



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 381 OF 2017

BETWEEN

JOSEPH MUSYOKA NDUNDA.....CLAIMANT

VERSUS

SEVERIN SEA LODGE [E.A.] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ananda & Company, Advocates for the Claimant

Sherman Nyongesa & Mutubia, Advocates for the Respondent

JUDGMENT

1. The Claimant lodged his Statement of Claim on 11th May 2017. He avers, he was employed by the Respondent Hotel on 2nd February 2010 as a Food and Beverage Manager. His first salary was Kshs. 50,000. He avers, he was to work until he retired at the age of 55 years.

2. He worked hard, rising to the position of Operations Manager in charge of Food and Beverage. He also performed the role of Housekeeper, Food and Beverage Manager, Executive Chef, and Night Manager. He handled all these responsibilities single-handedly. He never had off-duty breaks.

3. On 4th March 2017, he avers he was asked by Respondent's Son, to hand over, as his contract was not going to be renewed. [It is not clear who Respondent's Son here refers to, the Respondent being a Limited Liability Company].

4. The Claimant handed over on 15th March 2017. He was not paid his final dues. His last salary was at a rate of Kshs. 252,000 monthly. He was not paid acting allowance for discharging the role of Manager. He prays for Judgment against the Respondent for:-

- a. 31 days of annual leave deducted in 2015 at Kshs. 252,000.
- b. 11.5 public holidays as of 14th March 2017 at Kshs. 96,000.
- c. 10 public holidays for 2014 at Kshs. 33,333.
- d. 17 days underpaid after promotion in 2015 at Kshs. 50,000.
- e. Salary for March 2017 at Kshs. 252,000.

f. Retirement benefits for March 2017 at Kshs. 12,500.

g. 12 months' notice based on previous permanent contract at Kshs. 3,024,000.

h. 12 months' retirement benefits at Kshs. 12,500.

i. Acting allowance for 2 years, 2016, 2017, assuming the Resident Manager earned Kshs. 350,000 per month, at Kshs. 210,000.

Total...Kshs. 4,080,433.

j. 12 months' salary in compensation for unfair termination. [Not clear why this is not computed with the other items above].

k. Costs.

l. Interest.

5. The Respondent lodged its Statement of Response on 13th June 2017. It concedes to have employed the Claimant. Employment was by way of different fixed term contracts. In the last contract, he was employed as Operations Manager, for 2 years, beginning 15th March 2015, ending 15th March 2017. His contract was not terminated by the Respondent; it ended on 15th March 2017 as agreed. He took annual leave on request. He was duly paid in respect of any public holiday worked. He did not have any accumulated public holidays. He was not under the contract, entitled to any leave not taken, by the end of April of the following year. In 2014, he took several off-duty days, on realization that he had exhausted his annual leave days. He was asked to hand over on end of his contract. The Respondent concedes the Claimant is entitled to salary for March 2017, but only for 14 days worked. The Respondent has a Retirement Benefits Scheme, to which the Respondent unflinchingly paid Claimant's pension contributions. It is not liable for payment of any pension. The Scheme is a different body. The Respondent cannot be held liable for any liability under previous contracts. At no time was the Claimant called upon to discharge the role of the General Manager. Acting role would only be created in writing. The Respondent prays the Court to dismiss the Claim with costs.

6. The Claimant gave evidence on 25th November 2019. Previous Employee of the Respondent, and current Member of Respondent's Board, James Owiti, gave evidence for the Respondent, on 4th February 2020, when hearing closed. The Cause was last mentioned in Court on 12th March 2020, when Parties confirmed the filing of their Submissions.

7. The Claimant adopted his pleadings, documents and witness statement, in his oral evidence. He testified that he actually worked for the Respondent initially, between 2003 and 2007. Performance went down, compelling the Claimant to resign. He was recalled in 2010.

8. He was the Food and Beverage Manager. Retirement age, which was not revoked under subsequent contracts, was 55 years. He signed an improved contract in February 2015. His salary was improved to Kshs. 250,000. He performed the role of Food and Beverage Manager, and Operations Manager. He was running the show. He discharged multiple roles.

