and the Claimant's testimony is employment status of Claimant, whether the dismissal was unfair and if so, appropriate remedies.

Employment Status of Claimant

14. The Claimant was issued with a letter of appointment dated 1 April 2009 and the letter clearly stipulated that he was appointed as a barman on permanent basis and that he would be entitled to payment for overtime and public holidays. He was also entitled to 21 days annual leave.

Whether dismissal was unfair

15. Section 47(5) of the Employment Act is clear on the legal burden imposed on both employees and employers in complaints of unfair termination or wrongful dismissal. The burden on an employee is to prove that an unfair termination or wrongful dismissal has occurred. The employer has the burden to justify the grounds for the dismissal.
16. The Claimant has proved that he was dismissed without notice or any reasons.
17. Section 45(2) of the Employment Act expects an employer to prove that the reasons for termination are valid and fair reasons. The Respondent's pleading/Response did not attempt to justify or prove the validity or fairness of the reasons for dismissing the Claimant.
18. In fact the type of Response filed by the Respondent cannot and does not meet the threshold expected of a pleading in the Industrial Court.
19. The Employment Act has explicitly set out the legal burden an employer should discharge. In this regard the content and form of a Response must adhere to what the Act expects an employer to discharge. Bare denials and putting Claimants' to strict proof will not just do.
20. Further section 41 of the Employment Act has made provision for an employer to notify and hear any presentation/explanation by an employee before he is dismissed.
21. From the material placed before me, I am satisfied that the Respondent did not comply with the procedural fairness dictates of section 41 of the Act.
22. The dismissal of the Claimant was both procedurally and substantively unfair, the Respondent having neglected/failed to participate in the hearing to prove the reasons for the dismissal and that those reasons were valid and fair reasons warranting dismissal and not some other form of sanction/penalty.
23. Before discussing appropriate relief I need to refer briefly to the testimony of the Claimant that he was not being issued with a pay slip. It is a mandatory requirement under section 20 of the Employment Act, 2007 for employers to issue employees with an itemized pay statement (what is generally called pay slip) and the Respondent in failing to issue the Claimant with an itemized pay statement was in breach of the law for which penal sanctions may result as provided for in section 25 of the Act.

Appropriate relief

One month pay in lieu of Notice

24. The Claimant's appointment letter did not have a clause on termination or notice period. This is contrary to section 10(3)(b) and (c) of the Employment Act on length of notice to terminate a contract and its duration. The Claimant's evidence was that he was being paid monthly. I would therefore invoke Section 35(1)(c) of the Employment Act and award him the equivalent of one month wages in lieu of Notice in the sum of Kshs 9,500/-.

Unpaid outstanding overtime

25. The Claimant sought Kshs 68,256/- being overtime as set out in paragraph 18 of the Memorandum of Claim. An employer is required to keep employment records and produce the same in legal proceedings. I expressly ordered the Respondent to file and serve the employment records of the Claimant. This order was not complied with.

26. The Respondent merely denied and traversed the Claimant's pleadings. I would award the Claimant the sum of Kshs 68,256/- as unpaid outstanding overtime.

Unpaid holidays worked

27. The Claimant sought Kshs 15,200/- as holidays worked but not paid. For reasons indicated in the preceding paragraph I would award this head of claim.

Service pay

28. The Claimant also sought Kshs 14,250/- as service pay for 3 years worked. Section 35(5) and (6) of the Employment Act regulate payment of service pay. There was no evidence that the Claimant was a member of the National Social Security Fund or any other named scheme.

29. The Claimant is therefore entitled to service pay calculated using the formula of basic pay and house allowance divided by twenty six to get daily rate multiplied by 45 days which comes to Kshs 16,442/-.

Compensation for unfair termination/wrongful dismissal

30. The equivalent of a number of months gross wages not exceeding twelve months is one of the primary remedies for unfair termination. I have come to the conclusion that the termination of the Claimant was unfair.

31. The Claimant testified that he has not secured alternative employment because the Respondent has not issued him with a recommendation letter/certificate of service. I have awarded him service pay. He had served the Respondent for a short time of three years. Considering these factors I would award the Claimant the equivalent of 10 months compensation which I assess at Kshs 95,000/-.

Conclusion and Orders

32. In conclusion I do find and hold that the dismissal of the Claimant was unfair and I award him

a. One month pay in lieu of Notice	Kshs 9,500/-
b. Outstanding overtime	Kshs 68,256/-
c. Unpaid holidays	Kshs 15,200/-
d. Service pay	Kshs 16,442/-
e. 10 months compensation	Kshs 95,000/-

TOTAL **Kshs 204,398/-**

33. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 1st day of November 2013.

Radido Stephen

Judge

Appearances

Mr. Asewe instructed by

Nyagaka SM & Co Advocates for Claimant

M. Ananda & Co. Advocates for Respondent but did not appear at hearing.