



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 44A OF 2018

ROBERT KABOMU KITSAO.....CLAIMANT

VS

THE BEAUMONT RESORT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed his Memorandum of Claim on 9th April 2018 claiming compensation for unlawful termination of employment as well as terminal benefits. The Respondent filed a Statement of Response on 8th May 2018 to which the Claimant responded on 6th July 2018.
2. The matter came up for hearing on 11th February 2019 when the Claimant testified on his own behalf and Emmanuel Mjomba Mmeku for the Respondent.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a security guard at a monthly salary of Kshs. 10,500 effective 2012. The employment relationship was formalised by a contract dated 20th June 2016.
4. The Claimant avers that he worked for the Respondent until 5th May 2017 when his employment was unfairly terminated on allegations of failure to prevent leakage of water from a tank, which was not within the scope of his employment.
5. The Claimant’s claim against the Respondent is as follows:

- a) Salary in lieu of notice.....Kshs. 10,500
- b) Leave pay for 5 years.....36,750
- c) Service pay for 5 years.....26,250
- d) 12 months’ salary in compensation.....126,000
- e) Unpaid rest days for 5 years.....91,000

The Respondent’s Case

6. In its Statement of Response dated 8th May 2018 and filed in court on the same date, the Respondent states that the Claimant was employed as a security guard on a 9 months’ contract. He earned a monthly salary of Kshs. 10,500 during the contract period.
7. The Respondent denies terminating the Claimant’s employment and states that his contract lapsed and was not renewed.

Findings and Determination

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

a) Whether the Claimant has established a case of unlawful termination;

b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

9. In denying the Claimant's claim that his employment was unfairly terminated, the Respondent states that the Claimant's employment contract lapsed by effluxion of time. Both the Claimant and the Respondent filed a 9 months' employment contract dated 1st June 2016. A simple tabulation of time returns 31st March 2017 as the effluxion date.

10. However, according to the employment records produced by the Respondent, the Claimant was at work up to June 2017. Indeed, the Respondent's Manager, Emmanuel Mjomba Mmeku testified that he gave the Claimant a month's leave from 6th May 2017. The question is if the Claimant's employment had lapsed in March 2017 on what basis was he allowed to take a whole month's leave? Overall, the averment that the Claimant's employment contract had lapsed is inconsistent with the evidence on record.

11. Mmeku further testified that after the Claimant came back from leave on 5th June 2017, he was notified that he would be offered a reliever contract meaning that he would not work every day. Mmeku told the Court that the decision to downgrade the Claimant's employment terms was made because the Claimant was unable to write reports.

12. As held by this Court (variously constituted) in *James Ang'awa Atanda v Judicial Service Commission [2017] eKLR* and *Daniel Njuguna Mwangi v De La Rue Currency and Security Print Limited [2017] eKLR* unilateral variation of terms of employment by an employer is not only outlawed by Sections 10(5) and 13(1) of the Employment Act but is also an unfair labour practice within the meaning of Article 41(1) of the Constitution of Kenya, 2010.

13. If the Court believes Mmeku's testimony that the Claimant left employment after declining to take up employment under downgraded terms, the finding must be that the Respondent was not empowered to take this unilateral decision in the first place. Whichever side of the evidence the Court adopts, the inescapable conclusion is that the Respondent is guilty of unlawful and unfair termination and the Claimant is entitled to compensation.

Remedies

14. Before making the final award in this matter, I need to deal with the issue of the effective date of the Claimant's employment on which the parties were sharply conflicted. On his part, the Claimant stated that he started working for the Respondent in August 2012. On this point, the Respondent chose to adopt 1st June 2016 as stated in the employment contract of even date. Mmeku however cracked under cross examination and admitted that when he joined the Respondent in February 2015, he found the Claimant working as a casual.

15. The Respondent therefore gave conflicting signals as to the effective date of the Claimant's employment thus drastically reducing the probative value of its evidence on this issue. Under Sections 10 and 74 of the Employment Act, the burden of keeping and availing employment records lies with the employer and where this burden is not discharged, the Court is allowed under Section 10(7) of the Act to take the Claimant's word. I therefore adopt August 2012 as the effective date of the Claimant's employment with the Respondent.

16. That settled, I now award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct in effecting the termination. I further award the Claimant one (1) month's salary in lieu of notice.

17. In the absence of any evidence of the Claimant having been a contributing member of the National Social Security Fund (NSSF), the claim for service pay succeeds and is allowed.

18. In response to the claim for leave pay, the Respondent produced a leave form dated 6th May 2017 by which the Claimant applied and was granted 26 days' leave. There is no indication of any further accrued leave and the claim for leave pay therefore fails and is dismissed. The claim for rest days was not proved and is also dismissed.

19. Ultimately, I enter judgment in favour of the Claimant in the following terms:

- a) 8 months' salary in compensation.....Kshs. 84,000
- b) 1 month's salary in lieu of notice.....10,500
- c) Service pay for 4 complete years (10,500/30x15x4).....21,000
- Total.....115,500**

20. This amount will attract interest at court rates from the date of judgment until payment in full.

21. The Claimant will have the costs of the case.

22. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MAY 2019

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JUDGE

Appearance:

Mr. Wanga h/b Mr. Nyongesa for the Claimant

Mr. Mwabonje for the Respondent