REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO E004 OF 2020

REEF HOTEL LIMITED.....APPELLANT

VS

JOSEPHINE CHIVATSI.....RESPONDENT

JUDGMENT

(Appeal from the judgment of Hon M.L Nabibya, PM in

Mombasa CMELRC No 167 of 2019 dated 17th September 2020)

Introduction

1. The Respondent (Claimant in the trial court) filed a Memorandum of Claim dated 28th January 2019, by which she sought compensation for unfair termination of employment and payment of terminal dues. The Appellant (Respondent in the trial court) filed a Statement of Reply on 30th May 2019.

2. After hearing both parties, ***Hon M.L Nabibya, PM*** delivered judgment in favour of the Respondent in the following terms:

a) 1 month's salary in lieu of notice…….Kshs. 14,000

b) Compensation for unlawful termination…….....84,000

c) Compensation for leave allowance….....53,314

d) Compensation for unpaid public holidays.....14,000

e) Costs plus interest

3. Being dissatisfied with the judgment of the trial court, the Appellant moved to this Court on appeal.

The Appeal

4. In its Memorandum of Appeal dated 14th October 2020, the Appellant raises the following grounds of appeal:

a) The learned Honourable Magistrate erred in law in holding that the Respondent's employment had been converted from casual to permanent employment and awarding the Respondent the reliefs sought;

b) The learned Honourable Magistrate erred in law in holding that the Appellant did not follow the procedure for termination of employment without first ascertaining or making a determination on whether the Respondent's employment was terminated;

c) The learned Honourable Magistrate erred in law in holding that the Respondent was entitled to one month's salary in lieu of notice and 6 months' salary being compensation for unlawful termination;

d) The learned Honourable Magistrate erred in law in holding that the Respondent was entitled to compensation for leave allowance contrary to the evidence adduced by both parties;

e) The learned Honourable Magistrate erred in law in holding that the Respondent was entitled to Kshs. 14,000 being unpaid public holidays;

f) The learned Honourable Magistrate erred in law in not considering the evidence adduced and submissions made on behalf of the Appellant;

g) The learned Honourable Magistrate erred in his evaluation and analysis of the evidence adduced and in not appreciating it properly, equitably, judiciously and sufficiently or at all and further erred in drawing the inference he did from the Appellant's evidence;

h) The learned Honourable Magistrate's decision was contrary to the weight of evidence placed before him by the Appellant;

i) The learned Honourable Magistrate erred in his evaluation and analysis of the pleadings and the evidence adduced.

5. Discerning from these grounds of appeal, I draw the following issues for determination in this appeal:

a) The Nature and status of the Respondent's employment with the Appellant;

b) Whether a case of unfair termination of employment was established;

c) Level of leave pay due to the Respondent;

d) Level of public holiday compensation due to the Respondent.

6. This being a first appeal, I am required to re-consider and re-evaluate the evidence on record, and being cognisant of the fact that I did not have the opportunity to see and hear the witnesses myself, arrive at my own conclusions.

7. On this account, the Appellant referred the Court to the decision in ***National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR*** where the Court of Appeal restated the duty of a first appellate court in the following terms:

> ***"…we are enjoined to revisit the evidence presented before the court below afresh, analyse it in order to arrive at our own independent conclusion but bearing in mind that we did not see or hear the witnesses as they testified."***

8. That settled, I will now proceed to consider the grounds of appeal as condensed in the four issues set out above.

Nature and Status of Claimant's Employment

9. In its first ground of appeal, the Appellant states that the Respondent was a casual employee and the learned trial Magistrate was therefore wrong in making the award he made in favour of the Respondent.

10. Section 2 of the Employment Act defines a casual employee as:

> ***"a person the terms of whose engagement provide for payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time."***

11. I need to state at this point that the defining feature of casual employment is not payment based on a daily wage, as opposed to a monthly salary, but rather a continuous employment period of less than a month or piece work performed within an aggregate period of less than three months. This then is the essence of Section 37 of the Employment under which the Court can infer a term contract.

12. In his judgment delivered on 17th September 2020, the learned trial Magistrate stated:

> ***"The claimant worked for an accumulative (sic) period of about 4 years, at some point she was on contract, sometimes worked continuously without a contract, in fact the aggregate working days were more than six months according to the respondent (sic) documents on record.***
>
> ***Considering the section 37 provisions, I do not agree with the respondent that she was a casual employee according to section 2 of the employment Act."***

13. This finding resonates with the Claimant's testimony before the trial court. To quote her verbatim:

> ***"In August 2013, I was employed by Reef Hotel. After 6 months a trainee, a recommendation letter was given dated 1/7/13…..In August I worked for some days which I was paid for. During the low seasons (when visitors are not there) there was no work. Payment was after 3 days. If worked for less than 3 days, payments would be after return. Records were kept. From September-December I worked every day and was paid. In 2014, I got a 2 months contract in April and May……..The contract is dated 1/3/2014 and I signed at page 3 thereof, same day contract was to end 15/5/2014 and I was paid. I didn't work in June, July,***

August. I worked again in September but not on contract. I also worked for some days for the rest of the months and I got paid. I did not work on contract in 2015 but worked continuously."

