



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

Cause No. 361 of 2011

between

OMAE JOSHUA ONDIEKI.....CLAIMANT

VERSUS

**GOTHIC INVESTMENT LTD T/A OSTERIA GROUP OF
HOTELS.....RESPONDENT**

JUDGMENT

The claimant filed his claim on 11-3-2011 against the Respondent for wrongful and unfair dismissal and seeking:-

- (a) Kshs.146,400/= as his employment terminal benefits.
- (b) Kshs.144,000/= as compensation for wrongful dismissal employment.
- (c) Costs and interests.

The Respondent has opposed the claim through her response filed on 30-3-2011. The Respondent admits employing the claimant as pleaded

in the claim but denies the amount of salary pleaded by the Claimant. The Respondent accuses the Claimant of misconduct of stealing food and then that the dismissal was lawful. The Respondent then relies on Section 44(3) of the Employment Act 2007 and the case of Njeru Vs Agip (K) Civil Application 519 of 1979 (986) KLR and prayed for the dismissal of the claim with costs.

The hearing was done on 24-10-2011; 30-7-2012 and 3-8-2012 when the Claimant testified as CW1 and the Respondent was represented by Lynett Nabwera as RW1.

CW1 told the court that he started working as a casual in January 2005 but after 8 months he started receiving monthly salary. That he worked for 2 years then transferred to Westlands Branch and finally Malindi Branch where he worked until March, 2010.

That on 22-4-2010 he was summoned to the Managing Director by his branch Manager and he met him on 28-4-2010 when he was summarily dismissed without any benefits. He prays for his accrued dues for the 5 years' service of Kshs.146,400/= plus Kshs.144,000/= for wrongful dismissal.

His pay was Kshs.12,000/= per month and that he was never paid his salary for April, 2010. He denied

going for any leave. He also prays for holiday pay, overtime, severance pay and Leave Travelling Allowances. He denies receiving such compensation from the Respondent.

RW1 in his evidence alleged that she was the Personal Assistant to the Director of the Respondent. That she keeps the personal file for the Claimant. She sought to produce several documents from the file which were objected to by the Counsel for the Claimant. She took the risk of producing the same, subject to the court's finding on admissibility thereof during judgment.

One of the documents included copy of Appointment letter dated 9-2-2007. The letter had cancellation which the witness said she was a stranger to. The other documents were an undated undertaking to accept Kshs.21,200/= as full and final dues, and petty cash vouchers dated 3-5-2010, 8-5-2010, 15-5-2010, 29-5-2010 and 5-6-2010 for Kshs. 5,000/=, 4,000/=, 5,000/=, 3,000/= and 4,200/= respectively.

She confirmed that she was not the author of the documents. According to the documents, the claimant had been paid all his dues amounting to Kshs.21,200/= and nothing more should be paid.

On cross-examination, she confirmed that she was employed by the Respondent on 1-5-2010 as Personal Assistant of the director of the Respondent. That she keeps all the files on behalf of the Director and she also represents him in meetings. That there is a newly employed Human Resources Manager for the Respondent.

It was her evidence that a chef never comes into contact with the customers. That only the waiters deal with the customers within the Restaurants. That she could not explain the cancellation on the vouchers from Ongeru to Ondieki. After the close of the hearing both counsel filed written submissions persuading the Court to find in their client's favour.

I have carefully read and considered the pleadings and the closing submissions by the learned counsel and the testimonies of the CW1 and RW1. The issues for determination are:

- (a) when did the employment contract between the parties herein commence?
- (b) what was the salary payable to the claimant as at the date of dismissal?
- (c) whether the summary dismissal of the claimant from service was unfair and unlawful?
- (d) whether any employment benefits are payable to the claimant in respect of the said summary dismissal?

On the first and second issue, I observe that both parties did not take keen effort on it, both in their testimonies and closing submissions. The testimony by the claimant is that he never signed a written contract in January, when he started working for the Respondent. That is also the submission by his counsel.

The RW1 testifies that there was a written contract dated 9-2-2007 for commencement on 1-2-2007. This has been objected to by the claimant's counsel. It was never shown to the Claimant during his testimony. It is not original but a photocopy which is not certified as true copy. The person producing it was not present when the claimant allegedly signed it. It is not produced with the whole file from where it has been allegedly kept and the alleged personal file for the Claimant which the RW1 alleges to keep was not brought to court.

I find that piece of evidence prejudicial to the Claimant and it is inadmissible. There was no proper basis for production by RW1 who is not the Human Resource Manager or even an officer in the Human Resource office. She was not even working for the Respondent as at the time the alleged contract letter was made.

I will, therefore believe the evidence of the claimant, that is to say that, the employment contract was oral

and started in January 2005 at a monthly salary of Kshs.12,000/=. This was never controverted by any admissible evidence from the Respondent.

The testimony of the RW1 is hearsay. The Respondent should have called primary evidence to rebut that of the claimant. The Director of the Respondent was alleged to be abroad, but no application was sought to await his return to the Country. It was not shown that waiting for him would occasion undue delay or unreasonable costs. Although this court is not supposed to insist on legal technicalities, I find it an act of neglect on the part of the Respondent not to take some steps to prove that the signature on the alleged contract letter to be that of the Claimant.

Turning to the third issue, I have no doubt that the evidence by the Claimant is uncontroverted on the manner in which he was dismissed. That on 22-4-2010, his Branch Manager sent him to the Managing Director's office where he reached on 28-4-2010 only to be dismissed summarily without benefits. Neither the Branch Manager nor the Managing Director testified or minuted any proceedings in the alleged personal file for the Claimant. According to the Claimant, the dismissal was summary and without benefits.

No evidence of the alleged theft has been tendered by either RW1 or the Branch Manager or any of the witness. No criminal charges were preferred against the claimant since no evidence was given to that effect.

I agree with the Claimant and his counsel's submission that the summary dismissal was unlawful and unfair. The Claimant was not given a hearing before decision to sack him was made.

The last issue to consider is that of the benefits payable to the claimant as a result of the unlawful and unfair termination. To begin with, for the same reason I have given above for dismissing the alleged letter of contract dated 9-2-2007, I will reject the alleged undated letter of undertaking to receive Kshs.21,200/= as full and final dues and also the petty cash vouchers dated 3-5-2010 – 5-6-2010.

I will proceed to award terminal benefits as follows:-

- | | | |
|---------------------------|---|----------------|
| (a) Salary for April 2010 | - | Kshs.12,000.00 |
| (b) Leave pay as prayed | - | Kshs.48,000.00 |
| (c) Service pay as prayed | - | Kshs.24,000.00 |

I will not award public holiday and overtime for lack of proper pleading and evidence. I will also not award leave traveling allowance as prayed because the Claimant never went for any leave.

I will, however award Kshs.72,000/= being 6 months for unfair termination. I have granted this because the Claimant confessed that he is in another gainful employment with better salary of Kshs.18,000/=.

In sum, the Claimant will get Kshs.138,400/= plus costs and interest.

Orders accordingly.

DATED and DELIVERED at Nairobi this 27th day of September, 2012.

Onesmus N. Makau
JUDGE