



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 215 OF 2017

LENNOX KATANA MASUDI.....CLAIMANT

- VERSUS -

EMERALD HOTELS RESORTS & LODGES.....1ST RESPONDENT

EMERALD FLAMINGO BEACH RESORT & SPA.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th November, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 21.03.2017 through Marende Necheza & Company Advocates. The respondent filed the statement of defence on 24.11.2017 through Mohamed Madhani & Company Advocates.

The claimant's suit is based on the amended memorandum of claim for salary arrears, constructive dismissal and claim for terminal dues filed on 04.10.2018. The claimant's case is as follows:

- a. The 1st respondent is a group of hotels and resorts offering accommodation and other related services with the 2nd respondent as one of its subsidiaries.
- b. The 1st respondent employed the claimant on 02.09.2012 as a barman at Kshs. 12, 066.00 basic pay plus Kshs. 5, 988.00 house allowance. The salary later increased to Kshs. 13, 320.00 plus Kshs. 6, 600.00 house allowance being a gross of Kshs. 19, 920.00 per month.
- c. The claimant diligently served but about 11.11.2015 his eyesight got impaired and he was given sick leave to get treatment.
- d. The doctor prescribed eye surgery and the claimant's wife one Betty Mulee communicated the claimant's situation to the respondent. The claimant was financially constrained and was initially operated on the left eye on 27.02.2017.
- e. Since January 2016 to-date the respondent stopped paying the claimant's monthly salary and communicated nothing about the claimant's employment. The claimant's case is that the stoppage of payment of salary amounted to constructive dismissal.
- f. The claimant's case was that the respondent ought to have retired him on medical grounds but failed to do so and stopped paying the salary.

The claimant claimed and prayed for judgment against the respondent for:

- a. Salary arrears for 15 months Kshs. 19, 988 x 15 = Kshs. 299, 700.00.
- b. One-month salary in lieu of termination notice Kshs. 19, 988.00.
- c. Service pay for 3 years worked Kshs. 6, 600.00 x 3 = Kshs. 19, 980.00.
- d. Compensation for unfair termination at 12 months' salaries Kshs. 159, 340.00.

e. Costs of the suit plus interest thereon.

f. Any other relief the Honourable Court may deem fit to grant.

The respondent filed the amended statement of defence on 02.11.2018. The respondent's case was as follows:

a. The respondent admitted that it employed the claimant on 02.09.2012 and the last pay was a gross of Kshs. 19, 988.00. The Court finds that there is no dispute that parties were in a contract of service.

b. The respondent admitted that in 2013 the claimant developed problems with his eyes and he was given sick leave per section 30 of the Employment Act. In October the eye sight developed more problems and he was given sick leave per section 30 of the Act.

c. The claimant's wife Betty Mulee notified the respondent about the claimant's predicament only in November 2015 and December 2015. The request was for unpaid leave days from 01.12.2015 to 14.12.2015 and it was paid. On 15.12.2015 the claimant through the wife requested for extension of the unpaid leave days and it was granted.

d. From January 2016 the claimant did not update the respondent about his progress or seek further extension of the unpaid leave days. In 2016 the claimant provided no certificate of incapacity to work to enable the respondent give him sick leave or unpaid leave.

e. The respondent denied breach of the contract of service and even gave the claimant paid and unpaid sick leave.

f. The respondent was sympathetic and offered to foot the medical bills. The claimant failed to communicate about his progress leaving the respondent in the dark and unable to offer the claimant early retirement.

g. The claimant is not entitled to the claims and the remedies as prayed for. Further, no demand notice was served.

The respondent prayed that the suit be dismissed with costs.

Despite service of the hearing notice the respondent failed to attend. The claimant testified to support his case. The claimant fully relied on his witness statement filed on 21.03.2017. His evidence was that in 2014 he started experiencing eye problem but he was still able to work. His situation became worse and effective 11.11.2015 he was not able to work due to poor vision and the respondent gave him sick leave to go for treatment. Effective January 2016 the respondent stopped paying his monthly salaries, hence the present suit. His left eye was operated on 27.02.2017. Final submissions were filed for the claimant.

The Court has considered all the material on record. The Court makes findings as follows:

First, the Court finds that there is no dispute that parties were in a contract of service at all material times.

Second, section 30 (1) of the Employment Act, 2007 provides that after two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre. For an employee to be entitled to sick leave with full pay under the section, the employee shall notify or cause to be notified as soon as reasonably practicable his employer of his absence and the reason for it. The full pay under the section includes wages at the basic rate excluding deductions from the wages allowable under section 19. The 12 months under the section run from the date of employment and thereafter commence on such subsequent anniversary dates of employment – but the employer can fix such date.

In the instant case the claimant was employed on 02.09.2012 so that the 12 months under section 30 of the Act was running from 2nd September of each month. On 08.11.2015 he was given leave and the Court finds it was for the 12 months running from 02.09.2015 to 02.09.2016. Further leave was given from 01.12.2015 to 14.12.2015 per the claimant's request letter dated 29.11.2015. The Court finds that for the 12 months from 02.09.2015 to 02.09.2016, the claimant exhausted his entitled leave of seven days with full pay and thereafter of seven days with half pay – though the Court considers that the respondent in fact appears to have paid full salaries for November and December 2015 because the claimant has not alleged or testified of such grievance of no salary payment over the two months. The Court therefore finds that the respondent fully complied with section 30 of the Act.

Third, did the respondent's failure to pay the January 2016 salary amount to constructive and unfair termination? The evidence is that after 11.11.2015 the claimant continued on sick leave. Further after his letter of 29.11.2015 for a further 14 days' leave and his wife's email of 15.12.2015 for extension of sick leave effective 15.12.2015, thereafter, the claimant appears not to have communicated with the respondent at all. The claimant does not say that in or after January 2016 he ever gave the respondent a certificate of incapacity or by himself or through his wife he ever notified the respondent about his predicament as envisaged in section 30 of the Act. The Court finds that for the period of 12 months from 02.09.2015 to 02.09.2016 the respondent has fully complied with provisions of section 30 of the Act and in absence of any other established contractual obligation, the respondent was not under a duty to pay the January 2016 salary. The Court finds that there was therefore no fundamental breach of the contract of service on the part of the respondent to justify a finding of constructive dismissal as was claimed for the claimant. The Court further finds that the failure to notify the respondent on his progress and to present the certificate of incapacity to work per section 30 of the Act and effective January 2016 and going forward shows that the claimant fully contributed to his predicament. The allegation of unfairness and the claim for compensation and other remedies as prayed for must therefore be declined. The Court finds that the claim for salary arrears was outside the design and prescription of section 30 of the Act and was not shown to be based upon a contractual provision and the same is declined as well as that it was contradictory to allege constructive termination effective January 2016 when the salary was stopped and after such constructive termination, claim salary arrears for the future period which then would be

devoid of employment relationship. The claimant was a member of NSSF and section 35(6) of the Employment Act would bar his claim for service pay. In any event the Court has found that in the instant case the claimant has failed to establish the alleged termination and the prayers for notice pay, compensation and service pay were all misconceived and unjustified.

The Court has considered the respondent's failure to participate at the hearing and considered the claimant's undisputed ill-health that rudely disrupted his otherwise good service with the respondent and the Court returns that each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for:

1. The dismissal of the suit.
2. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 5TH NOVEMBER, 2021

BYRAM ONGAYA

JUDGE