



IN THE HIGH COURT OF KENYA

AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS COURT

ELRC. CAUSE NO 452 OF 2015

GABRIEL NGARI NGAMBICLAIMANT

-VERSUS-

THE DIPLOMAT HOTEL LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant's suit is contained in the Amended Statement of claim filed on 29.9.2015 by which he seeks the following reliefs:

(a) A declaration that the said termination of his employment was unfair.

(b) An order directing the 1st Respondent to pay the sum of Kshs. 778,920.00 to the claimant as particularized in paragraph 10 of the claim to the claimant.

(c) An order directing the 1st Respondent to issue a Certificate of Service to the claimant.

(d) Costs of this suit with interest thereon at court rates.

2. The respondent denied the alleged unfair termination of the claimants' contract of service and averred that the contract expired automatically by effluxion of its term. She further averred that the claimant is not entitled to the reliefs sought and prayed for the suit to be dismissed with costs.

3. Both parties tendered evidence during the hearing and hereafter filed written submissions.

Claimants evidence

4. The claimant testified as CW1. He stated that he was employed by the respondent as Hotel Manager for over 13 years in 1997. His starting salary was Kshs. 10000 per month. After working for some time, he left and went to work for Tigoni Resort Club Limuru. However after 3 weeks the respondent's Director went for him and re-employed him under a new contract for a salary of Kshs. 30000 per month.

5. After working for 8 years he again resigned due to unfulfilled promises but the respondent used his friend to prevail over him and he continued working. When he persisted in demanding for salary increase, the respondent terminated his services via SMS and told him to go to her office at Corner House 11th floor.

6. The claimant further testified that on reaching corner house he found a secretary who gave him a petty cash voucher for Ksh. 6000/- being salary for days worked but he declined and resorted to legal battle. He therefore prayed for the reliefs sought in his amended claim contending that termination of his employment by SMS was unfair and a breach of the Labour laws.

7. In cross-examination he admitted that he was employed under a renewable contract which was renewed throughout. He contended that from 2002 his salary was increased to Kshs. 30000. He however, admitted that he was given appointment letter dated 20.9.2005 and resigned by his letter dated 24.1.2011. He further admitted that he went to work for Ambassador Hotel but the respondent's director went for him.

8. He further admitted that he worked again for the respondent until 16.5.2013 when he was served with a notice that his contract would end on 31.7.2013. He also admitted that on 31.7.2013, he received SMS telling him that his services were no longer required.

9. Finally he contended that he was deducted NSSF contributions from 1997 to 198 but it was never remitted.

Defence evidence

10. M/s. Lucy Muthoni Mwangi testified as RW1 and confirmed that the claimant was employed at the respondent's hotel manager from 1997. She contended that she used to sell drinks to the claimant's on credit which was recovered from his salary for his July 2013. She contended that the claimant was drinking the beers after work in the evening.

11. Mr. Kabuya Miano, respondent's director testified as RW2. He confirmed that the claimant was his employee between February 1997 and August 2013. He contended that on 31.8.2003 the contract of service expired and the claimant was paid all his terminal dues and signed a settlement voucher dated 3.9.2003.

12. RW2 further testified that the claimant went to work for Tigoni Resorts and Hotels until 2006 when he was re-employed by the respondents. He however resigned again by the letter dated 24.1.2011 and went to work elsewhere. However, he was re-employed shortly thereafter under a contract which expired on 26.6.2013 and he was served with a notice to that effect. The contract was however extended for 2 months upon the claimant's request.

13. RW2 contended that the claimant never returned to work after the expiry of the contract extension period. He denied that the claimant worked for the respondent continuously from 1997 to 2013. He further denied the claim for salary from July 2013 contending that the claimant had taken a salary advance of Kshs. 10000 incurred a debt of Kshs. 14840 and medical bill of Kshs. 6000. He further denied the claim for leave and contended that the claimant took 52 leave days as per his leave records filed. He further contended that the hotel paid claimant's NSSF contributions using a wrong number supplied by the claimant.

14. RW2 did not however produce any leave record but he admitted that he sent SMS to the claimant on 2.8.2013 terminating his w services because his contract had expired.

