



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 918 OF 2015

GEOFFREY HAMISI OTANGA.....CLAIMANT

VERSUS

LEOPARD BEACH RESORT & SPARESPONDENT

J U D G M E N T

1. Vide a Memorandum of Claim dated 20th November 2015 and filed in Court on 10th December 2015, the Claimant sued the Respondent and pleaded, *inter-alia*, as follows:-

- a) that the Claimant was employed by the Respondent in November 2004, earning ksh.3,227 plus house allowance of ksh.1,737, which was increased to ksh.8,747 plus house allowance of ksh.5,324 at the time of termination.
- b) that although the Claimant’s first appointment was on temporary seasonal terms, the Claimant worked for the Respondent continuously since then till July 2013, for a total of eight (8) years five (5) months.
- c) that sometimes in July 2013, the Claimant reported to work but was told that there was no work due to low season and would be called back during the pick season.
- d) that since then, the Respondent refused to return (get) the Claimant back to work, thereby amounting to constructive termination.
- e) that the Respondent’s failure to get the Claimant back to work and (failure) to pay his dues amount to constructive dismissal.

2. The Claimant set out his claim against the Respondent as follows:-

- a) 12 months salary (being) compensation for wrongful termination (8,747x12)..... ksh.104,964
- b) Three months salary in lieu of notice @ 8,747.....skh.26,241
- c) Gratuity (1/2x8,747x8 years 5 months).....ksh.39,361.50

The Claimant also claims costs of the suit and interest.

3. The Claimant also filed the following documents, which accompanied the Memorandum of Claim, the claimant’s Statement dated 17th August 2017, a list of documents dated 20th November 2015 listing and annexing copies of a temporary/seasonal employment contract dated 1st November 2004, a temporary/seasonal employment (contract) dated 1st January 2013, and a demand letter dated 30th March 2015.

4. The Respondent entered appearance on 12th February 2016 and filed a Response to the Memorandum of Claim on 20th April 2016 whereby it denied the Claimant’s claim and further pleaded, in the alternative, that the Claimant was not entitled to any relief, having voluntarily resigned.

5. On 10th November 2016, the Respondent filed a witness statement by one FRANCIS MARUBE, and a list of documents dated 9th

November 2016, listing some four documents, these being: a letter dated 5th January 2008 informing staff of closure of business, letter dated 6th January 2008, a bundle of contracts for diverse dates and a letter dated 9th September 2015 informing the Claimant how his dues were to be calculated.

6. The Respondent subsequently filed two witness statements by the Respondent's Human Resource Manager, on 30th September 2021 and 18th November 2021 respectively.

7. When the trial opened on 18th November 2021, the Claimant adopted his recorded and filed witness statement dated 17th August 15 as his testimony in chief. He also produced in evidence the documents listed on his list of documents dated 24th November 2015. The Claimant further testified:-

a) that he (the Claimant) signed a seasonal contract with the Respondent on 1st November 2004, which ended on 31st March 2005, but continued working upto 2013. That contracts were being given while they were at work.

b) that on 1st January 2013, he was given another contract for the period ending 28th February 2013, whereby he was earning ksh.8,747 plus a house allowance of ksh.5,324.

c) that written contracts were only being given at times, and that during those other times, the Claimant worked and was being paid on weekly basis, and that he continued working upto May 2013, even after his last contract ended on 28th February 2013.

d) that in May 2013, the Claimant (and other employees) were told to go home as the hotel was being renovated and would be called back.

e) that the hotel opened again in July 2013 and when the Claimant went back, he was told to go and would be called back, but was never called back upto date.

f) that he (the Claimant) was earning salary as set out in the contract dated 1st January 2013; and never received any termination letter.

g) that although the hotel closed in January 2008 due to post election violence, the Claimant returned to work in September 2008 after the clashes subsided; as he had not been given a termination letter. That he worked upto May 2013.