9. In 2016, there was change in Respondent's attitude towards the Claimant. There was a plan hatched, to punish the Claimant. In February 2017, he requested for a printout of his annual leave, off-duty days and public holidays record. He was called by the Directors and told his contract would not be renewed. This was 10 days before the contract expired. He lived at the Hotel. He was not given adequate time to move out. Previous contracts were not terminated before the last contract was executed. Termination was unfair and malicious. Due to terrorism every Employee was compelled to take unpaid leave of 1 month. The Claimant was denied acting allowance. He was denied public holiday pay. The Respondent wanted to punish the Claimant, because he indicated his intention to leave the Respondent.

10. Cross-examined, the Claimant conceded that his employment was regulated by different contracts. He signed a contract in 2010 and another in 2015. He was Food and Beverage Manager in 2010, on a salary of Kshs. 50,000 which was increased subsequently to Kshs. 150,000. By the time he left in 2017, he was on the contract executed in 2015, and on a monthly salary of Kshs. 250,000. He held that termination was based on the first contract of 2010. According to the Respondent, termination was based on the second contract of 2015. Clause 7 of the 2015 contract states that, untaken leave would be forfeited. He claims annual leave from 2013 to 2017. He was never away for a month in continuity, owing to his responsibilities. Acting role was not communicated in writing. He did not have any documents showing the Respondent defaulted in remitting pension contributions, to the Pension Scheme which was administered by Jubilee Insurance. Redirected, the Claimant told the Court that the contract of 2010 had a termination clause of 3 months. He was not issued 3 months' notice. The contract of 2015 had a notice period of 1 month. It was not issued.

11. James Owiti told the Court he was Respondent's Resident Manager. He is retired today, but serves as a member of the Respondent's Board. He worked for the Respondent for 40 years. He runs a Safari Business and is an agent of the Respondent. He adopted in his evidence, his witness statement and documents filed on behalf of the Respondent.

12. Cross-examined, he told the Court he did not offer to give evidence to assist the Respondent owing to his association with the Respondent. The Claimant did not act in Owiti's position when Owiti was absent. The Claimant was a sharp professional, overseeing food and beverage, and housekeeping issues. Owiti was in charge overall. He knew the Claimant for over 11 years. He did not recall any disciplinary case against the Claimant. Owiti, the Claimant and other Staff worked as a team during a very hard period in the industry, marred by terrorism. Owiti recalled the Claimant to have signed 3 different contracts of employment in 2011, 2012 and 2015. He was not aware about termination of the contract of 2010. Retirement age under this contract was 55 years. The Claimant was not owed any leave. There were times, when Owiti was off-duty. No one acted in his absence. There was a Pension Scheme operated by Jubilee Insurance. The Claimant did not complain that the Respondent failed to pay contributions. Redirected, Owiti told the Court that Heads of Department ran their respective departments in his absence. The last contract superseded all the others. If leave was not taken, it was forfeited.

The Court Finds:-

13. Relevant to the Claim is that the Claimant worked for the Respondent Hotel between 2010 and 2017. He worked under different contracts. In the first contract he was appointed on 2nd February 2010, as acting Assistant Food and Beverage Manager, on a monthly salary of Kshs. 50,000. The contract was indeterminate, with a termination notice period of 3 months. The contract states also, that the Claimant's services would terminate automatically, upon the Claimant becoming 55 years old.

14. On 1st October 2011, the Parties entered another contract, varying the terms outlined in the contract of 2010. The Claimant was named Food and Beverage Manager. The notice period remained at 3 months. Termination could also take place summarily if the Claimant was guilty of serious misconduct; failed to carry out his duties properly; was convicted of a criminal offence; or became bankrupt. Retirement clause was changed. Retirement was now at the discretion of the Respondent's Board, and according to the law of the country. Annual leave was retained at 26 days annually, with a forfeiture clause introduced. Leave not taken would lapse by 30th April of the following year. Accumulated leave would not be taken without the written consent of the General Manager. Like the contract of 2010, this contract was indeterminate.

15. Further variation of the contract of employment is captured in the contract dated 13th March 2015. Principally, the contract was no longer indeterminate. The Claimant consented to a 2 year contract, beginning 15th March 2015 and ending on 14 March 2017. He was now designated as the Operations Manager. His gross monthly salary was Kshs. 250,000. Termination notice remained at 3 months. Summary dismissal clause was retained. Being determinate, the contract did not include retirement clause.

