



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 176 OF 2012

(Originally Nairobi Cause No. 845 of 2011)

SAMUEL NDUNGU MBURU

CLAIMANT

v

MIDVIEW HOTEL, MOMBASA

RESPONDENT

JUDGMENT

Background and Pleadings

1. Samuel Ndungu Mburu (the Claimant) filed a Memorandum of Claim against Midview Hotel, Mombasa (the Respondent) on 2 June 2011 and the issue in dispute was stated as *failure by the Respondent to pay terminal benefits to the Claimant.*
2. The Respondent filed its Memorandum of Reply on 17 June 2011 and after several appearances before various Judges, I heard the parties on 24 April 2013 and 21 May 2013.
3. In the Memorandum of Claim the Claimant pleaded that he was employed by the Respondent through a letter dated 18 May 2008 as a storekeeper and that he diligently served the Respondent until he resigned on 2 February 2011 and handed over due to uncondusive working environment and a partisan decision taken by the Respondent at a meeting held on 1 February 2011.
4. The Claimant further pleaded that in November 2010 the revenue collected by the Respondent was Kshs 3,178,430/23 and not Kshs 3,411,713/88 as claimed by the Respondent.
5. The Claimant further pleaded that the claim that the Claimant did not bank some Kshs 93,754/- is not true.
6. The Claimant therefore sought retained payment, being public holidays worked from May 2008 to January 2011 of Kshs 39,863/20; 128 off days worked from May 2008 to January 2011 of Kshs 196,249/60 and 42 accrued annual leave days from May 2008 to January 2011 of Kshs 32,197/20, less one month notice payment in lieu of notice owed to the Respondent of Kshs 23,000/- all totalling Kshs 245,310/-.
7. The Claimant also pleaded that conciliation efforts through the Ministry of Labour did not succeed.
8. The Respondent on its part pleaded that it employed the Claimant as a Purchasing and Stores Officer on or about 19 May 2008 and promoted him to Hotel Accounts Controller with responsibility of collecting and banking money on its behalf.
9. The Respondent further pleaded that the Claimant was entitled to one rest day per week and therefore never worked on Sundays and that the Claimant was not diligent or faithful in his duties.
10. Further the Respondent pleaded its revenues for November 2010 were Kshs 3,411,713/88 and not Kshs 3,178,430/23 out of which the Claimant failed to bank Kshs 93,754/-
11. The Claimants resignation, it was pleaded was because he could not account for the Kshs 93,754/- which the Claimant has refused to pay back.

- 12.Regarding leave, the Respondent pleaded that the Claimant took 44 leave days out of 55 days he was entitled to thus had balance of 11 days at time of resignation and that the Claimant was fully compensated for 2 public holidays in December 2010 and January 2011 and that after reconciliation the Claimant owed it Kshs 105,264/- being counterclaim for the unbanked money less one month pay in lieu of notice.
- 13.Both parties produced various documents which I will refer to in my discussion.

Issues arising for determination

- 14.From the parties pleadings and documents filed the issues which arise for determination are in my view, mainly issues of fact
- i. Whether claimant worked during public holidays from May 2008 to January 2011 and is entitled to Kshs 39,863/20
 - ii. Whether the claimant is owed 128 off days worked from May 2008 to January 2011
 - iii. Whether the claimant is owed 42 leave days from May 2008 to January 2011
 - iv. Whether the Claimant owes the Respondent one month pay in lieu of notice.
 - v. Counterclaim and unbanked money
- 15.I will endeavour to discuss each of these issues and make reference where necessary to the evidence and documents put forward to prove or justify the issues from each party.

Whether the Claimant worked during public holidays from May 2008 to January 2011 and is entitled to Kshs 39,863/20

- 16.It is not disputed that the Respondent employed the Claimant with effect from 19 May 2008.
- 17.The employment contract did not make any provision for work during public holidays or how it should be treated. I must therefore take recourse to the statute governing public holidays and the practices and customs which have been built around public holidays.
- 18.The Public Holidays Act, Cap 110 has set out the public holidays in Kenya. The Act is quite clear that the days are public holidays and therefore rest days for employees. Any work done on a public holiday should be subject to agreement on rates of pay or off in lieu thereof. Before the promulgation of the Constitution in 2010, Part I of the schedule to the Public Holidays Act named 11 public holidays.
- 19.By a letter dated 5 October 2010, (SNM A in Reply to Counterclaim) the Respondent admitted that the Claimant would be compensated for 25 accrued public holidays. In the Memorandum of Claim, the Claimant is seeking compensation for 26 public holidays.
- 20.After the promulgation of the Constitution, 2010 there are 3 public holidays in December, being 12th December, 25th December and 26th December. The New Year is also a public holiday. Because there is no claim in respect of these 4 public holidays, I take it the Claimant did not work or if he did he was compensated as pleaded by the Respondent in paragraph 13 of the Memorandum of Reply.
- 21.The Respondent's second witness, Mwanaisha Suleiman testified that the Claimant worked during 20 public holidays from the time of his employment to resignation. This witness testified that the Claimant served the Respondent for about two years and eight months.
- 22.The Respondent produced the muster rolls covering the period May 2008 to January 2011 but my attention was not drawn to the 20 public holidays the Respondent stated the Claimant worked to disprove his contention that he worked for 26 days. The role of record keeping and producing the same in legal proceedings is something which was particularly within the province of the Respondent.
- 23.Relying on the Respondent's letter of 5 October 2010, I do find and hold that the Claimant worked for 26 public holidays and is entitled to compensation. The Respondent did not dispute the calculations of the Claimant but only the number of public holidays worked. The Claimant has made a case for entitlement to Kshs 39,863/20 under this head of claim.