Issues for determination

15. There is no dispute that the claimant was employed by the respondent between 1997 and July 2013 under seasonal contracts. The issues for determination are :

(a) Whether the last contract of service was unfairly terminated by the respondent through SMS on 1.8.2013.

(b) Whether the claimant is entitled to the reliefs sought.

Unfair termination

16. The claimant's last stint at the respondent's hotel which according to RW2 and paragraph 11 of the defence, was governed by a fixed term contract starting 1.3.2011 and lapsing on 30.4.2012. The contract was renewed by consent for 3 months from 16.2.2013 to 15.5.2013 and again upto 31.7.2013 at the request of the claimant.

17. It is without dispute that the contract would automatically lapse on 31.7.2013 as agreed mutually between the parties. Indeed, the respondent wrote a letter to the claimant on 16.5.2013 indicating that the contract had been renewed at his request until 31.7.2013 when it would finally end his services. The claimant agreed with the terms by signing on the said letter on the same date.

18. The foregoing notwithstanding, the court notes that the employment relationship herein was within the hotel sector and therefore it fell within the provisions of the Registration of Wages(Hotel and Catering Trades) Order. Regulation 18 provides that:-

“18. (1) No person shall be employed on temporary or seasonal terms of employment for a period exceeding six months.

(2) An employee on temporary or seasonal terms of employment shall be deemed to have been converted to regular terms of employment on completion of six months' continuous service.”

19. Applying the foregoing regulation to the facts of this case, it is clear that after serving for 6 months from 1.3.2011 on seasonal terms, the claimant's contract converted to regular term contract terminable by the requisite notice. It follows therefore that the purported renewal of the contract on 16.2.2013 and 15.5.2013 was immaterial by dint of the mandatory provision of Regulation 18 aforesaid.

20. In view of the foregoing the court returns that the second stint of the claimant at the respondent's hotel ran continuously from 1.3.2011 to 31.7.2013 and it was terminated by the RW2 admittedly via SMS which told the claimant that his services were no longer required. The termination was without prior notice as required under Regulation 20 of the said Regulations.

21. Regulations 20 (1) (c) provides that where an employee serves for less than 5 years continuously, the notice required before terminating his services is one month notice in writing. Consequently the failure to serve the claimant with one month's termination notice amounted to breach of his contract of service.

22. The said termination was however not for a cause and as such the provisions of section 41, 43 and 45 of the Employment Act do not apply. The termination was obviously based on misconception by the parties that they could continue engaging in temporary terms of service. However, it is trite law that parties cannot enter into a contract to defeat an express provision of the law.

Reliefs

23. In view of the foregoing finding, I decline to declare that the termination of the claimant was unfair but rather hold that it was wrongful for failure by the employer to service prior notice of one month in writing. Accordingly, I award the claimant one month salary in lieu of notice being 30,000.

24. The claim for 17 years accrued leave is declined because the claimant never served continuously for the 17 years and as such some of the claims would be time barred especially the claim not forming part of the contract of service for the period between 1.3.2011 and 31.7.2013. I therefore, grant the claim for leave in respect of the period from 1.3.2011 to 31.7.2013 being $2\frac{1}{3}$ years.

25. Under Regulation 9 (1), (a) every employee in the sector is entitled to 24 days annual leave with full pay but the said leave cannot be accumulated except in exceptional circumstances and subject to mutual agreement. The claimant never applied for his leave during his last contract period between 1.3.2011 and 31.7.2013. He therefore forfeited the leave except for the last 12 months, which equals to 24 days pay. Hence Kshs. 30000 x 24/26 = Kshs. 27692.30.

26. Finally the claim for salary for July 2013 is allowed. The allegation that the claimant had debt owed to the respondent in respect of beer drinks, salary advance and medical bill has not been substantiated and it is dismissed.

27. In the end I enter judgment for the claimant against the respondent as follows:

- (a) NoticeKsh. 30000
- (b) LeaveKsh. 27692.30
- (c) Salary for July 2013Ksh. 30000

- TotalKshs.87692.30**

The said award is subject to statutory deductions but in addition to costs and interest from the date of filing suit.

Dated, signed and delivered in open court at Nairobi this 24th day of January, 2020.

ONESMUS MAKAU

JUDGE