



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 849 OF 2016

BETWEEN

AGOKO OTIENO APODO.....CLAIMANT

VERSUS

AEGIS [KENYA] LIMITED t/a LEOPARD BEACH RESORT & SPA.....RESPONDENT

*Rika J*

*Court Assistant: Andrew Mwabanga*

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*Tindika & Company Advocates for the Claimant*

*Mburu Kariuki & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 1<sup>st</sup> November 2016. He states, he was employed by the Respondent as a Security Guard on temporary/ seasonal contract, commencing 31<sup>st</sup> May 2004.
2. His last contract was in June 2013. Whenever he was not under contract, he continued to work as a Casual Employee. His last working day was 9<sup>th</sup> June 2015. He worked for 11 years. He avers his contract was terminated unfairly, by word of mouth, by Respondent's Director Ubhi Karan Singh, on 19<sup>th</sup> June 2015.
3. As of the date of termination, he was earning a gross monthly salary of Kshs. 17,772. In 2014, the Respondent introduced a system of working on rotation. The Respondent wanted to reduce staff. The Claimant therefore worked for 2 weeks in a month, and was paid at the end of every week. The issue of rotational duty was among issues discussed between the Respondent and Claimant's Trade Union KUDHEIHA. There was no consensus, and the Union advised the Claimant to take early retirement.
4. The Claimant wrote a notice of early retirement of 4 months, dated 19<sup>th</sup> March 2015. The Respondent accepted the notice in writing on 7<sup>th</sup> May 2015, giving the date of retirement as 31<sup>st</sup> July 2015.
5. The Respondent informed the Claimant on 7<sup>th</sup> June 2015, that he had to go on annual leave and take all pending off-duty days. He had not been paid salary for 2 ½ months. KUDHEIHA demanded he is paid, before he proceeds on annual leave.
6. On 9<sup>th</sup> June 2015, the Claimant met Ubhi Karan Singh. Singh asked the Claimant what his role was. The Claimant told him he was a Security Guard. Singh then callously and curtly, ordered the Claimant to collect rubbish. The Claimant refused to do so. Singh became agitated; verbally assaulted the Claimant; calling the Claimant a very vulgar name; and informed the Claimant that his services had been terminated forthwith. The Claimant reported verbal assault at Diani Police Station, but was unable to have Singh prosecuted, because Singh corrupted the Police Officers.

7. He received tabulation of terminal dues showing he would be paid Kshs. 286,230. He disputed tabulation through a letter dated 15<sup>th</sup> June 2015. The Respondent did not reply to the Claimant, and never paid terminal dues to the Claimant. He received the letter of termination dated 1<sup>st</sup> July 2015, stating that his last working day was 9<sup>th</sup> June 2015.

8. He seeks Judgment against the Respondent, on a rather long list of items, listed below: -

- a. Certificate of Service to issue.
  - b. Declaration that termination was wrongful and unfair.
  - c. Declaration that the Claimant ought to be paid service charge for the months of July, August, September and December 2014, April and May 2015.
  - d. 12 months' salary in compensation for unfair termination at Kshs. 213,264.
  - e. 4 months' gross salary in lieu of notice at Kshs. 71,088.
  - f. Shoe allowance July 2012 – May 2015 at Kshs. 500 every month, at Kshs. 17,500.
  - g. Service charge, July 2014 at Kshs. 5,600.
  - h. Service charge, August 2014 at Kshs. 7,000.
  - i. Service charge, September 2014 at Kshs. 4,200.
  - j. Service charge, December 2014 at Kshs. 13,800.
  - k. Service charge, April 2015 at Kshs. 4,982.
  - l. Service charge, May 2015 at Kshs. 1,500.
  - m. Annual leave for 2008, 2009 and 2010 at Kshs. 13,656.
  - n. Unpaid half salary for 2 months between 7<sup>th</sup> September 2013 and 7<sup>th</sup> November 2013 at Kshs. 16,011.
  - o. Salary for December, 2013 at Kshs. 16,011.
  - p. 64 days' overtime from 2<sup>nd</sup> July 2014 to 24<sup>th</sup> January 2015, at Kshs. 13,153.
  - q. Night allowance for 73 days at Kshs. 7,501.
  - r. Leave traveling allowance for 2013, 2014 and May 2015 at Kshs. 5,157.
  - s. Pending 11 days, at double rate, Kshs. 11,572.
  - t. Kisimani 10 days, at double rate, Kshs. 10,520.
  - u. Public holiday, 1<sup>st</sup> June 2015, Kshs. 1,052.
  - v. Retirement gratuity, at the rate of 24 days' gross salary for 11 years completed in service, Kshs. 156,394.
  - w. Salary increment arrears at Kshs. 32,712.
- Total... Kshs. 622,673.

