



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 285 OF 2018

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

RITZ GARDEN HOTEL.....1ST RESPONDENT

GEORGE OPANDE.....2ND RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 27th August, 2018 and filed in court on 28th August, 2018, the Claimant sought payment of one-month salary in lieu of notice, one year of unpaid leave, 9 days salary for holidays worked, salary for 17 days worked, under payments and 12 months' salary in compensation for unfair termination.
2. The 2nd Respondent filed a Response to the claim on 13th September, 2018, wherein, he wholly denied the Claimant's claim.
3. The Claimant presented two witnesses during hearing, one being the grievant in the matter, Mr. Elisha Ochieng and Harrizone Owuor Andoke, the grievant's former co-worker and also a one-time chef of the Respondents to testify on their behalf.
4. The 2nd Respondent testified in opposition to the Claimant's claim.
5. The witnesses adopted their witness statements and produced their bundle of documents filed in evidence before court.
6. Parties did not file submissions in the matter.

The Claimant's Case

7. Mr. Elisha Ochieng testifying for the Claimant, stated that he was employed by the 2nd Respondent to work at the 1st Respondent, which was a hotel owned by him where he served as a waiter for one year and two months.
8. It is his case that the 2nd Respondent employed him on 30th December, 2014, after consultation on the terms of employment. It is his case that he was not given a written employment contract but that he diligently served the Respondent under terms agreed upon verbally. It is his further case that he was paid in cash and was never given a pay slip through out his time in the service of the Respondents.

9. The Claimant states that he was terminated on 17th February, 2016. The Claimant further avers that the Respondents deducted but never remitted his NSSF contribution. He further avers that he joined the Claimant union on 8th October, 2015 and that he personally paid union dues to the Claimant.

10. Mr. Ochieng stated on cross examination, that contrary to the 2nd Respondents averment denying being the owner of the 1st Respondent, that he knows the 2nd Respondent operated the 1st Respondent, where he doubled up as a Director and the Manager of the hotel. He further avers that the 2nd Respondent employed staff for the 1st Respondent and was fully in charge of its daily operations.

11. Mr. Harrizone Owuor Andoke's testimony, is that he was the grievant's co-worker at the Respondents hotel where he served as a chef between the year 2013 to 2019. He further states that he knows the 2nd Respondent as the Director of the 1st Respondent and that he was his employer.

12. It is Mr. Andoke's testimony that just like the grievant, he was never given a written contract of employment, but that he served the Respondents under a verbal agreement. He states that the 2nd Respondent wrote him a recommendation letter which was to assist him secure alternative employment when the 2nd Respondent converted the 1st Respondent to rental houses.

The Respondents' Case

13. It is the 2nd Respondent's case that he does not know the two witnesses who testified in the matter. He states that he did not employ the grievant and that the letter of recommendation produced in court by Mr. Andoke was not issued by him and hence it is a work of forgery.

14. The 2nd Respondent denies being the owner of the 1st Respondent and avers that he was wrongly sued in this matter. He states that he did not issue the grievant with a letter of employment because he was not his employee.

15. The Respondent states that he only met the grievant in court for the first time. It is his case that he is not in breach of any contract of employment as he did not issue any. He further states that there is nothing connecting him to the grievant and by extension the Claimant.

Determination

16. The court identified the following as issues for determination in this matter:

- i. Whether the 2nd Respondent is/was the owner or operated the 1st Respondent
- ii. Whether the Claimant/grievant was unfairly terminated
- iii. Whether the Claimant is entitled to the reliefs sought.
- iv. Who bears the costs of the suit.

Whether the 2nd Respondent is/was the owner or operated the 1st Respondent

17. The 2nd Respondent denies knowing the grievant in this matter. He also denies being the owner of the 1st Respondent hotel. The Claimant's witnesses confirmed having been recruited and employed by the 2nd Respondent to work at the 1st Respondent hotel that was operated by the 2nd Respondent.

18. The Claimant's witness number two, Mr. Harrizone Owuor Andoke, corroborated the evidence of the Claimant's first witness who is also the grievant in this matter, Mr. Elisha Ochieng. It was Mr. Andoke's testimony that he together with the grievant, were in the service of the 2nd Respondent. He produced a letter of recommendation written for him by the 2nd Respondent to enable him secure alternative employment when he converted his hotel to rental houses.

19. In the opinion of this court, the 2nd Respondent's evidence is a mere denial of his relationship with the 1st Respondent, as well as the employment relationship that existed between him and the two witnesses in this matter. Both of the Claimant's witnesses described him as someone they knew well and who they worked for.

20. The 2nd Respondent did not produce registration documents and/or business licenses to disassociate himself with the 1st Respondent. His evidence is a bare denial of the Claimant's case and smirks of dishonesty.

21. I find and hold that the 2nd Respondent is the owner/Director of the 1st Respondent.

Whether the Claimant/grievant was unfairly terminated

22. By denying being the employer of the grievant when it is evident from the testimony of the two witness that he was their employer, the 2nd Respondent denied himself an opportunity to disapprove the Claimant's claim. He did not address himself to the issue of unfair termination raised by the Claimant in this matter and neither did he answer or oppose the reliefs that the Claimant seeks herein.

23. The witnesses confirmed to this court that the 2nd Respondent habitually engaged employees without giving them letters of appointment, in a bid to avoid the obligations that come with employing workers in his business.

24. The 2nd Respondent wrote a letter of recommendation for the Claimant's witness number two Mr. Andoke, using the letter head of the 1st Respondent and further signed of as the Managing Director of the 1st Respondent. There is no denying that indeed the 2nd Respondent operated the 1st Respondent where he employed the Claimant's witnesses/grievant.

25. The court finds and holds that in the absence of evidence to the contrary, the grievant herein was unfairly terminated.

Whether the Claimant is entitled to the reliefs sought

26. The 2nd Respondent did not address himself or oppose the reliefs sought herein. The 2nd Respondent did not issue appointment letters and pay slips or pay advise to the grievant which is his obligation to do as an employer.

27. The Claimant had no other way of proving that he was not paid and neither has the Respondent, as the employer proved that he paid the Claimant.

28. The court finds and holds that the Claimant is entitled to the reliefs sought in his statement of claim and are hereby awarded as per claim.

29. In Conclusion, judgment is entered for the Claimant against the 2nd Respondent as follows:

- i. One-month salary in lieu of notice at Kshs. 11,831/=
- ii. Pay in lieu of leave at Kshs. 9,465/=
- iii. 9 days of unpaid public holidays at Kshs. 3,549/=
- iv. 17 days worked in February, 2016 at Kshs. 6,704/=
- v. Salary under payment at Kshs. 73,550/=
- vi. 4 months' salary as compensation for unfair termination at Kshs. 47,324/=
- vii. Costs of the suit and interest until payment in full.

30. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF JANUARY, 2022.

CHRISTINE N. BAARI

JUDGE

APPEARANCE:

MR. ERIC NGAME PRESENT FOR THE CLAIMANT

MR. GEORGE OPANDE 2ND RESPONDENT PRESENT IN PERSON

MS. CHRISTINE OMOLLO- C/A



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