



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 540 OF 2015

PAUL MBITHI MWANGANGI.....CLAIMANT

VS

SAI ROCK HOTEL LIMITED.....1ST RESPONDENT

PRIDE INN HOTELS & INVESTMENTS LTD.....2ND RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 28th July 2015 and filed in court on 30th July 2015, the Claimant had initially sued the 1st and 2nd Respondents for unfair termination and failure to pay terminal dues. However, on the day of trial, the Claimant opted to withdraw the claim against the 2nd Respondent.
2. This judgment therefore relates to the claim as against the 1st Respondent only. The 1st Respondent did not file any response to the claim. The Claimant testified on his own behalf.

The Claimant’s Case

3. The Claimant states that he was employed by the 1st Respondent as a waiter sometime in August 2008. He was initially paid a daily rate of Kshs. 300. From October 2009, the Claimant was promoted to the position of Head of Department, Banqueting at a monthly salary of Kshs.9000. At the time of leaving employment, the Claimant’s salary stood at Kshs. 12,000.
4. The Claimant states that his employment was terminated on 28th May 2014 on the grounds that there was low business. He was not issued with a termination notice and was not paid his terminal benefits.

5. The Claimant’s claim is as follows:

- a) Salary in lieu of notice.....Kshs. 12,000
- b) Severance pay @ 15 days per year.....30,000
- c) Accrued leave for 4 years.....48,000
- d) Unpaid overtime.....234,000
- e) 12 months’ salary for unfair redundancy.....144,000
- f) Certificate of service
- g) Costs

Findings and Determination

6. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

7. Section 47(5) of the Employment Act, 2007 provides as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

8. In his witness statement dated 28th July 2018, the Claimant states that on 28th May 2014 while at his place of work, he was notified by the Human Resource Manager, Rose Baitili that his employment had come to an end due to low volume of work.

9. In his testimony before the Court however, the Claimant stated that he was terminated by way of short text message (sms) while away on two days' off duty. The Claimant did not explain this obvious contradiction to the Court. Further, from a certificate of service dated 24th September 2010 filed by the Claimant himself, it would appear that contrary to what is pleaded in his Memorandum of Claim, the Claimant worked for the 1st Respondent from 1st August 2009 until 19th September 2010. Again, there was no explanation for this contradiction.

10. In light of this the Court finds and holds that the Claimant has failed to establish a case of unlawful termination of employment as required under Section 47(5) of the Employment Act. That dispenses with the claims for compensation and notice pay.

11. Similarly, no basis was laid for the claims for severance pay, accrued leave and overtime which therefore fail and are dismissed.

12. The effect is that the Claimant's entire claim fails and is dismissed.

13. I make no orders for costs.

14. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Anaya for the Claimant

No appearance for the 1st Respondent