9. The Respondent filed its Statement of Response on 14<sup>th</sup> March 2017. It admits to have employed the Claimant, as a Security Guard, on seasonal contract, on 1<sup>st</sup> June 2004. He was summarily dismissed for gross misconduct. He is not entitled to Kshs. 622,673 or any part thereof. The Respondent prays the Court to dismiss the Claim with costs.

10. The Claimant gave evidence on 17<sup>th</sup> September 2019 and 25<sup>th</sup> February 2020, when he rested his Claim. Human Resource Manager, Mwanaisa Suleiman Hassan, gave evidence for the Respondent on 9<sup>th</sup> October 2020, closing the hearing.

11. The Claimant restated in his oral evidence, his employment history with the Respondent, and his terms and conditions of service, as contained in his Statements of Claim and Witness. He would work on casual terms when his seasonal contracts expired. He was in 2014

placed on rotational duty, because of diminished business at the hotel. The Claimant did not agree with the rotational work arrangement. He consulted his Trade Union, who advised him to take early retirement. He gave notice of retirement.

12. On 9<sup>th</sup> June 2015, he was on his way for lunch, when he met Director Singh. The Director asked the Claimant what his duty was. The Claimant told him he was a Security Guard. Singh asked the Claimant why there was so much garbage in the compound. The Claimant told Singh he was a Security Guard, not a Cleaner. Singh insulted the Claimant, saying, ‘‘ I can fuck you!’’. Singh alleged that the Claimant could do any work assigned to him by the Respondent. The Claimant still had not received his full salary. The Claimant showed Singh a letter from his Trade Union to the Respondent, asking to be paid his dues. Singh directed the Resident Manager Marube, to pay Claimant’s dues, and have the Claimant released from the premises. The Claimant was paid outstanding salary by the Cashier. He reported abuse by Singh to a local human rights group, who advised he reports the matter to the Police. The Management Officers went to the Police Station and compromised the Officers.

13. Management Officers then went to the Trade Union Offices. The Trade Union did a tabulation of the Claimant’s dues. The Claimant declined what was tabulated. The Claimant was serving his notice period, when he was dismissed. He was compelled to resign. Another company had been outsourced to supply guard duties. This, coupled with the Claimant’s age, led to the advice by the Trade Union that the Claimant should take early retirement. The Claimant was not involved by his Trade Union, in the computation of dues.

14. The Claimant was entitled to shoe allowance which was not paid. He used to receive service charge through the bank. It was denied to him for the specified period. He was denied annual leave. He was involved in an accident and was unable to work for 2 months. The Respondent placed him on half salary over the period of sick leave. The Respondent had directed the Claimant to work 12 hours a day, instead of 8 hours. At Kisimani [borehole site], the Claimant served 12 hours a day, instead of 8 hours. He prays for night allowance and 1 public holiday. He seeks gratuity, arrears of salary increment, compensation for unfair termination, costs and interest.