Whether the claimant is owed 128 off days worked from May 2008 to January 2011

24. Clause 3 of the employment contract provided that the claimant was entitled to one day off a week. The clause is in tandem with section 27(2) of the Employment Act which provides that an employee is entitled to one rest day every period of seven days.
25. The Respondent's letter dated 5 October 2010 to which reference has been made acknowledged that the Claimant had 124 off days pending for which he would be compensated. The Claimant is claiming for 128 off days. Considering that he served for a further 3 months after the letter was written, I am inclined to accept his side of the case.
26. The Respondent in paragraph 6 of the Memorandum of Reply had pleaded that the Claimant never worked on any Sunday, which was his day off. The muster roll was produced.
27. I am unable to reconcile this plea by the Respondent with its letter of 5 October 2010 in which it was acknowledging that the Claimant had 124 pending off days for which he would be compensated.
28. As a matter of fact I do believe the Claimant and do find as a fact that he had 128 pending off days and that the Respondent acknowledged to compensate him for these days. The Respondent did not dispute the calculations by the Claimant and I find and hold he has established he is entitled to Kshs 196,249/60.

Whether the claimant is owed 42 leave days from May 2008 to January 2011

29. Without going into a long narration, based on the acknowledgment in the letter dated 5 October 2010 that the Claimant had 42 leave days pending for which he would be compensated and lacking any evidence that the Claimant took any of these days after the date of the letter, I am satisfied that the Claimant is entitled to Kshs 32,197/20.
30. However, it is imperative that I mention that the Claimant in his testimony stated that from to 16th December 2010 he was not on duty but the muster roll produced by the Respondent showed that he was marked as present and on duty!

Whether the Claimant owes the Respondent one month pay in lieu of notice.

31. The Claimant testified that he resigned without due notice and that he is ready to pay the Respondent the equivalent of one month's pay as payment in lieu of notice. At the time of resignation the Claimant was earning a basic salary of Kshs 14,700/- and this is what is due to the Respondent, not the gross salary of Kshs 23,000/-.

Counterclaim and unbanked money

32. This is where the real dispute between the parties is though none of the parties would admit to it. And I believe it is this that made the hearing protracted.
33. According to the Respondent, the Claimant who was responsible for revenue collection and banking collected a total of Kshs 3,411,713/88 in November 2010 but after reconciliation, it was established that the Claimant had not banked or could not account for Kshs 93,754/- , which it counterclaims for.
34. But the Claimant would have none of this. In his pleading and testimony, the revenues collected in November 2010 were Kshs 3,178,430/23.
35. There are serious and unexplained discrepancies in the reconciliation/cash reports relied on by the parties. The Claimant annexed and produced a November 2010 Revenue reconciliation (SNM 6) in which he gave a detailed itemisation of cash, visa and cheque receipts for each single day in November 2010 complete with receipt numbers starting from receipt number 4226 sequentially up to receipt number 4620. But the report does not have certain receipt numbers which are in a cash deposit received for December Bookings in November 2010 annexed in the Memorandum of Reply as *Appendix H*.
36. The irreconcilable discrepancies however are with the November 2010 Daily Bankings schedule marked as *Appendix I* in the Memorandum of Reply. I will give only a few for illustration purposes. And I assume the Bankings would be done the next day (daily banking schedule). In the Claimant's schedule, on 1 November 2010 Kshs 7000/ cash in total was collected but according Respondent's *Appendix I* on 1st and 2nd November no money at all was banked. Instead, on 3

- November 2010 Kshs 75,000/- in cash was banked.
37. According to the Claimant's *SNM 6* on 3 November 2010 he collected a total of Kshs 10,500/- but according to Respondent's *Appendix I* only Kshs 16980/- visa payment is indicated as having been banked.
38. From the illustrations given, it is extremely difficult to ascertain where the truth lies. But I must still make a considered decision. The reconciliation report by the Claimant and the Daily Bankings schedule by the Respondent were reports made on the basis of some primary documents. I would expect that the primary materials such as receipts (etr receipts), banking slips and bank statements were and still under the custody of the Respondent.
39. In an employment relationship, the employee and employer are never on an equal footing. The Respondent as the person having custody of the primary documents or records should have at least brought to Court the primary documents to help clarify the real position on the disputed facts. But the Respondent as the custodian of the documents did not produce them. In the circumstances I would give the benefit of doubt to the Claimant and believe his factual narration regarding the November 2010 revenue collections.
40. I therefore find that the Respondent has failed to establish the Counterclaim regarding the unbanked revenue collections.

Conclusion and Orders

41. In conclusion I do find and hold that the Claimant has established that he is entitled to terminal dues and I do award him

a. 26 public holidays worked	Kshs 39,863/20
b. 128 off days worked	Kshs 196,249/60
c. 42 accrued leave days	Kshs 32,197/20
TOTAL	Kshs 268,310/-
Less one month pay in lieu of Notice	Kshs 14,700/-
TOTAL AWARD	Kshs 253,610/-

42. There will be no order as to costs.

43. The Counterclaim for unbanked Kshs 93,754/- is dismissed.

Delivered, dated and signed in open Court in Mombasa on this 28th day of June 2013.

Justice Radido Stephen

Judge

Appearances

Claimant

in person

Mr. Sitonik instructed by Ndegwa Muthama

Katisya Associates Advocates

for Respondent