



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1410 of 2010

SAMWEL ITEBA ONSARE CLAIMANT

VERSUS

TRAVELLERS BEACH HOTELRESPONDENT

JUDGMENT

The Claimant Samwel Iteba Onsare filed the memorandum of claim on 17th November 2010 through Waiganjo Wachiara and Company Advocates. The Respondent Travellers Beach Hotel filed the memorandum of reply on 8th July, 2011.

The claimant has prayed for judgment against the Respondent for:

- (a) Unpaid salary for September, October and
half of November - Ksh.273,800/=
- (b) Service charge arrears for 12 years worked - Ksh.177,120/=
- (c) Allowance for Acting Sous Chef - Ksh.105,000/=
- (d) Estimated share of service charge for
September, October and half of November - Ksh.5,000/=
- (e) Less 1 month in lieu of notice - Ksh.29,520/=
- (f) Net amount claimed - Ksh.331,400/=
- (g) All other accumulated rights
- (h) Interest at court rates till payment in full
- (i) Costs of and incidental to this suit

The Respondent prayed that the court should reject all the claims by the claimant as being baseless since he had already signed certificate confirming receipt of all his statutory benefits.

The cause came up for hearing on 23rd May, 2012 and the claimant testified as follows:

- (a) That the claimant is a Chef by profession and was employed by the Respondent on 22nd February, 1996.
- (b) He was required to give one month's notice or one month's pay in lieu on notice so as to terminate the contract of employment.
- (c) He gave a resignation notice on 2nd November, 2008 and the Respondent accepted it.
- (d) The Collective Agreement which the claimant was not a party to prescribed notice of four months. He testified that he opted not to join the Union.
- (e) The claimant acted for three months as the Executive Sous Chef. The Executive Sous Chef earned Ksh.70,000 and the claimant was not paid the acting allowance for his services as the acting Executive Sous Chef.
- (f) That the Respondent was entitled to deduct one month salary in lieu of the one month notice for termination since the claimant resigned without giving the termination notice.
- (g) The service charge claimed depended upon the number of guests staying at the Respondent hotel.
- (h) The claimant stated that he was entitled to leave pay of Ksh.20,664.

The Respondent called a witness one Fredrick Wanyoike Kiuru, the Respondent's General Manager. He testified as follows:

- (a) The claimant voluntarily resigned by personally delivering to the Respondent the resignation letter dated 2nd December 2008.
- (b) Most of the hotel staff were members of the KUDHEIHA and KWAHU workers Trade Unions. The claimant was bound by the provisions of the relevant Collective Agreement. At the time the claimant resigned, he was a Union member and the Respondent deducted the relevant union dues.
- (c) The Collective Agreement provided for the termination clause. For an employee of ten years and above, a termination notice of 4 months was prescribed. The grievant did not give four months notice and therefore he was to pay the Respondent four months' salary in lieu of notice.
- (d) The claimant was paid for the months of August, September and October, 2008 as per the copies of the relevant payrolls produced from the bar by Counsel for respondent.
- (e) Service charge was a gratuity included in the Collective Agreement and it was based on the number of years served.
- (f) As per Appendix 6 on the Memorandum of reply, the claimant's gratuity for 12 years at the rate of 15 days for every year worked was worked out in accordance with the Collective Agreement. The claimant signed the acknowledgement of full and final dues on leaving the Respondent Hotel as per Appendix 6. He signed freely and confirmed,

“Certified above is the full and final settlement of both dues and liabilities and there will be no further claims whatsoever hereafter”.

- (g) The claimant was given a certificate of service dated 27th August, 2009 as required by the law.
- (h) According to the computation of final dues at Appendix 6, the claimant owed the Respondent

Ksh.7,690/=.

- (i) The Respondent did not owe the claimant any money. The Respondent trusted and was confident that the claimant would come back to clear his liability of Ksh.7,690/= with the company.
- (j) The payroll for August, 2008 was not in dispute but, on its face, the claimant's signatures for September and October 2008 looked suspicious and different.
- (k) The Respondent had not made any specific counterclaim in the cause.
- (l) The claimant signed for the final dues on 18th August, 2009 because it took him nine months to come back for clearance.
- (m) The witness was not aware that the claimant's liabilities to the co-operative had been paid because he was not a co-operative official.