15. Cross-examined, the Claimant told the Court he worked for 11 years. He was locked out on 9<sup>th</sup> June 2015. He seeks salary increment up to 31<sup>st</sup> July 2015. He could be wrong on the date of termination. He last worked on 9<sup>th</sup> June 2015. The duty rota showed that when the Claimant was not on contract, he was still working on casual terms. He took some leave days, as shown in leave application forms, exhibited by the Respondent. He gave notice of resignation dated 19<sup>th</sup> March 2015. Effective date would be 20<sup>th</sup> July 2015. The Respondent changed this to 31<sup>st</sup> July 2015. The Claimant agreed to the change. Notice would still be payable under the CBA. The Claimant did not know how service charge was calculated. The rates were placed on the notice board. Service charge is regulated under clause 21 of the CBA. The Claimant asked the works committee why his name was excluded from the list of service charge beneficiaries. The works committee stated that the Claimant was not on contract for the relevant period. The Claimant worked excess hours on instructions given by the Respondent. He was offered 2 different figures as terminal dues: Kshs. 263,464; and Kshs. 286,230. He did not agree with the tabulation. As at the time of termination, he was on casual engagement.

16. Redirected, the Claimant told the Court that he was entitled to 26 days of annual leave under the CBA. What is shown in the leave forms is less than 26 days. He was not supposed to be on casual engagement, after 11 years of service. The Director had no right to assign the Claimant garbage collection duty, insult the Claimant and lock the Claimant out. The Claimant disagreed with the amounts offered, and made a counter-proposal. There was no response. Nothing was paid through the Claimant’s bank account, not even the figure offered.

17. Mwanaisha Suleiman Hassan, adopted in her oral evidence, Respondent’s Witness Statement, Pleadings and Documents. The Claimant utilized his annual leave, as shown in the leave application forms on record. Annual leave days were pegged to the contractual period. The leave forms reflect the contractual period. He opted to retire and gave notice of 4 months to the Respondent. It would expire 31<sup>st</sup> July 2015. His contract was however terminated by the Respondent on 9<sup>th</sup> June 2015, a little over a month to the date he would have left of his own choice.

18. He was asked by the Director to collect some garbage from the compound. He declined saying he was a Security Guard, not a Cleaner. The Respondent tabulated his dues. He contested tabulation. He served 2 months’ notice. The Respondent included balance of 2 months in the tabulation. He was offered shoe allowance from 2012, as agreed with the Trade Union. Service charge was the responsibility of the works committee. The committee omitted the Claimant. Off-days were single-rated.

19. Cross-examined, Hassan told the Court she joined the Respondent in July 2015 as Human Resource Manager. The Claimant was already off the scene. She relied on personnel records, in giving her evidence. She could not say exactly what transpired between the Claimant and Director Singh. The Claimant was employed in 2004. He was a member of KUDHEIHA. There was a CBA governing the employment relationship. Clause 19 regulated temporary and seasonal employment. These type of contracts could not exceed a period of 1 year. The Claimant was treated as a regular Employee.

20. Hassan was not aware about the Respondent hiring an external security service company in 2014. She did not have document showing that Security Guards were placed on 2-week rotational duty. A permanent Employee works 30 days in a month. The rotational arrangement was made between the Respondent and Claimant’s Trade Union, KUDHEIHA. Hassan did not have a copy of the agreement. The Respondent supplies to Employees, with House Rule and Guidelines on employment. She did not have these in Court. The Claimant had issues with the Director. She did not know that the Director abused the Claimant; or that the Claimant made a report with the Police; and that the Police were corrupted by the Director, to overlook the complaint. Termination was on 9<sup>th</sup> June 2015. There was no letter of termination issued, to-date.

21. Service charge is payable under clause 21 of the CBA, to all Unionisable Employees. Hassan was not aware if the Claimant was on duty, on the days he claims service charge. The Claimant earned basic monthly salary of Kshs. 11,862; and house allowance of Kshs. 5,910 – total Kshs. 17,772. Hassan is not aware of any notice issued to the Claimant on disciplinary hearing. She did not agree with the Claimant, that he was a victim of big-man syndrome. If he was escorted out of the workplace, she would agree it was wrong.

