



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MALINDI**  
**CAUSE NUMBER 12 OF 2017**

**BETWEEN**

**MOSES S. MWATEMBO .....CLAIMANT**

**VERSUS**

**SALAMA BEACH HOTEL LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*C.K. Mwero Advocates for the Claimant*

*Opu & Company Advocates for the Respondent*

**JUDGMENT**

1. The Claimant filed his Statement of Claim on 16<sup>th</sup> May 2017. He states, he was employed by the Respondent Hotel on 1<sup>st</sup> November 2010 as an Accountant. He was promoted to Resident Manager on 1<sup>st</sup> June 2013.
2. He was a Member of the Kenya Union of Domestic, Hotels, Institutions, Hospitals and Allied Workers [acronym, KUDHEIHA], until his promotion as Resident Manager.
3. He was entitled to salary raise through the CBAs concluded between KUDHEIHA and Kenya Association of Hotel Keepers and Caterers [KAHC] between 1<sup>st</sup> July 2010 and 1<sup>st</sup> July 2013. This was not acted upon, because the Respondent did not implement the various CBAs through which increment was made. As of October 2015, his gross monthly salary was Kshs. 184,846.
4. Effective 1<sup>st</sup> November 2015 his salary was slashed from Kshs. 184,846 to Kshs. 100,000 without cause. He was demoted to Accountant, and a new General Manager was appointed. The Staff had issues with the new General Manager. The Respondent thought the Claimant instigated Staff to undermine the new General Manager.
5. The Claimant felt he could not continue working in this environment and resigned. He avers he should not have been demoted without being paid redundancy dues. He asks the Court to grant Judgment against the Respondent in the following terms:-

- a) Reinstatement.
- b) The Respondent is restrained from interfering with Claimant's logbook.

**Alternatively:**

- c) 1 month salary in lieu of notification notice at Kshs. 184,846.
- d) 1 month salary in lieu of notice at Kshs. 184,846.
- e) Severance pay at 15 days' salary for each of the 8 years completed in service at Kshs. 853,135.

- f) Unpaid annual leave from June 2014 to October 2015 at Kshs. 236,390.
- g) 9% salary increment under the CBA from 1<sup>st</sup> July 2010 at Kshs. 107,892.
- h) 10% salary increment effective 1<sup>st</sup> July 2011 at Kshs. 131,798.
- i) 10% salary increment from 1<sup>st</sup> July 2012 at Kshs. 132,897.
- j) 12 months' salary in compensation for unfair termination at Kshs. 2,218,152.
- k) Damages for loss of employment at Kshs. 2,218,152.
- l) Costs.
- m) Interest.
- n) Any other order.

6. The Respondent filed its Statement of Response and Counterclaim, on 12<sup>th</sup> July 2017. Its position is that the Claimant was employed by the Respondent. He abandoned his employment without notice, cause or justification and never returned. He left voluntarily. He was indebted to the Respondent to the tune of Kshs. 550,000 in a car loan obtained on 21<sup>st</sup> November 2015. He took additional money from the Respondent by virtue of his position, in the sums of Kshs. 450,000 and Kshs. 215,000. In total he took Kshs. 1,215,000 in car loan and off the counter.

7. The Claimant refused to testify in matters involving the Respondent in Court, despite the fact that he was the only one with critical evidence. Written information by the Hotel Security implicated the Claimant in various criminal activities. The Respondent called Staff meeting to establish the matter and take action appropriately. He was urged by Management to avail himself to enable Parties agree on their obligations to one another if any. He declined. The Respondent claims notice of 1 month from the Claimant at Kshs. 184,846.

8. The Respondent counterclaims a total amount of Kshs. 1,439,000.

9. He is not owed any amount in severance pay.

10. The position of Accountant was not Unionisable, but a Management position. The Respondent effected changes, relieving the Claimant of administrative role, leaving him to discharge the role of Head of Accounts. The Claimant was given a good and competitive salary.

11. Without prejudice, the Respondent states the Claimant is entitled to severance at Kshs. 619,384 and balance of annual leave of 19 days at Kshs. 67,704. The Claimant owed the Respondent 1 month salary in lieu of notice, which was offset against his annual leave entitlement. This results in severance and annual leave concession by the Respondent, at Kshs. 551,680. The sum should be set off against what he owes the Respondent. He is not entitled to damages or compensation as pleaded. The Claimant filed Response to the Counterclaim on 28<sup>th</sup> July 2018. He generally denies the position taken by the Respondent, except that he concedes to some extent, indebtedness to the Respondent.

12. The Cause was scheduled for hearing on 28<sup>th</sup> June 2019. An application was made on behalf of the Respondent for adjournment, on the ground that Respondent's Advocate was unwell. The application was opposed by the Claimant. The Court found there was no evidence placed before it, authenticating the claim that the Advocate for the Respondent was unwell. The Claimant went on to give his evidence unopposed, and hearing was marked as closed, on 28<sup>th</sup> June 2019.