14. In his witness statement dated 6th November 2019, the Respondent's Manager, Michael Kai stated as follows:

"One month after the Plaintiff's training we employed her as a room steward on diverse dates and/or periods whenever her services were needed in the rooms especially during high occupancy.

The first time we offered her employment was on 14th August 2013 and she did not work continuously and also did not work on a daily basis and sometimes on seasonal contracts up to 21st December, 2016."

15. From Kai's testimony, it is evident that the Respondent was sometimes employed on seasonal contracts. She performed the work of a room steward, which by nature is a continuous job in all going concern hospitality establishments.

16. One of the grounds of appeal is that the trial court did not consider the Appellant's documents and because this appeal is in the nature of a retrial, I have the latitude to comment on these documents. At page 28 of the Record of Appeal, the Appellant exhibits a summary of days worked by the Respondent and at pages 29-30 is a detailed statement thereof.

17. I will say two things regarding these documents which are computer generated; first, their maker is not identified and second, the source document, in the nature of an attendance register signed by the Respondent was not availed to the trial court.

18. The documents appearing at pages 31, 44 and 45 of the Record of Appeal, titled '*Casuals Payment* List' which bear the Respondent's signature only serve to show that the Respondent was paid a daily wage on 29th September 2014, 30th September 2014 and 22nd April 2015.

19. It would have been helpful for the trial court to analyse these documents and assign probative value thereon for the benefit of the parties. However, this omission did not in any way affect the finding that the Respondent was not a casual employee, because as I have already stated, casual employment is not defined by the payment of a daily wage.

20. While it is on record that the Respondent was sometimes let go during low business seasons, it would appear that these breaks would fall within the category of unpaid leave, which is a common employment practice in hospitality establishments within the Coast Region, where the Respondent operates. This did not however make her a casual employee. To this extent, I affirm the finding by the trial court that the Claimant was not a casual employee.

Unfair Termination

21. The Respondent's case before trial court was that that her employment was terminated following a complaint that she had mishandled a guest. The Respondent testified that the accusation made against her was unfounded and that she was not given an opportunity to defend herself.

22. In denying this part of the Respondent's claim, the Appellant's Manager, Michael Kai, testified that after 21st December 2016, the Respondent did not present herself for consideration for either casual employment or seasonal contract.

23. At this point I need to comment on a consent dated 9th July 2020, by which the parties agreed to forego the oral evidence of three of the Appellant's witnesses while adopting their witness statements. The trial court appears to have adopted this consent, which in my view, was problematic because a witness statement only becomes testimony once its maker adopts it on oath.

24. As it is, the three statements, which were not adopted on oath were of no probative value. That being the case, only the witness statement of Kai, who appeared before the trial court and was cross examined, was available for use as *viva voce* evidence.

25. Kai's word as to the circumstances surrounding the Respondent's exit from employment was therefore uncorroborated. This, coupled with the finding that the Respondent was not a casual employee can only lead to one conclusion; that the Appellant terminated the Respondent's employment without justifiable cause as required under Section 43 of the Employment Act and in violation of the procedural fairness edicts of Section 41 of the Act.

26. In light of the foregoing, the finding by the trial court that the Respondent had proved a case of unlawful and unfair termination of employment is confirmed. The award of 6 months' salary in compensation and 1 month's salary in lieu of notice is also confirmed.

Leave Pay

27. On the issue of leave pay, the learned trial Magistrate rendered himself thus:

"For unpaid leave, the parties submitted that the claimant was entitled to unpaid leave allowance. She worked from the year 2013 to 2016. The issue of contention is whether the claimant is entitled to 23 days leave or for four days per month.

Having found that the claimant was a permanent employee, I will proceed to award the normal annual leave days of 23 days for four years which comes to (23x4)=92 days."

28. With much respect to the learned Magistrate, this finding was against the Respondent's own testimony that she worked on seasonal contracts and was sent away during low business seasons. On this limb, the trial court should have adopted the tabulation presented by the Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers via letter dated 4th January 2017.

Public Holidays

29. In making its award on this claim, the trial court proceeded on the basis that the Respondent worked on all public holidays within the year. This finding was however not supported by the Respondent's own testimony that there were periods she did not work.

30. An employee claiming compensation for working on public holidays is required to adduce evidence as to which particular holidays they worked worked. This position was affirmed by the Court of Appeal in its decision in ***Rogoli Ole Manadiegi v General Cargo Services Limited [2016] eKLR*** in the following words:

> ***"It is true the employer is the custodian of employment records. The employee in claiming overtime however, is not deemed to establish the claim for overtime by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he worked on public holidays or even rest days….he did not justify the global figure claimed in overtime showing specifically how it was arrived at…."***

31. In this case, the Respondent did not adduce evidence showing on which particular public holidays she worked. The finding by the trial court on this limb was therefore unsupported. In the circumstances, the only thing the trial court could have done was to adopt the tabulation presented by the Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers vide letter dated 4th January 2017.

32. On the whole, this appeal partially succeeds to the extent that the awards for leave pay and public holidays are set aside and replaced with the following:

a) Leave pay…….....Kshs. 14,306

b) Public holidays…….....9,952

33. As the appeal has succeeded partially, I direct that each party will bear their own costs in this court and the court below.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Mrs. Oluoch-Wambi for the Appellant

Mr. Nyongesa for the Respondent