22. Hassan testified that the Claimant does not merit damages. He was in service for 11 years. He would have notice of termination of 4

months under the CBA. Uniform allowance was included in his terminal dues. She did not have evidence to show it was computed from July 2012. She was not aware that the Claimant worked for 12 hours daily. If he was authorized to do so, he would be entitled to overtime. Terminal dues included leave traveling allowance; public holidays; and gratuity. She did not know if he received Certificate of Service. He merits Certificate of Service.

23. On redirection, Hassan told the Court that the Claimant did not collect what was tabulated. She was not there when altercation between the Claimant and the Director ensued. The Claimant did not complain about being frustrated in his letter of retirement. He thanked the Respondent. His dismissal was summary. There was no need to call a meeting. He said KUDHEIHA advised him to retire. The Respondent and the Trade Union agreed on variation of terms of service. The Respondent waived Claimant's notice period and paid him.

The Court Finds: -

24. The Claimant was employed by the Respondent Hotel, as a Security Guard, on 1<sup>st</sup> June 2004. He was placed on temporary / seasonal contract of 2 months. He was issued other similar contracts subsequently. He last worked for the Respondent on 9<sup>th</sup> June 2015.

25. The Claimant had, on the advice of his Trade Union, issued the Respondent a notice of retirement of 4 months, in accordance with clause 27 [a] of the CBA. The notice issued on 19<sup>th</sup> March 2015, and was to take effect on 20<sup>th</sup> July 2015.

26. The date of termination was varied by the Respondent. First, on 7<sup>th</sup> May 2015, the Respondent wrote to the Claimant, accepting his notice of retirement, but indicating that the last working day would be 31<sup>st</sup> July 2015.

27. During this shifting notice period, a supervening event happened, altering the date of termination once again. The Claimant, a Security Guard, was asked by Respondent's Director, to collect garbage from the hotel compound. He declined on the ground that this was not part of his duty description. There was an altercation in which the Claimant alleges he was told by the Director Singh that, " *I can fuck you.*"

28. After this incident, the Director asked the cashier to pay the Claimant arrears of his monthly salary. The Resident Manager then informed the Claimant that his contract had been terminated, effective 9<sup>th</sup> June 2015. This was approximately 1 month and 21 days, to the date last advised, as the date of retirement- 31<sup>st</sup> July 2015.

29. The first question that the Court must answer, is whether, the decision by the Respondent to terminate Claimant's contract, while he was serving his 4-month notice of retirement period, was an unfair termination.

30. The Claimant had worked for 11 years. He was not in seasonal, temporary or casual employment after 11 years. He was in regular employment. This position finds support under clause 19 of the CBA concluded between the Respondent and the Claimant's Trade Union, KUDHEIHA. Clause 19 requires, that: -

- The Employer may employ persons on temporary/ seasonal basis for a period to be specifically advised to the Employee.
- Such period not to exceed 1 year.
- Temporary / seasonal employment may be offered for genuine temporary/ seasonal purposes or projects.
- The Employer shall not re-employ the temporary/ seasonal Employee within a short period of time in order to avoid employing that temporary/ seasonal Employee on permanent basis.

From this clause, it is clear that it cannot have been the intention of the Parties, that the Claimant would be in casual employment, 11 years on.

31. This clause finds support in Section 37 of the Employment Act, which is strongly for decasualization of labour. The Claimant had served for 11 years and the role he performed, of guarding the Respondent, does not fit the description of work carried out, for temporary/seasonal purpose or project. His role was long-term and central to Respondent's business.

32. The Claimant was at the time of leaving employment, a regular Employee of the Respondent, entitled to the whole gamut of protections and guarantees of the Employment Act.