13. The Claimant adopted his Witness Statement on record, which mirrors his Statement of Claim, summarized at the beginning of this Judgment. He added that the Director alleged there were allegations by Staff against the Claimant. He did not disclose the nature of the allegations, which distressed the Claimant, leading to poor health. The Claimant was demoted arbitrarily, with his salary reduced from Kshs. 184,846 to Kshs. 100,000. He was constantly accused of unspecified crimes. The Claimant felt psychologically tortured and resigned.

14. The Claimant acknowledges he owes the Respondent Kshs. 510,000 in car loan, and Kshs. 215,000 in additional cash claimed by the Respondent. He also had a Saco Loan of Kshs. 460,000 from Temple Point Sacco, a different entity from the Respondent. The Claimant explained that there was a legal dispute on ownership of the Respondent, leading to freezing of bank accounts. The owner adopted another business vehicle, Temple Point Hotel, to run Salama Beach Hotel.

15. Every time the Claimant took money from the Respondent, it was documented. He signed cash voucher. He was already out of employment, when the Respondent asked him to give evidence in another Court matter. The Director wrote to the Claimant after he left, stating he regretted that the Claimant opted to leave. The Claimant stated specifically that he owes the Respondent Kshs. 725,000 and Kshs. 460,000 – total Kshs. 1,185,000. He asked the Director to offset this against his dues. The Claimant did not mind even if in the end, he received Kshs. 100,000 only. The Claimant met the Director at a Hotel named Turtle Bay. There was an agreement that the Respondent would pay Claimant's dues. Nothing was paid.

**The Court Finds:-**

16. The employment history, particulars, terms and conditions of the Claimant's service with the Respondent are largely not in dispute.

17. He was employed on 1<sup>st</sup> November 2007 as an Accountant. He ascended to the position of Resident Manager on 1<sup>st</sup> June 2013. He resigned on 4<sup>th</sup> November 2015. This is the same date the Claimant received a letter from the Respondent demoting him to the position of Head of Accounts, with a drastically reduced salary of Kshs. 100,000. The Claimant earned a salary of Kshs. 184,846 as Resident Manager. His salary as of 28<sup>th</sup> October 2010, in the position of Accountant, was Kshs. 99,900, meaning he was being reverted to this salary 5 years later in 2015, as Head of Accounts.

18. The Counterclaim is to a large extent, admitted in the evidence of the Claimant. The Claimant was an honest Witness, who admitted the Counterclaim, even in the absence of evidence from the Respondent. **Judgment is entered for the Respondent as admitted by the Claimant, in the amount of Kshs. 1,185,000.**

19. The Claimant enjoyed various salary reviews reflected in the change of his salary from Kshs. 99,900 in 2010 to Kshs. 184,846 at the point of departure, November 2015. The letters communicating salary review indicate review was made in line with the applicable Collective Bargaining Agreement. The Court does not understand why the Claimant should then claim salary increment under the CBA separate from the increment granted under salary review. He distorts salary increment under the CBA. The prayers for salary increment under the CBA are rejected.

20. If salary increment was based on the CBA, it cannot be that the CBA was inapplicable to the Claimant, on the ground that he was an Accountant, and in Management, as argued by the Respondent. Although Accountants are ordinarily Employees holding confidential positions, and therefore deemed Management Employees as categorized under the Industrial Relations Charter, this is a standard which the Parties can agree to vary, and apply CBA to Management Employees. In other words, Parties opted to bring an Employee who ordinarily would be in Management, and therefore Unionisable, within the coverage of their freely negotiated CBA. The individual contract of employment incorporated the CBA.

21. The Respondent concedes severance pay and balance of annual leave of 19 days, at Kshs. 551,680. The Parties do not agree on the mode of computation. The Claimant adopts under paragraph 4.3 [4] of his Statement of Claim, a period of 19 days of unpaid leave. Unfortunately the Parties have not directed the mind of the Court to the CBA clauses, regulating these benefits. The CBA is not exhibited in full, but in extracts by the Claimant. 19 days' salary, based on a maximum of 26 working days in a month, would result in a sum of Kshs. 135,079. The Claimant did not owe the Respondent notice, and there would be no justification to offset alleged notice pay, against his annual leave pay. **The Claimant is granted annual leave pay at Kshs. 135,079.** Although the Claimant certainly did not exit on redundancy under Section 40 of the Employment Act, Parties agree he is entitled to severance pay, which perhaps is to be understood, as the generic service or gratuity pay, rewarding and recognizing years of service. The Respondent's offer of severance is based on basic salary, while the Claimant adopts his gross salary. The law on service, severance and even notice pay, adopts the total remuneration payable to an Employee monthly. Section 35, 36 and 40 of the Employment Act do not adopt basic salary on computation of service, notice and severance. In the absence of the CBA indicating the rate at which severance is to be granted, the Court adopts 15 days, salary for every complete year of service, but at a monthly gross salary of Kshs. 184,846. **The Claimant is allowed the prayer for severance pay at Kshs. 853,135.**

22. The Claimant has not established his prayer for notice pay and notification notice pay. The Court did not understand in particular what the Claimant means by the latter. He gave notice to the Respondent in his letter of resignation, which he advised should be offset from his annual leave of 30 days. He cannot turn around and ask for notice from the Respondent.