8. The Respondent called one witness, MWANAISHA SULEIMAN HASSAN, who adopted her statement filed in Court on 18th November 2021 as her evidence in chief. She further produced as exhibits the documents listed in the Respondent's list of documents dated 9th November 2016. The witness further testified:-

a) that she was the Respondent's Human Resource Manager.

b) that the Respondent Hotel was closed in 2008 due to tribal clashes and workers were duly notified of termination of their contracts vide a letter dated 5th January 2008.

c) that the claimant cleared with the hotel and was duly paid his tabulated dues.

d) that any further engagement of the Claimant would involve a new contract.

e) that other than the contracts produced in evidence by the Claimant, he signed many others, the last one being for January 2013 to March 2013. That those many other contracts included those dated 4th November 2005, 30th November 2007, 15th December 2010, 30th October 2011 and 1st January 2013 (bundle marked as Respondent's exhibit no.3).

f) that if a contract was not renewed, the Claimant could work as a casual employee.

g) that on 9th September 2015, after receiving the (Claimant's) demand letter, the Respondent tabulated the Claimant's dues (Respondent's exhibit no.4) but the tabulated dues were not paid to the Claimant as he did not clear with the Respondent.

h) that the tabulated dues included two months' pay in lieu of notice as per the CBA.

i) that when the Claimant had a running contract, he was paid monthly but was paid weekly when he had no running contract, though the witness had nothing to show in support of this.

j) that the Claimant lastly left employment in July 2013.

9. Having considered the pleadings by the parties herein and the evidence presented, issues that emerge for determination are as follows:-

a) whether the Claimant's employment was terminated by the Respondent and if so, whether the termination was unfair.

b) whether the Claimant could claim that he had been unfairly terminated.

c) whether the Claimant is entitled to the reliefs sought.

10. On the first and second issues, the Respondent's witness (RW1) testified that upon receiving the Claimant's letter of demand, the Respondent proceeded to tabulate the Claimant's dues on 9th September 2015. This tabulation includes two months basic salary in lieu of notice (ksh.19,418) and two months house allowance in lieu of notice (ksh.11,820). This tabulation is contained in the Respondent's exhibit no. 4. The Respondent would not have offered to make payment in lieu of notice if it had not terminated the Claimant's employment. The Respondent's pleading at paragraph 6 of its Response to the Memorandum of Claim that the Claimant resigned flies on the face of the Respondent's own evidence. It is my finding that the Claimant's employment was terminated by the Respondent as pleaded and demonstrated by the Claimant.

11. On whether or not termination of the Claimant's employment was fair, the Respondent did not demonstrate that it in any way complied with the mandatory procedural requirements of Section 41 of the Employment Act 2007, which provides:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”

12. The Court of Appeal held in the case of JANET NYANDIKO-VS- KENYA COMMERCIAL BANK LIMITED [2017] eKLR, that:-

“Section 45 of the Act makes provision, inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity. The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee upto the date of termination, the extent to which the employer has complied with Section 41. Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer.”

I find and hold that termination of the Claimant's employment by the Respondent was unfair.

13. On the second issue, the Claimant pleaded and demonstrated that he was in continuous employment of the Respondent from the year 2004 to May 2013, with a break falling between 5th January 2008 and July 2008, occasioned by closure of the Respondent's hotel due to post election violence in 2008. The Respondent's witness (RW1) also testified on this closure. The Respondent did not controvert the Claimant's evidence that he went back to work after the hotel opened in July 2008 and continuously worked until May 2013. Indeed, RW1 testified that the Claimant left employment lastly in July 2013.

14. Section 45(3) of the Employment Act 2007 provides:-

“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.”

15. The Claimant has, on a balance of probability, demonstrated that he had, immediately before the date of termination, been in continuous employment of the Respondent for a period of not less than thirteen months. It matters not whether he was in such continuous employment on the basis of a written contract or without a written contract. The Claimant testified that even after the end of his last written contract, he continued working until May 2013 when his employment was terminated by the Respondent. It was the Claimant's evidence that the written contracts were (being) given to them as they worked. The Respondent did not produce in Court any record/register to show that the Claimant did not work continuously.

16. The Claimant's employment was terminated without notice and without compliance by the Respondent with section 41 of the Employment Act 2007. The termination was unfair, and the Claimant has the right, under Section 45(3) of the Employment Act, to complain and to plead that he was unfairly terminated.

17. On the third issue, and having considered submissions filed by counsel for both parties herein, I do find that the claimant is entitled to compensation for unfair termination of employment and to two month's salary (under the CBA as admitted by the Respondent in evidence). The claim for gratuity is declined as the Claimant's termination did not result from redundancy.

18. Judgment is, therefore, hereby entered in favour of the Claimant against the Respondent as follows:-

- a) eight months' salary being compensation for unfair termination of employment (8,747x8).....
ksh.69,976
- b) two months' salary being payment in lieu of notice (ksh.8,747x2).....ksh.17,494
- Total.....ksh.87,470

19. The Claimant is also awarded costs of the suit and interest from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

APPEARANCE:

NO APPEARANCE FOR CLAIMANT

NDUKU FOR RESPONDENT