33. If he had issued a notice of retirement, why did not the Respondent just hold its peace, and let the notice run out, have the Claimant out of employment through retirement as he wished, instead of summarily dismissing him on 9<sup>th</sup> June 2015? The Respondent took up the initiative in termination of the contract, while the Claimant had himself initiated termination, and ended up exposing itself to this Claim for unfair

termination.

34. The Claimant's contract was terminated ostensibly on the ground that he defied Director Singh. Singh had commanded the Claimant to pick garbage, a role which was not consistent with Claimant's duty description. He was a Security Guard, not a Cleaner. There was no contract exhibited by the Respondent, which states that the Claimant could be assigned any other duty by the Respondent, other than guarding. The CBA has clear job categories. A Cleaner is defined in Appendix B of the CBA on record, as "An Employee undertaking specific cleaning tasks allocated as directed by the Employer in all areas of an establishment. Areas include swimming pool, garden, kitchen, offices laundry, boat etc." A Security Guard is described as, "An Employee responsible for safeguarding property under his charge and being alert for theft or illegal entry. Conducts regular patrols as directed and enforces Employer's security arrangements."

35. From this CBA dictionary of job categories, the roles of a Cleaner and a Security Guard, are clearly delineated. The Director would not be issuing a lawful command to the Claimant, by asking him to collect garbage. The Claimant would not be guilty of insubordination, under Section 44 [4] of the Employment Act, by declining to obey the command of his superior, issued outside the contract governing the employment relationship. The Claimant therefore was not wrong, to decline the instruction of Director Singh.

36. And even if there was a lawful command issued by a superior to the Claimant, nothing would justify the statement by Singh to the Claimant, which was that, "I can fuck you." Nowhere does the Employment Act contemplate vulgarities in the employer-employee relationship. The Industrial Relations Charter requires Employers and Employees to communicate in respectful and acceptable language, observing industrial relations etiquette and decorum at all turns. Singh went way out line, and as correctly argued by the Claimant, exhibited traits of big man syndrome. Why would a reputable Hotel Director use such crass language on a Security Guard?

37. The Director went ahead and instructed the Resident Manager to have the Claimant paid his dues; and locked out of the premises. He was not paid his dues, but was locked out effective 9<sup>th</sup> June 2015. He was not heard on any accusation. He was not presented with any charges relating to insubordination. There was no hearing of any shade. There was not even a letter of termination. The Claimant was just thrown out after 11 years guarding the Respondent. Clause 9 [d] of the CBA requires that the Employee is given reasons in writing, with the letter copied to his Shop Steward and the Union Representative. Section 43 of the Employment Act similarly requires that the Employer supplies the Employee, with the reason or reasons justifying termination.

38. **Termination was unfair for lack of valid reason/s and fairness of procedure, under Sections 41, 43 and 45 of the Employment Act 2007.** The Claimant is entitled to compensation.

39. He had worked for 11 years. He was a diligent Employee. He exhibited documents showing he was The Employee of the Month in December 2004 and February 2013. He was garlanded through a letter of appreciation from the Respondent, dated 6<sup>th</sup> March 2013, for what the Respondent called amazing effort, dedication and display of professionalism. He applied for retirement on the advice of the Union, based on his advanced age, and the presence of a new security service provider at the hotel. He did not expect to go on working for long, even had termination not occurred on 9<sup>th</sup> June 2015. Parties are in agreement that by 31<sup>st</sup> July 2015, the Claimant would be out of employment. He no doubt was subjected to a very hurtful exit, laced with vulgarities and big man syndrome. He was offered terminal dues computed at Kshs. 286,230 before the dispute was presented in Court, and Kshs. 310,651 in the Witness Statement of the Human Resource Manager. The Claimant did not accept the offers. He felt he was short-changed. **He is granted compensation for unfair termination, equivalent of 5 ½ months' salary, at Kshs. 97,746.**

