



**Mtana v Swahili Beach Resorts Limited (Cause E076 of 2022)
[2023] KEELRC 3235 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3235 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E076 OF 2022
AK NZEI, J
DECEMBER 7, 2023**

BETWEEN

MTANA MWAHUNGA MTANA CLAIMANT

AND

SWAHILI BEACH RESORTS LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent herein vide a memorandum of claim dated 21/9/2022 and filed in Court on 28/9/2022, and pleaded that he was employed by the Respondent on 5/1/2022 as a Human Resource Manager at the Respondent's establishment at Diani, earning ksh. 200,000 per month, and was terminated on 14/7/2022 without any just cause and/or adherence to due process.
2. The Claimant further pleaded that on 22/6/2022, the Respondent's Chairman, Mr. Singh Kalsi, went to the Claimant's office shouting and asked the Claimant to take his pending leave days, which the Claimant did; and that when he reported back to the office on 14/7/2022, the Respondent's Managing Director asked the Claimant to resign as the Chairman did not like him. That the Claimant did not resign as there was no reason for him to resign. That the Claimant's employment was terminated without him being given any reasons, and without being given the benefit of a disciplinary hearing.
3. It was the Claimant's further pleading that termination of his employment was illegal and contravened Sections 35,41 and 45 of the *Employment Act* 2007.
4. The Claimant sought the following reliefs against the Respondents:-
 - a. a declaration that the Claimant's dismissal from service was unfair, unjust and unconstitutional.
 - b. an order directing the Respondent to pay the Claimant his terminal contractual dues amounting to ksh. 2,400,000 (being 12 months' salary).



- c. costs of the suit and interest.
5. Documents filed by the Claimant alongside the memorandum of claim included an affidavit verifying the claim, the Claimant's written witness statement dated 21/9/2022 and an evenly dated list of documents, listing five documents. The listed documents included the Claimant's letter of employment dated 3/1/2022, a letter of confirmation of employment dated 11/4/2022, a letter of termination dated 14/7/2022, a Certificate of Service dated 15/7/2022 and a demand letter dated 15/7/2022.
6. The suit was defended vide a memorandum of reply dated 24/10/2022 and filed in Court on 25/10/2022. The Respondent admitted having employed the Claimant as pleaded by him, but denied the Claimant's claim and denied having wrongfully and unlawfully terminated the Claimant's employment, and put him to strict proof of his allegations.
7. Other documents filed by the Respondent included a written witness statement of one Amer Kalsi dated 21/11/2022 and an evenly dated list of documents, listing five documents. The listed documents included the Claimant's letter of employment and the letter of termination, a payslip for July 2022, a copy of a cheque dated 29/7/2022 and a bank payment voucher dated 20/7/2022.
8. Trial commenced before me on 19/4/2023, when the Claimant testified and adopted his written and filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 5 of this judgment. The Claimant told the Court that he was claiming compensation for unfair termination of employment. He maintained that he was never told the reason for his termination, and was never issued with a show cause letter or taken through a disciplinary process.
9. Cross-examined, the Claimant testified that he on 20/6/2022 arrived from home at around 9.00am while he was supposed to report to work at 8.00am; that he had telephoned his boss and told him that he would be late. He denied having send a number of the Respondent's employees on leave without informing the employer, and denied having been informed of such an allegation; not even in his termination letter. That he was terminated under Clause 5:1 of his contract and was paid one month salary in lieu of notice. The Claimant maintained that each termination should follow the law, as a contract is not superior to the law.
10. The Respondent called one witness, Amer Kalsi (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 7 of this judgment. RW-1 further testified that the Claimant was terminated because he made decisions on staffing without the management's consent, and that he was terminated under Clause 5:1 of his contract. That the Claimant accepted both the termination letter and payment upon termination.
11. Cross examined, RW-1 admitted that he had not exhibited minutes of any meeting with the Claimant before termination, and that the termination letter did not state any reason for the termination.
12. Having considered the pleadings filed and evidence presented by both counsel, issues that present for determination, in my view, are as follows:-
 - a. whether the Claimant is entitled to complain that he was unfairly terminated.
 - b. whether termination of the Claimant's employment was unfair.
 - c. whether the reliefs sought are deserved.
13. On the first issue, it was a common ground that the Claimant was employed on 5/1/2022 and that his employment was terminated on 14/7/2022. This means that the Claimant was in the Respondent's



employment for only six (6) months and about nine (9) days. Section 45(3) of the Employment Act 2007 provides as follows:-

“(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”

14. The foregoing being the law, I find and hold that the Claimant is not entitled to complain that his employment was unfairly terminated by the Respondent. This finding on the first issue automatically determines the second and the third issues, as the Claimant’s claim herein is for compensation for unfair termination of employment. The claim cannot stand, and the suit is hereby dismissed.

15. Each party will bear its own costs of the suit.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DECEMBER 2023.

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:

..... Applicant

..... Respondent

