



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1334 of 2010

ELIAS MUCHOKI MAINA.....CLAIMANT

VERSUS

VIENNA TASTY MEALS.....RESPONDENT

JUDGMENT

BY a memorandum of claim dated 27th October 2010, the Claimant **ELIAS MUCHOKI MAINA** states that he was employed by the Respondent **VIENNA TASTY MEALS** on 16th February 2005 as a cook and was later promoted to be a manager. He was dismissed on 21st March 2008 through a text message whose transcript reads as follows:

“Name: Mama Dan

Number: +254722558298

Content:

Mburu it seems you have a lot of matters to solve so please stop work because it is inconveniencing me a lot, I will manage myself, thanks u can come for your money end month.

Time 21/03/2008, 3:59:42”

The Claimant contends that on that day he had sought sometime off work to attend to his expectant wife. He was not paid salary in lieu of notice, service pay and severance benefits. That the termination was untimely, unlawful and unjustified and in complete disregard of the tenets of natural justice.

He claims the following:

- | | |
|--------------------------------------|-----------------|
| a) Service/gratuity pay | Kshs.16,100.00 |
| b) Payment in lieu of notice | Kshs.8, 050.00 |
| c) Compensation for loss of earnings | Kshs.96, 600.00 |
| d) Unpaid leave days | Kshs.16, 905.00 |

- e) Public Holidays Kshs.17, 709.00
- f) Rest days; 1 day per week for 3 days Kshs.41, 808.00
- g) 7 hours of overtime worked per day Kshs.253, 548.00

Total Kshs.450, 720.00

The Claimant further avers that he reported the dispute to the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) who reported the dispute to the Ministry of Labour but the Respondent refused to attend meetings called by the Labour Office. His salary at the time of termination was Kshs.8, 050.00.

The Respondent filed its Memorandum in Reply to the Claim in which it alleges that the Claimant was a casual employee, that the Claimant left work for a whole week during Easter Period in the year 2008 without permission and that one to his breach of the employment contract the Respondent only remedy was the summary dismissal of the Claimant. The Respondent denies owing any money to the Claimant and prays that the claim be dismissed with costs.

The parties were heard by Hon. Justice Isaac E.K. Mukunya as he then was on 23rd May, 2012. The Claimant testified and stated that he resides in Thika. He was employed by Vienna Tasty Meals, the Respondent on 16th February 2005. He started work as a cook then was promoted to waiter in 2006 and in 2007 he was promoted to a manager. He was issued with employment identification (Appendix 1). He was paid monthly. He worked every day including public holidays from 6.00am to 9.00 pm.

On 21st March 2008 he was off daily. It was Good Friday and he asked for permission. While at home he received an sms message not to go back to work and collect his pay at the end of the month. He had no warning letter. He was paid Kshs.5, 380 being 20 days pay.

On 27th March, 2008 he reported the dispute to Labour Office. He claims notice pay, service, unpaid leave and others as particularized in his memorandum of claim. In cross examination he stated that he was never issued with a letter of appointment, but had a job card, he worked between 6.00 and 9.00, was paid monthly by cheque or cash.

The Respondent also called one witness MS. ROSE MBETI GAKERE who testified that she is the manager of Vienna Tasty Meals, where she started working in 2003. The business runs fro 24 hours and operates in 2 shifts. Day shift begins at 7.00 am to 6.00 pm and night shifts from 6.00 pm to 7 am. She confirmed employing the Claimant from 17th February 2007 and he was paid monthly by cheque. He was a cook then waiter. His salary was Kshs.8, 050. She deducted NSSF. She produced her bank statement as standard chartered bank for Claimant first salary paid on 2nd March 2007. She denied that the Claimant worked overtime, but confirmed that the business operated on public holidays but is closed on Sundays, Christmas day and 1st January.

She admitted summarily dismissing the Claimant for absconding duty. She denied that he sought permission. She denied owing the Claimant any money. In the cross examination she denied that Claimant was a manager and also deny issuing him a job card. She testified that she was remitting NSSF but there was a problem with NSSF records. She denied ignoring letters from Labour office and union. She stated that she paid above statutory minimum rates to covers overtime. She admitted not giving the Claimant annual leave and notice.

The issues for determination by the Court are the following:

1. Whether the Claimants dismissal was unlawful.
2. Whether the Claimant is entitled to payment of terminal benefits and compensati9on as prayed in

the memorandum of claim.

