



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 608 OF 2017**

**JEREMIAH KIILU KALI.....CLAIMANT**

**- VERSUS -**

**LEOPARD BEACH RESORT & SPA.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> October, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 27.07.2017 through M/s Otieno Asewe & Company Advocates. The claimant was employed by the respondent on 01.09.1998 as a supervisor in the house cleaning department at Kshs. 23,342.00. He was unfairly terminated on 15.04.2016 but, after attending a meeting with the relevant Coast Disciplinary Committee (CDC) on 18.05.2017 it was agreed that he is terminated (or he resigns) because he could no longer work in the hostile environment. He was to be paid his terminal dues but he has not been paid. He claimed against the respondent for:

- a) 4 months' salary in lieu of notice Kshs. 68, 360.00.
- b) 4 months in lieu of notice house allowance Kshs. 25, 008.00.
- c) Prorate leave for January – April 2016 Kshs. 7, 003.00.
- d) Prorate leave travel allowance for January to 15<sup>th</sup> April Kshs. 1, 283.00.
- e) House allowance February – 15<sup>th</sup> April 2016 Kshs, 15, 630.00.
- f) Salary for February - 15<sup>th</sup> March 2016 Kshs. 42, 725.00.
- g) Salary increment arrears for July – August 2015 Kshs. 3, 581.00.
- h) December 2015 service charge Kshs.11, 238.00.
- i) Uniform allowance for December 2012 to March 2016 Kshs. 20, 000.00.
- j) Gratuity Kshs. 198, 407.00.
- k) NHIF deductions refund for 2012 Kshs. 530.00.
- l) Less 2 days taken in advance Kshs. 1, 556.00.
- m) Total claim Kshs. 392, 209.00.

The claimant's case is that despite demand the respondent has failed to pay the amount now claimed. The claimant also claims a certificate of service. He prayed for:

- a) Payment of terminal dues Kshs. 392, 209.00.
- b) Costs of the suit plus interest.
- c) Certificate of service.
- d) Any other relief the court may deem just and fit to grant.

The respondent filed the response to the claim on 09.10.2017 through Mburu Kariuki & Company Advocates. The respondent admitted employing the claimant as the Public Area Supervisor. The respondent admitted that the parties met before the CDC and an agreement was reached that parties separate. The claimant denied the tabulated claim or that the dues were tabulated and forwarded to the claimant to sign but he declined to do so. The claimant therefore has no cause of action.

The claimant's evidence and which the respondent does not dispute is as follows:

- a) Sometimes in January 2016 the claimant was at work making his routine rounds when he saw a black polythene bag at the compound. He decided to pick it up and it was cold with something hard inside. He decided to go and show it to the security guards at the director's office. Before reaching guards he met with director and he wanted to know whatever the claimant was holding. He explained the circumstances and that he did not know the contents. The director asked him to open the bag and it had a piece of raw chicken. The director summoned the security guards and the claimant gave his statement on the incident.
- b) The claimant was suspended in February 2016 as a suspect and a disciplinary process followed. He received a termination letter on 20.05.2016 terminating him effective 01.04.2016. The claimant reported to his union and the prescribed CDC reconsidered the case. The respondent agreed to reinstate the claimant and to set aside the termination. However, the claimant declined to return to work because his reputation and pride had been injured and relationship had become strained. He cleared but his final dues were not paid.
- c) The claimant further testified that he was shown the computed dues as exhibited and being exactly as claimed herein but declined to sign in acceptance because he needed legal advice. He also testified that he later found out that the dues had been properly computed.

The respondent's witness testified that the final dues were computed for the claimant's perusal but he declined to consent to the figures. Later the respondent received the demand letter from the claimant's Advocates.

The Court has considered the pleadings, the evidence and the final submissions. The evidence is consistent with the pleadings by both parties that the final dues were tabulated as claimed by the claimant. The Court will therefore award the claimant **Kshs. 392, 209.00**. The Court also finds that the claimant is entitled to a certificate of service per section 51 of the Employment Act, 2007.

The respondent has submitted that the claimant was entitled under contract to the amount claimed except Kshs. 68, 360.00 and Kshs. 25, 000.00 being 4 months' salary and house allowance in lieu of notice respectively - the claimant having resigned or turned down the reinstatement. However, the Court returns that the submission is inconsistent with the respondent's pleading that the final dues had been tabulated and offered. There was no pleading about the matters now submitted about and the respondent must be bound by its pleadings. Further, the evidence was that parties by mutual agreement decided that the contract of employment would be terminated and final dues computed - it was not the claimant's unilateral decision and the respondent must be bound by the undisputed agreement to separate as the submission was inconsistent with that agreement.

Nevertheless, the Court considers that had the claimant taken due diligence to seek timely legal advice and informed the respondent his desire to consult prior to signing for the final dues as had been computed, may be the suit would not have been filed. On the other hand, the respondent has not offered an explanation why the claimant was not given a certificate of service promptly. To balance justice for parties, each will bear own costs of the suit.

In conclusion judgment is hereby entered for the parties for:

- 1) The respondent to pay the claimant a sum of **Kshs. 392, 209.00** by 01.12.2021 failing interest to be payable thereon at Court rates from the date of filing the suit till the full payment.
- 2) The respondent to deliver the claimant's certificate of service by 01.12.2021.
- 3) Each party to bear own costs of the suit.

**Signed, dated and delivered by video-link** and in court at **Mombasa** this **Friday 29<sup>th</sup> October, 2021**.

**BYRAM ONGAYA**

**JUDGE**