



**Mngambwa v Leisure Lodge Limited (Cause 232 of 2018)
[2024] KEELRC 48 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 48 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 232 OF 2018
AK NZEI, J
JANUARY 25, 2024**

BETWEEN

ANDREW NYAMBU MNGAMBWA CLAIMANT

AND

LEISURE LODGE LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted the suit herein on 16/4/2018 vide an evenly dated memorandum of claim seeking the following reliefs against the Respondent:-
 - a. Service pay from 2014-2018X15 days for each year worked.
 - b. Salary for 14 days worked in March 2018Kshs 17,235.
 - c. Overtime worked @ 11 hours every 6 days per week from 5 years i.e.
15,600 x Kshs 170.....Kshs 2,652,600
 - d. 12 months' compensation for unfair and unlawful terminationKshs 443,184
 - e. One month salary in lieu of noticeKshs 36,932
 - f. Certificate of service.
 - g. Costs of the suit.

2. The Claimant pleaded that he was employed by the Respondent as a Kitchen Steward from the year 2014, earning a starting salary of kshs. 15,256, and that he was earning a gross salary of Kshs 36,932 at the time of termination. The Claimant further pleaded that during his employment with the



- respondent, his working hours were from 7.00 am. to 5.00 pm from Monday to Friday, and 8.00am to 6.00pm on Saturdays and Sundays.
3. It was the Claimant's pleading that on 12/3/2018, the Respondent terminated the Claimant's services while his contract was in force; and that the termination was unfair in that no reason was given for the termination, and the Claimant was not accorded a hearing as by law provided.
 4. Other documents filed by the Claimant alongside the memorandum of claim included the Claimant's written witness statement, which replicated the memorandum of claim, and a list of documents dated 16/4/2018, listing 6 documents. The listed documents included employment contracts, payslips, termination letter dated 12/3/2018, Identity Card, NSSF statement and a demand letter.
 5. The Respondent entered appearance and filed a response to the claim on 4/6/2018, dated 30/5/2018. The Respondent denied the Claimant's claim and pleaded:-
 - a. that the Claimant was employed from time to time on seasonal contracts based on availability of work and depending on hotel seasons for periods ranging from 1 month to 3 months at a time on different occasions. That the Claimant was not employed by the Respondent on full time basis from 2014 as alleged by him
 - b. that the Claimant's contract dated 1/3/2018, which the Respondent terminated vide a letter 12/3/2018, contained a clause allowing either party to terminate the contract by giving the other 7 days' notice and without assigning any reason.
 - c. that the Claimant's services were fairly and lawfully terminated; and that his dues were calculated and offered to him for payment upon him clearing with the company. That the Claimant refused to clear and to collect his dues.
 - d. that the Claimant was customarily paid all his dues at the end of every seasonal contract, and therefore his claim for terminal dues is not merited.
 - e. that the Claimant's suit is wrongfully brought, and is an abuse of the Court's process as the Claimant's dues were calculated and paid to him in accordance with provisions of a Collective Bargaining Agreement (CBA) in force at the time and the terms of respective contracts.
 - f. that the Respondent had a registered CBA with KUDHEIHA, of which the Claimant was a member, which CBA sets out terms and conditions of employment of its members and sets out detailed and exhaustive dispute resolution mechanisms which parties ought to follow in the event of a dispute.
 - g. that it was unfair for the Claimant to bypass and/or avoid the terms of the CBA. That the Claimant's claim is pre-mature and incompetent, and ought to be struck off.
 6. Other documents filed by the Respondent included a witness statement of Jackson Mutiso dated 12/10/2021 and a list of documents dated 30/5/2018 listing 3 documents. The listed documents included a letter dated 12/3/2018, addressed to the Claimant, a Collective Bargaining Agreement dated 2017/2018 and a calculation of the Claimant's final dues. The Respondent also filed a further list of documents dated 12/10/2021, listing 4 documents. The further listed documents included the Claimant's Settlement Form/final dues calculations, various seasonal contracts and end of seasonal contracts, clocking in register and the Claimant's payslips.
 7. The Court's record shows that on 1/12/2020, the Respondent filed a Notice of Preliminary Objection dated 27/11/2020, calling for the Claimant's suit herein to be struck off on account of the CBA



referred to in paragraphs 5 and 6 of this judgment. The Court, (Ndolo, J), considered the preliminary objection and dismissed it with costs vide a Ruling delivered on 29th July 2021.

8. In dismissing the preliminary objection, the Court stated as follows:-

“9. My understanding of the Respondent’s objection is that because the Claimant has not exhausted the dispute resolution mechanisms provided under the CBA, then this suit is pre-mature.

10. That may be so. However, applicability of the CBA to the Claimant in this case is a contested matter, more so because the copy availed to the Court is not executed. This is a matter on which evidence needs to be adduced.

10. What is more, even if the Court were to find that the Claimant has bypassed a dispute resolution mechanism, the thing to do would not be to strike out the claim, but rather to refer it to the correct forum.”

9. Trial commenced before me on 10/3/2022 when the Claimant testified. He adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified that prior to being terminated vide the letter dated 12/3/2018, he was not served with a termination notice despite the fact that he had a running contract, being the contract running from 1/3/2018 to 30/4/2018. That the termination letter did not give any reason for the termination. That he was given the termination letter and thereupon removed from the Respondent’s premises by security guards.

