



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 686 of 2012

DAVID MUTHOKA KYUNGUCLAIMANT

VERSUS

ATHUSI BAR AND RESTAURANT..... RESPONDENT

JUDGMENT

The claimant is David Muthoka Kyungu acting in person. He filed the memorandum of claim on 24th April, 2012, claiming for-

- (a) The sum of Ksh.76,800/= for service pay and pay in lieu of annual leave due but not taken.
- (b) Compensation for wrongful dismissal to a maximum of 12 months' wage amounting to Ksh.96,000/=.
- (c) Costs.
- (d) Interest.

The Respondent filed the Response to the statement of claim on 18th June 2012 through Adere & Company Advocates. The Respondent admitted that the Respondent employed the claimant on 29th September 2003 as an accountant and at the time of termination of the service on 31st August, 2011 the claimant was earning a sum of Ksh.8,000/=. The respondent also pleaded that-

- (a) the claimant's termination was fair and lawful;
- (b) the termination followed the claimant's abusive language to his seniors and workmates including despising them and exhibiting uncooperative and unacceptable attitude to work relation;
- (c) the claimant and been on leave in or about January 2007 and against in May, 2008 and had opted to be paid in lieu of all his other leave entitlements; and
- (d) the claimant was not entitled to any further payment from the respondent in respect of the terminated employment.

The case came up for hearing on 19th November, 2012. The claimant gave evidence to support his claim. The respondent's counsel was in court but did not call any witness.

The claimant testified as follows:

(a) he had not received pay increment for three years and the ksh.8,000/= he was paid for the monthly wage could not sustain him in Mombasa. So he wrote the letter dated 7th April, 2011 annexed to the memorandum of claim. The letter was addressed to the Respondent's Company Secretary one John Musyini and it stated as follows:

"Dear Sir,

RE: REQUEST FOR A TRANSFER

It is my wish to request you for a transfer from our Mombasa branch to an upcountry branch, preferably Sultan Hamud branch.

Reasons for this request are twofold:

1. I would like to relocate to a branch closer to Kilungu where my children are living and schooling so that I can be closer to them.

I am also a single parent and my children have no minder since my elderly mother who have been taking care of them has been suffering from poor health and is also in need of my assistance.

2. As you are aware I have repeatedly complained of my extremely low pay and you realize that I have not received any pay rise for over three years. As such my purchasing power has all been eroded by inflation and the reality is that my salary can no longer sustain town living and I make no pretensions that I am capable of surviving on such a low pay. As a pointer to my plight it would only be fair if you consider my remunerations compared to those of Mr. Ngele and Mr. Kasuni who left recently and you will note how underpaid I am.

It is in this regard that I intimate to you that I did bring the issue of salary for discussion with the directors Mr. Kilonzo and Mr. Mukula during their regular visit here albeit individually. Mr. Kilonzo listened to my sentiments but referred me to you. When I brought up the issue for discussion with Mr. Mukula I was so shocked when he exploded in a fit lambasting and accusing me of sitting idle all day on my desk doing nothing yet I have the audacity to ask for a pay rise. He went further and informed me that I had reached the apex of my career since I do not discharge hotel/bar waiters duties or do any cooking and so I am not eligible for promotion. True he had a right to make his observations but I do not think he was justified in that I have had a very heavy workload which cannot even allow me to take an off. All these for a paltry Ksh.8,000/= or Ksh.266/= per day. This is less than what a construction worker takes home. To be sincere I was very hurt that my employer could rubbish my sweat and labour using such demeaning language. It was unnecessary.

You will note that it is now seven years since I joined the company. It is also instructive to note that I previously worked for Commercial Bank of Africa for sixteen years and my last work station was Chief Cashier. I am reasonable educated. Professionally I have completed stage II of my Kenya Institute of Bankers Examinations where I topped the Accounting class. I have been a student of management but after the seven years period that I have been an employee of Athusi Bar & Restaurant I have never known any promotion and my Accounting Office is the most disparaged and needless to say I have the most number of supervisors though they hold no better qualifications than I do. This is the reason why the office has not even been accorded a work station in the forms of a desk and I have had to compete for the sitting space with customers yet 99% of the company's written documents emanated from my office.