The Law

The law relating to employment is contained in the Employment Act, 2007; section 2 defines a casual employee as one employed for not more than 24 hours. Section 37 provides for conversion to monthly contract terms of any casual employees who works continuously for one month on intermittently for 3 months.

Section 10 requires employers to keep records of employment while section 9 requires every employer to issue a written contract to any employee whose employment is likely to go for a period beyond 3 months.

The Respondent failed to comply with all these provisions of the Employment Act or to keep records of Employment as required by section 10(6) and therefore the burden of proving or disapproving the allegations of the Claimant as provided in section 10(7).

I now look at the prayers by the Claimant in the context of these provisions of the Employment Act.

a) Service Gratuity

Section 35 (5) of the Employment Act provides that any employee whose employment contract is terminated under subsection (1) ©_ is entitled to Service Pay unless the employee falls under the provisions of subsection 6 (a) (b) (c) or (d). The Respondent submitted that there were complications about remittance of NSSF.

RW 1 was unable to produce wither evidence of deduction of NSSF or evidence of remittance of the same. Since there is no proof of payment of NSSF, the Claimant is entitled to service pay. The rate of service pay has not been set by the Minister as required by Law. However, this Court has traditionally applied the rate of 15 days for every completed year of service, which is also the minimum rate customarily applied. I will therefore adopt the same rate of 15 days pay for each year of service.

The Claimant alleged that he was employed on 16th February, 2005 and had therefore worked for 3 months by the time he was dismissed. The Respondent however submitted that the Claimant was employed from February 2007. In the absence of records to prove the same, I will presume that the Claimant was employed in February 2005 and had therefore worked for 3 years. His service pay is therefore $8,050 \times 15 = 30 \times 3$ Kshs.12, 075.

I enter judgment in favour of the Claimant in sum of Kshs.12, 075 under this head.

b) Payment in Lieu of Notice

The Claimant was terminated via sms message. He had been away from work from morning to 13.59.42, the time when the sms message was received on 21st March 2008. He was obviously not given a hearing before being terminated as provided under section 41 of the Employment Act. Neither can an sms message be taken to be a valid mode of termination of employment. The termination or dismissal was obviously both unfair and unlawful. According to section 49 (1) (a) is entitled to payment of pay in lieu of notice. I therefore give judgment to the Claimant in the sum of Kshs.8, 050 being one month's salary in lieu of notice.

c) Compensation

Having been dismissed unfairly and wrongfully the Claimant is entitled to compensation. however taking into account the length of service which is 3 years only and the fact that it is not clear from the evidence on record whether or not the Claimant was granted leave to be absent on 21st March, 2012. He is not entitled to full compensation. I therefore grant him 2 months compensation at Kshs.16, 100.

d) Unpaid Leave

The Respondent admitted that the Claimant did not take leave during the period he was employed by the Respondent. The Claimant is therefore entitled to leave of 3 years that he was in employment at 21 days salary per year worked as provided in section 28 of the Employment Act. This adds up to Kshs.16, 905.

I give judgment of the same to the Claimant.

e) Public Holidays

The Respondent did not produce any records to show that the Claimant was given a day off in lieu of work on public holidays. The Claimant is therefore entitled to payment in lieu of all the public holidays at double the normal hourly rates. He worked for 13 hours and 858 hours for the 11 public holidays per year for 3 years at double the normal hourly rate everyday as admitted by the testimony of RW1. He is therefore, entitled to Kshs.30, 716.40.

I give judgment for the same under this head.

f) Rest Days

The Respondent stated that the workers were given 1 rest day every week. The Claimant did not contest this. This claim is therefore dismissed.

g) 7 Hours Overtime worked per day.

The Respondent admitted operating for 24 hours with 2 shifts and that the Claimant worked from 7 am to 7 pm. This adds up to 12 hours per day. Maximum hours per week should not exceed 52 hours.

The Claimant worked 12 hours a day for 6 days. This amounts to 72 hours a week translating to 20 hours per week of overtime.

This translates to Kshs.167, 440.

I give judgment to the Claimant in the said sum. In conclusion, judgment is entered for the Claimant in the sum of Kshs.251, 286.40. The Respondent will also pay the Claimant's costs.

Orders accordingly.

DATED AND DELIVERED IN NAIROBI THIS 10TH DAY OF DECEMBER, 2012.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

No appearance for Respondent.

Elias Muchoki Maina for Claimant.