23. The last and main issue in dispute is whether termination was at the instance of the Claimant [whether he deserted, left employment voluntarily] or whether termination was at the instance of the Respondent? If by the Respondent, was it unlawful and/or unfair, warranting payment of damages and compensation as pleaded by the Claimant?

24. The Court is of the view that the Claimant was compelled to resign, by the conditions of employment created by the Respondent at the workplace.

25. The Claimant was demoted from Resident Manager to Head of Accounts. His salary was slashed from Kshs. 184,846 to Kshs. 100,000. As observed earlier in this Judgment, he was reverted to a salary he earned 5 years back as an Accountant. All the increments given to him, under the CBA were taken away by a stroke of the Respondent's pen. He was accused of unspecified crimes. This is confirmed at paragraph 9 [d] of the Statement of Response, where the Respondent alleges information from its Security Officers, implicated the Claimant in various criminal activities. The criminal activities were not disclosed to the Claimant. The Respondent alleges a Staff meeting was held to establish the accusations. It does not say whether the allegations were established after the meeting or what the allegations were. The Claimant was never reported to the Police for any criminal activities, or even presented with employment offences and accorded a disciplinary hearing at the workplace. He was just faced with undisclosed offences, which took a toll on his health. His terms and conditions of service were fundamentally altered to his detriment, without consultation. He had worked for 8 complete years, and earned his stripes. He was compelled to resign.

26. His resignation fell within the principles established in Court of Appeal of Kenya decision, **Coca Cola East and Central Africa Limited v Maria Kagai Ligaga [2015] e-KLR**, an Appeal which arose from **Industrial Court at Nairobi, Cause Number 611 [N] OF 2009 between Maria Kagai Ligaga v Coca Cola East and Central Africa Limited [unreported]**.

27. Resignation amounted to constructive dismissal. The Claimant was constructively dismissed by the Respondent. The decisions above established that the Employee may resign where the Employer has fundamentally and unilaterally changed the terms and conditions of service; created an intolerable work environment; and shown by conduct that the Employer is no longer interested in honouring the fundamental terms of the contract. The Employee resigns, believing he has been fired. The Claimant resigned on the ground of repudiatory breach by the Respondent. The Respondent unilaterally demoted him and lowered his salary to the amount the Claimant earned 5 years back. The Claimant was accused of criminal activities which were never disclosed to him. He resigned, believing himself to have been fired. He was constructively dismissed.

28. He is however not entitled to general damages and compensation as pleaded. There were no multiple breaches. There was only one

contract of employment which was breached by the Respondent. The Industrial Court in *Maria Kagai Ligaga* held that remedies for unfair and /or unlawful termination must be proportionate to the economic injury suffered by the Employee.

29. The Claimant worked for 8 years. He had a clean record. Respondent's Director regretted Claimant's departure, buttressing the view that the Claimant was a valued Employee. His record was unblemished. His contract was open-ended. He expected to go on serving as Resident Manager. He was demoted and calumniated. He did not in any way contribute to the circumstances leading to his resignation. ***He is granted equivalent of 12 months' salary in compensation for constructive, unlawful and unfair dismissal at Kshs. 2, 218,152.***

30. The prayer for reinstatement is wholly unreasonable, impracticable and against the law, constructive dismissal having taken place about 4 years ago. The Claimant resigned ostensibly because his contract was fundamentally altered to his detriment by the Respondent. He has not given evidence that circumstances have changed, making an order of return to work proper.

31. Nothing was said in his evidence on the prayer for an order barring the Respondent from interfering with his logbook.

32. ***Costs to the Claimant.***

33. ***Interest granted to the Claimant at the rate of 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

***a) It is declared that the Claimant was constructively dismissed by the Respondent, and dismissal was unlawful and unfair.***

***b) The Respondent shall pay to the Claimant: leave at Kshs. 135,079; severance at Kshs. 853,135; and compensation at Kshs. 2,218,152- total Kshs. 3,206,366.***

***c) The Claimant shall pay to the Respondent a total sum of Kshs. 1,185,000.***

***d) There be an offset, resulting in the total sum payable to the Claimant at Kshs. 2,021,366.***

***e) Costs to the Claimant.***

***f) Interest granted at 14% per annum from the date of Judgment, till payment is made in full.***

**Dated and delivered at Mombasa this 31<sup>st</sup> day of October 2019.**

**James Rika**

**Judge**