Counsel for the claimant submitted as follows:

1. That the prayers had been proved on a balance of probability.
2. It was not in doubt that the claimant was entitled to gratuity of the sum of Ksh.177,120/=.
3. It was not contested that the claimant acted as an Executive Sous Chef between December 2004 to March, 2005 and the Respondent had failed to adduce any evidence that the claimant had been paid for the acting.
4. The service charge was contested and the figures varied and therefore the claimant's claim was on average basis.
5. The payrolls produced by Counsel for the Respondent during the hearing should be struck off from the record as the signatures of the claimant reflected thereon were different.
6. The claimant was not a member of the union as claimed by the Respondent.
7. Respondent's Appendix 6 indicated the exact amount the claimant was entitled to but the Respondent proceeded to levy unjust deductions in order to deny the claimant his rights.
8. Respondent's Appendix 7, the certificate of service, was an acknowledgement by the Respondent that the claimant was entitled to service pay because he had served from 22nd February 1996 to 19th November, 2008.
9. Section 3 (6) of the Employment Act, 2007 provides for minimum terms and conditions of employment so that even if the Collective Agreement was in force, a four months' notice was illegal and unfair.
10. The court should allow the prayers made and costs of the claim.

Counsel for the Respondent submitted as follows:

- (a) The claimant was unionisable cadre and therefore was covered by the Terms & Conditions of the Collective Agreement.
- (b) The parties were entitled to enhance the termination notice period from one month to four months because the Employment Act, 2007 prescribed the minimum terms of service.
- (c) The claim for the Acting allowance was time barred in view of the provision of Section 90 of the

Employment Act, 2007 which prescribes 3 years from the date of the cause of action.

- (d) The claimant signed the settlement document and he cannot come back and repudiate. It was full and final settlement and the claimant is bound by the discharge so that he cannot reopen the claim.
- (e) The claimant's case be dismissed with costs.

The main issue for determination in this cause is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings in view of the prayers made.

- (a) There was no material on record to prove that the claimant was a member of a trade union. The respondent did not even produce Collective Agreement that was alleged to apply to the claimant. Accordingly the court finds that the claimant was not a unionisable staff and was not bound by any Collective Agreement.
- (b) The Respondent did not produce any evidence to show that the claimant was paid salary for September, October and half of November, 2008. The respondent's witness admitted that the signatures appearing on the payrolls shown to the court by the respondent's Counsel for August, September and October 2008 were different and could not be verified to belong to the claimant. The claimant was entitled to a written statement from the respondent containing particulars of the gross wage or salary, statutory deductions and net amount paid as stipulated in Section 20 of the Employment Act, 2007. In absence of the prescribed pay slips, the court finds that the claimant was never paid and is awarded Ksh.73,800/= as prayed.
- (c) The Respondent has not disputed the service pay of Ksh.177,120/= with respect to the 12 years service and the court grants the same as is also an entitlement under Section 35(5) of the Act.
- (d) The allowance for acting as Sous Chef was claimed at Ksh.105,000/=. It was submitted that the acting was between December 2004 and March 2005. The claim was filed in court on 17th November, 2010. The court finds that the claim was time barred as submitted by the Counsel for the Respondent because it was filed long after lapsing of the three years prescribed under Section 90 of the Employment Act, 2007. The claim will therefore fail.
- (e) The claimant has prayed for Ksh.5,000/= being estimated share of the service charge for September, October and half of November 2008. The claimant testified that the service charge was based on the number of visitors at the hotel during the period in issue. No evidence was provided on the claim and no formular was referred to as to how to calculate the due service charge. Thus, the claim shall fail.
- (f) The claimant admitted that he should pay one month salary in lieu of notice and the sum of Ksh.29,520/= shall be deductible from the court's award to the claimant as admitted.

The claimant has disputed the alleged discharge dated 18th August, 2009. The court finds that the alleged discharge is not valid because:

- (a) it has not been explained why it was allegedly signed on 18th August, 2009, long after the claimant had resigned on 2nd November, 2008;
- (b) it provided for deductions which are not explained and proved such as an alleged loan from the co-operative and an advance for shoes; and
- (c) on its face it was signed on different dates so that the alleged committee witness cannot be said to have witnessed the signing.

Accordingly, judgment is entered for the claimant against the respondent for:

- (a) Payment of Ksh.221,400/= plus interest at court rates from 2nd November, 2008 till full payment;
- (b) Costs of the cause.

Signed, dated and delivered this 26th day of October, 2012.

BYRAM ONGAYA
JUDGE