40. The Respondent offered the Claimant terminal dues including; salary up to 9<sup>th</sup> June 2015 at Kshs. 4,734; pro-rata leave, at Kshs. 11,862; traveling allowance at Kshs. 5,157; 11 pending [off?] days at Kshs. 11,572; Kisimani days at Kshs. 10,520; night allowance of 17 days at Kshs. 1,683; notice of pay of the remaining 2 months at Kshs. 35,544; 1 public holiday at Kshs. 1,052; retirement gratuity at 24 days' salary for each complete year of service at Kshs. 156,394; salary increment arrears at Kshs. 32,212; and uniform/ shoe allowance from December 2012 to 30<sup>th</sup> May 2015 at Kshs. 15,000; and service charge for December 2014 at Kshs. 13,258 and April 2015, at 4,982. In total, the Human Resource Manager, in her Witness Statement filed in Court on 30<sup>th</sup> September 2019, quotes terminal dues payable to the Claimant at **Kshs. 310,651**, less P.A.Y.E at **Kshs. 43,397** – **net sum payable Kshs. 267,254.** **The Court allows this offer of terminal dues at a total of Kshs. 310,651.**

41. The Claimant was not offered, or paid, service charge for July 2014, August 2014, September 2014 and May 2015. The Claimant was entitled to service charge, under clause 21 of the CBA. Clause 21 [ii] provides that service charge, "shall be distributed equally to all Unionisable Employees [always excepting Management Staff] on terms to be agreed by the Works Committee of an Individual Establishment." The clause does not leave room for omission of any Unionisable Employee. It was not for the Works Committee, or the Respondent, to determine that the Claimant was not on contract at specific time, and disentitled to service charge. He remained Unionisable at all times, and the Court has concluded the Employment Act and the CBA, deem him to have been a regular Employee. The role of the Works Committee is to determine in what portion, the cake of service charge is to be shared, among all Unionisable Employee. Its role does not include shutting out some Unionisable Employees. There was discrimination against the Claimant, which cannot be justified under the CBA. The sums claimed as service charge by the Claimant appear to this Court reasonable, and consistent to what he had received earlier. The Respondent did not dispute the computation given by the Claimant. Its position is that the Claimant was denied service charge for specified period, on account of his being out of contract

42. ***The Court grants service charge for July 2014 at Kshs. 5,600; August 2014 at Kshs. 7,000; September 2014 at Kshs. 4,200; and May 2015 at Kshs. 1,500 – total Kshs. 18,300.***

43. ***Certificate of Service to issue.***

44. ***Costs to the Claimant.***

45. ***Execution of Judgment is stayed for 30 days from the date of delivery.***

46. ***The total sum awarded is for avoidance of doubt, subject to P.A.Y.E.***

47. Other prayers sought are captured in the offer made by the Respondent. The Claimant ought to have received what was offered without prejudice, and pursue what is contested, to ease the work of the Court and the Parties. It was illogical to pray for the same items that were offered by the Respondent. It is to be noted that the Claimant told the Court that his Trade Union, was involved in the tabulation. The Court is satisfied that tabulation of terminal benefits by the Human Resource Manager, attached to her Witness Statement was not way off the mark. The Claimant has not established the other items sought, outside of what has been offered by the Respondent, and /or allowed by the Court.

***IN SUM, IT IS ORDERED: -***

***a. It is declared that termination was unfair.***

***b. The Respondent shall pay to the Claimant: compensation for unfair termination equivalent of 5 ½ months' salary at Kshs. 97,746; terminal benefits offered by the Respondent at Kshs. 310,651; and service charge at Kshs. 18,300 – total Kshs. 426,697.***

***c. Certificate of Service to issue.***

***d. Costs to the Claimant.***

***e. Execution of this Judgment is stayed for 30 days from the date of delivery.***

***f. The total sum is subject to P.A.Y.E.***

**Dated, signed and released to the Parties electronically, under Ministry of Health and Judiciary Covid-19 Guidelines, at Nairobi, this 15<sup>th</sup> day of December 2020.**

**James Rika**

**Judge**