As for my personal growth and development Mr. Mukula was unequivocal that I should not expect any upward mobility and I have no reason to doubt him. It is for this particular reason that I wish to be transferred upcountry where the cost of living of such low pay may be slightly tolerable.

It is my request that you treat my case as desperate, helpless and urgent. I am indeed in need of

relocation for it is pointless to continue being here when the wages cannot cater for my town living expenses, rent, food and medical services yet I have children who need my attention.

Kindly deal with the issue conclusively and expeditiously.

Yours faithfully

SIGNED

David Muthoka Kyungu”

(b) By the letter dated 20th April, 2011 attached on the memorandum of claim, the Respondent asked the claimant to proceed on compulsory leave with immediate effect.

(c) The claimant testified that he spoke to the Respondent’s Chief Executive Officer one John Musyimi to convey to him his fate but he did not receive any progress report. Instead he asked him to go to Mombasa to collect his pay and the claimant travelled on 31st June 2011 to the Respondent’s Mombasa office. On 24th August, 2011 the claimant met the Respondent’s Chief Executive Officer at Athusi Bar & Restaurant at Ronald Ngala Street in Nairobi. They discussed the employment relationship including the claimant’s relationship with one Mr. Ngele and alleged theft by one Tabitha Mutambu.

(d) On 31st August, 2011 the claimant received the letter dated 31st August, 2011 attached to the memorandum of claim by which the Respondent terminated his services. The letter informed the claimant to arrange to collect his dues plus one month’s salary in lieu of notice. He called the Respondent’s Chief Executive Officer who informed him that he was entitled to one month pay in lieu of notice and no more. On 27th October, 2011 he was paid 8,000/= being one month in lieu of notice and Ksh.8,000/= for house allowance.

The Counsel for the Respondent submitted that the claimant had failed to prove his case and which the court should dismiss with costs.

The court has considered the pleadings, evidence and submissions by the parties and makes the following findings:

(a) the Respondent pleaded that the termination was attributable to the claimant’s abusive language to his seniors and workmates including despising them and exhibiting unco-operative and unacceptable attitude to work relations. The court finds that the respondent has failed to prove that reason for termination.

In addition, the termination letter did not state the reason for the termination. Under Section 43 of the Employment Act, 2007 it was the Respondent’s burden to prove the reason for termination and the Respondent having failed to do so, the court finds that the termination was unfair. The claimant raised a valid grievance about his low pay and requested for a redeployment. It was within his entitlement to make such requests. In particular the court finds that it was unfair labour practice for the Respondent to prefer compulsory leave and subsequently a termination of employment flowing from the claimant’s genuine complaint. Section 46 (h) of the Act provides that initiation or proposed initiation of a complaint that is responsible and well founded cannot constitute a fair reason for dismissal or for the imposition of a disciplinary penalty. The court finds that the Respondent acted unfairly and in breach of Section 46 (h) of the Act. The claimant is entitled to 12 months gross salary compensation for the unfair termination and is awarded **Ksh.96,000/=** as prayed for.

(b) The claimant is entitled to service pay for every year worked as provided for in Section 35 (5) of the Employment Act, 2007. The court finds the claim of **Ksh.32,000/=** reasonable and the claimant is granted as prayed for in the memorandum of claim.

(c) The claimant has prayed for pay in lieu of annual leave for the eight years he served. The respondent had pleaded that the claimant took leave in January 2007 and May 2008. It was the duty of the

Respondent to maintain records of the leave due and taken. Such records were not produced in court. The claimant did not testify to support this claim. Taking into account all the evidence on record, the court finds that the claimant has failed to prove the claim and the same shall fail because there is no sufficient evidence provided on the issue.

In conclusion, judgment is entered for the claimant against the respondent for-

- (a) a declaration that the termination of the claimant's employment by the respondent was unfair;
- (b) the respondent to pay the claimant Ksh.128,000/= plus interest at court rates till full payment; and
- (c) the Respondent to pay the costs of the cause.

Signed, dated and delivered in court at Nairobi this 23rd day of November, 2012.

BYRAM ONGAYA

JUDGE