10. The Claimant further testified that he worked continuously from 2014, and was at times given contracts while at other time he continued working even when he had not been given any contract, still earning the same amount. That the contracts he signed were either for 1 month, 2 months or 6 months, and never exceeded six months.

11. It was the Claimant’s evidence under cross examination that at the end of each contract, he was given a letter to show that a particular contract had come to an end, and indicating what would be paid to him, and that he was being paid such dues. That he was being paid according to tabulations on his payslips, and had nothing to show that he worked overtime. That he was not paid for the 12 days worked in March 2018.

12. The Respondent called one witness, Jackson Mutiso (RW1), who adopted his filed witness statement dated 12/10/2021 as his testimony, and produced in evidence the Respondent’s documents referred to in paragraphs 6 of this judgment; save for the document listed as item no. 1 on the list of documents dated 30/5/2018, which was not availed by the Respondent. RW1 further testified that the Respondent hotel had high and low occupancy seasons, and that during low seasons, the Respondent did not require the same workforce as it did during high seasons. That the Respondent’s employees were seasonal/casuals, depending on hotel occupancy.

13. It was the Respondent’s (RW1’s) evidence that the Claimant’s last contract was to run from 1/3/2018 to 30/4/2018, and that the Claimant worked for 12 days as he was stopped due to low occupancy, that his dues were calculated but he never collected the same.

14. Cross-examined, RW1 testified that the Claimant was terminated on 12/3/2018, and was earning Kshs 25,435.84, payable monthly. That at the time of termination, the Claimant had a contract dated 1/3/2018, set to end on 30/4/2018. That the Claimant was not issued with a show cause letter before termination, was not subjected to a disciplinary process, and his dues were not paid.



15. Having considered the pleadings filed and evidence adduced herein, issues that present for determination, in my view, are as follows:-
 - a. whether the Claimant's claim was filed prematurely and is therefore incompetent.
 - b. whether termination of the Claimant's employment was unfair.
 - c. whether the Claimant is entitled to the reliefs sought.
16. On the first issue, the Court, (Ndolo J), noted in the Ruling delivered herein on 29/7/2021 that the Respondent's assertion that the suit was premature for failure by the Claimant to exhaust alternative dispute resolutions was disputed and was one that could only be proved by evidence. The Court noted that the CBA availed to the Court was unexecuted. It is worthy noting that the said unexecuted CBA, filed in Court on 4/6/2018, is what the Respondent produced in evidence. No executed and valid CBA was produced in Court. The Respondent did not tender any evidence to prove the alleged incompetence of the suit; and I so hold.
17. On the second issue, it was a common ground that the Claimant worked for the Respondent continuously on short contracts from 2014 to 12/3/2018, and that as at 12/3/2018 when the Claimant's employment was terminated without notice, the Claimant had a running contract set to end on 30/4/2018. By virtue of Section 35(a) (c) of the *Employment Act*, and by virtue of the terms of the Claimant's contract dated 12/3/2018 which stated "that the appointment may be terminable by either party giving seven (7) days' notice of its intention to do so", the Respondent was legally obligated to serve a termination notice on the Claimant before terminating his contract. The Claimant's termination letter dated 12/3/2018 stated that his contract had been terminated with immediate effect.
18. Failure by the Respondent to issue a termination notice rendered termination of the Claimant's employment unfair, and I so find and hold.
19. On the third issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant the equivalent of nine months' salary being compensation for unfair termination of employment. The Claimant pleaded that he was earning ksh., 36,932 at the time of termination. His payslip for The equivalent of nine months' salary is therefore Kshs 36,932x9 = Kshs 332,388. The Claimant is also awarded Kshs 14,772.8 being salary for 12 days worked in March 2018. February 2018, which he produced in evidence alongside other documents, confirmed that position.
20. The claim for service pay is declined as the Claimant was a member of, and a contributor to the NSSF. He produced his NSSF statement in evidence. Section 35(6) (d) of the employment The claim for one month salary in lieu of notice is allowed. The Claimant demonstrated that he had continuously worked for the Claimant on fixed term contracts since 2014, and that he had a running contract at the time of termination. He was entitled to be issued with a termination notice. The Claimant was not shown to have been on probation at the time of termination. The Respondent was obligated to issue a termination notice as by law provided. Parties to a contract of service cannot, by their contract, purport to shorten the statutory notice period. I award the Claimant Kshs 36,932 as prayed.
Act disqualifies him from claiming service pay. The claim for overtime was not proved, and is declined.
21. The claim for issuance of a certificate of service is allowed pursuant to Section 51(1) of the *Employment Act*.
22. Ultimately, and having considered written submissions filed on behalf of both parties, judgment is hereby entered for the Claimant against the Respondent for:-



- a. Compensation for unfair termination
of employmentKshs 332,388
 - b. Salary for 12 days worked
in March 2018.....Kshs 14,772.8
 - c. One month salary in lieu of notice.....Kshs 36,932
- Total Kshs 384,092.8
23. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
24. The Respondent shall issue a certificate of service to the Claimant pursuant to Section 51(1) of the Employment Act within thirty days from the date of this judgment.
25. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH JANUARY 2024.

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

