



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 757 OF 2017

DEXTER MUYE MWANGOMBE.....CLAIMANT

VS

MOMBASA GO-KART-GARIMELI LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for compensation for unfair termination of employment brought by Dexter Muye Mwangombe against Mombasa Go-Kart-Garimeli Limited. The claim is documented by a Statement of Claim dated 30th August 2017 and filed in court on 21st September 2017. The Respondent filed a Response on 12th October 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Managing Director, Reto Casanova. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent in October 2011. He was issued with a letter of appointment on 1st December 2013 and worked until 2nd February 2017, when his employment was terminated. At the time of leaving employment, the Claimant earned a monthly salary of Kshs. 14,054.30.

4. The Claimant’s claim is as follows:

- a) One month’s salary in lieu of notice.....Kshs. 14,054.30
- b) 12 months’ salary in compensation.....168,651.90
- c) Severance pay.....40,541.25
- d) Underpayment.....123,553.20
- e) Overtime (1.12.2013-1.2.2017).....151,840.00
- f) Costs plus interest

The Respondent’s Case

5. In its Response dated 12th October 2017 and filed in court on even date, the Respondent states that the Claimant joined its establishment on 1st December 2013 in the position of security guard. The Respondent denies having employed the Claimant since October 2011.

6. In December 2017, one of the Respondent’s staff in the paintball department resigned. The Claimant was offered a transfer to the vacant position but he declined without giving any reason. At the time, the Respondent had decided to reduce its security guards. Upon refusal to accept a transfer, the Claimant was issued with a termination letter.

Findings and Determination

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

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

Unlawful Termination?

8. On 2nd January 2017, the Respondent wrote to the Claimant as follows:

“RE: Termination of services

I hereby give notice that I terminate your services as defined in the Letter of Appointment from 1st November 2015.

This is due to reduction of our night security staff. We were offering you a day time job on our Go-Kart track at same payment and conditions. Unfortunately you are not willing to accept the offer.

The date of termination is on 2nd February 2017.

Reto Casanova

(Signed)

Managing Director

GARIMELI Ltd”

9. 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.

10. The Claimant conceded that the Respondent offered him an alternative position at his obtaining terms and conditions. He however declined to take up the new position ostensibly because his colleagues who were deployed in this position had been accused of stealing paint balls. He therefore saw the deployment as a ploy to terminate his employment without payment of his dues.

11. The Court was unable to understand why the Claimant who had declined an opportunity to continue working for the Respondent, albeit in a new position, would complain that his employment had been unfairly terminated. The reason given by the Claimant for failure to take up the new position was unconvincing and the Court finds and holds that he has failed to prove a case of unfair termination.

12. As a result, the Claimant’s claims for compensation and notice pay fail and are dismissed. The Claimant was not declared redundant and the claim for severance pay is therefore without basis and is dismissed. The claims for underpayment and overtime compensation were not proved and are also dismissed.

13. In the end, the Claimant’s entire claim fails and is dismissed.

14. Each party will bear their own costs.

15. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF MARCH 2019

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JUDGE

Appearance:

Mr. Mathare h/b for Mr. Odhiambo the Claimant

Mr. Reto Casanova (Managing Director) for the Respondent