



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 197 OF 2013**

**ANTHONY KIRAGU NGANG'A.....CLAIMANT**

**-VERSUS-**

**TAIDY'S RESTAURANT.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 20<sup>th</sup> December, 2013)

**JUDGMENT**

The Claimant is **Anthony Kiragu Ngang'a** and the respondent is **Taidy's Restaurant**. The claimant filed the memorandum of claim on 26.06.2013 and prayed for:

- a. **payment of 14 days wages during the period of suspension;**
- b. **48 days annual leave;**
- c. **notice pay;**
- d. **overtime;**
- e. **house allowance;**
- f. **underpayment;**
- g. **6 months wages as compensation for wrongful loss of employment;**
- h. **total claim of Kshs.245,326.30**
- i. **costs of the suit; and**
- j. **any other remedy court may deem just.**

The respondent filed the defence on 17.07.2013 through R.W. Chege & Associates and prayed that the claimant's suit be dismissed with costs.

The claimant appointed Geoffrey Otieno & Company Advocates to represent him in the suit.

The case was heard on 6.11.2013. The claimant gave evidence to support his case. The respondent's witness was its General Manager Festus Kigen (**RW**).

The claimant testified he was orally employed by the respondent as a waiter in January, 2006. He was later issued with the letter of appointment for employment commencing 1.6.2006 as per exhibit **AKN1** at Kshs.5,000.00 per month. The claimant testified that he worked from 6.00 am to 6.00 pm way beyond the agreed 8 hours per day. He was not given or paid for annual leave in 2010 and 2011.

The claimant testified further that he was suspended from duty by the letter of 14.03.2012. The suspension letter stated as follows:

**“Re: Suspension Letter**

**This is to let you know that the management is aware of your growing habit of being deceit in regard to stock management. You are therefore suspended for 14 days unpaid starting from March 15, 2012 until March 28, 2012. You are expected to report to work on March 29, 2012. On more than one occasion recently, you have been found transferring stocks from bar off the set standard procedures.**

**Below are a few specific occurrences we noted:**

- **March 09, 2012; the following items were found missing from the stock ( 1 Tursker lager, 2 Redds can, and 1 Gilbeys gin 350ml);**
- **March 12, 2012; you transferred Smiirnoff vodka 250 ml, and Viceroy 350 ml from pool bar to residents bar without proper authorized beverage transfer sheet;**

**We want you to be aware that we take the company set procedures very earnestly, and we want you to start following the set procedures seriously henceforth. If you continue violating the set company procedures in the future, you may be subject to additional penalties which may constitute termination of service or summary dismissal. Meanwhile, we would like to inform you that you will be working as a waiter after completion of suspension period, and your performance will be under strict observation from this time forth.**

**A copy of this letter will be placed in your personal file. You have the right to respond in writing to present information or arguments refuting this suspension. If you choose to respond, you have until March 15, 2012, 2 pm to do so. Your response, if any, will be considered prior to imposition of this suspension. It will be assumed that you've waived the right to respond if you do not take advantage of the above alternative.**

**Sincerely,**

**Signed**

**Festus Kiprof**

**Manager”**

The claimant replied the suspension letter by his letter dated 15.03.2012 addressed to the Manager and stating:

**“Re: Suspension**

**I humbly request you to reinstate me to employment or give me an indication as to when I shall be returning to my usual duty, since on the issue of stocks I request that you take my explanation as follows:**

1. **The business being new there was not set procedures of transferring stock from one counter to another.**
2. **That transferring of stocks was only consent between the bar tender setting on the said counters.**
3. **That the only set procedure of stock requisition of fresh stores to bar counter and vice versa.**
4. **That the management did not find any missing stocks and if it were it was deducted from the salaries that could not lead to suspension of one party and leaving the other.**

**I request you to consider my explanation and lift suspension.**

**Yours sincerely**

**Signed**

## **Antony K. Ngang'a**

The claimant resumed duty after 14 days of suspension and continued in employment. On 1.05.2012, a termination letter was delivered to him. The termination letter is exhibit **AKN8** on the memorandum of claim. The letter stated that the termination was on account that on several occasions the claimant cashed out bills to a tune of Kshs.1,290.00 which was not remitted to the cash box.

A certificate of service dated 03.05.2012 stated as follows that the claimant served the respondent as a waiter for 4 years and was promoted to the position of barman for a period of three years and that “**During this period, Mr. Kiragu proved to be hardworking, intelligent and he showed an impeccable character, he left the company on his own accord.**”

After termination, the claimant appealed but the manager RW rejected the appeal. The claimant submitted a grievance to the Labour Office and there was no amicable resolution.

RW testified that after suspension the claimant was moved from barman to waiter but the computer passwords were not changed so that the claimant misused the passwords he retained to defraud the respondent. He admitted that the alleged shortfall of Kshs.1,290.00 was deducted from the claimant's salary and it was normal to have such shortfalls and deductions. In reexamination, RW contradicted his evidence and stated that it was not normal to have shortfalls.

The only issue for determination is whether the claimant is entitled to the prayers made. The court makes the following findings:

1. The claimant has failed to establish the claims for annual leave, overtime, house allowance and underpayment. The court finds that the claims will fail. These claims were not in issue while the claimant was in employment and the respondent has shown that the claimant took the due leave days as per exhibit **FK1**.
2. It is clear that the termination was without any termination notice and the court finds that the claimant is entitled to **Kshs.5,000.00** pay in lieu of the termination notice.
3. The claimant is not entitled to pay for the 14 days of unpaid suspension because that was with respect to a concluded administrative disciplinary action and which the claimant had not appealed against or been dissatisfied with prior to the termination. The prayer will therefore fail.
4. The claimant was not accorded a notice and a hearing before termination and as envisaged in section 41 of the Employment Act, 2007. The court finds that he is entitled to **Kshs.30,000.00** being six months' salaries as prayed for and at Kshs.5,000.00 being his last gross pay. In making the award, the court further finds that the reasons for the termination were not valid in view of the certificate of service that stated that the claimant was a person of impeccable character.

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

1. the respondent to pay the claimant Kshs.35,000.00 by 1.2.2013, in default, interest to be payable at court rates from the date of the judgment till full payment; and
2. the respondent to pay 50% of the costs of the suit.

**Signed, dated and delivered in court at Nakuru this Friday, 20<sup>th</sup> December, 2013.**

**BYRAM ONGAYA**

**JUDGE**