16. In the respectful view of the Court, the last contract for purposes of this dispute, is the relevant contract. The other contracts were amended by the Parties. They freely negotiated and concluded the contract of 2015. What was indeterminate became determinate. The previous contracts need not have been explicitly terminated. The Claimant is mistaken in his evidence that his contract of 2015 terminated under the terms of the previous contracts. This is absurd thinking. If it was intended that termination would be based on previous contracts, there would be no need for the contract of 2015. A letter of promotion and increment of salary would have sufficed.

17. Was the contract of 2015 terminated by the Respondent? It was not. It was to run, and did run, from 15th March 2015, to 14th March 2017. There was no requirement for either Party to issue notice, upon the contract maturing. Notice would only issue, if termination was before the date of maturity, 14th March 2017. The Claimant left on 15th March 2017. His contract had come to an end. There was no notice. The date of expiry, in a fixed term contract, is always known to the Parties under the contract. Notice was in the contract.

18. The Respondent did not terminate the contract. There was no requirement in law to justify termination. The reason for termination was expiry of the period, something both Parties were aware about, and in deed consented to, in their last contract.

19. The Court is satisfied that the prayers for notice pay and compensation for unfair termination are misplaced. They are declined.

20. Retirement benefits dispute, is not in the jurisdiction of the E&LRC as confirmed recently in Supreme Court of Kenya, in ***Albert Chaurembo Mumba & 7 Others v. Maurice Munyao & 148 Others [2019] e-KLR***. The Supreme Court was emphatic that the right dispute resolution mechanism in retirement benefit disputes, the mechanism established under the Retirement Benefits Act. The Claimant has brought his claim for retirement benefits at the wrong forum, and against the wrong Respondent. He ought to sue Jubilee Insurance Company who operated the Scheme, at the Retirement Benefits Authority. This aside, he has not demonstrated that the Respondent failed to remit his monthly contributions under the Scheme. This prayer is rejected.

21. He has not established the prayer for acting allowance. He did not have any written instructions to act in any position. He pleads the item on the basis of an assumption, that the salary of a Resident Manager was Kshs. 350,000. There is no evidence that this a correct assumption. It was not asked of the Resident Manager Owiti, whether his salary was Kshs. 350,000 monthly. The prayer for acting allowance is declined. There is similarly no evidence of underpayment of salary at any time in 2015. The Claimant was paid what was agreed.

22. The Claimant did not in his evidence, establish his prayer for 31 days of annual leave, deducted in 2015. Deducted from where? He signed a contract which states he would forfeit any leave not utilized by 30th April of the following year. He was away on unpaid leave imposed on the Staff of the Respondent, due to poor business performance. He was at one time in Germany training. He has not shown that he is owed annual leave and public holiday overtime. He did not explain these prayers against the documents filed by both Parties in relation to the prayers. There are Leave Passes and Staff On-duty and Off-duty time-table.

23. The prayer for '12 months' notice based on previous contracts' is not founded on any evidence or law, and is rejected.

24. It is agreed that the Claimant left employment on 15th March 2017. He prays for salary for the whole month, which is not merited. ***He merits salary for 15 days worked in March 2017, which the Court awards at Kshs. 144,230.*** This is based on a monthly salary of Kshs. 250,000, in a 26 day working month.

25. No order on the costs and interest.

26. Lastly, the Court must record that it has been compelled to release this Judgment from the confines of the Judge's home at Chaka, Nyeri County, owing to the covid-19 pandemic. Other modes of delivery are neither failsafe, nor safe to the Parties, in particular considering that the place of trial, Mombasa City has been identified by health authorities as a hotbed of the pandemic. Whereas the Court is required to read its Judgments in Open Court, under Rule 28 of its Procedure Rules, this cannot be done without risking lives. The wheels of justice must however keep rolling. Resort must be made to Rule 38 which allows the Court to take control of its proceedings. It is noted also that the Hon. the Chief Justice has directed that all pending Court decisions must be delivered by 30th May 2020. Parties shall have access to the Ruling from the Court Registry, and as soon as practicable, from the Kenya Law Reports web portal.

IN SUM, IT IS ORDERED:

a. The Respondent shall pay to the Claimant Kshs. 144,230 being his salary for 15 days worked in the month of March 2017.

b. No order on the costs and interest.

c. Respondent is granted an order for stay of execution of 45 days.

Dated, signed and released at Chaka, Nyeri County, for dispersal to the Parties, this 29th day of May 2020.

James Rika

Judge