



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 555 OF 2015**

**DOMNIK OPIYO NGOJE.....CLAIMANT**

**VERSUS**

**ALLIANCE HOTELS & RESORTS LIMITED.....1<sup>ST</sup> RESPONDENT**

**ALLIANCE NOMINEES LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 4<sup>th</sup> August 2015 and amended on 13<sup>th</sup> October 2016, the Claimant has sued the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for unlawful termination of employment and payment of terminal dues.
2. The Respondent filed a Response on 14<sup>th</sup> July 2016. At the trial, the Claimant testified on his own behalf and the Respondent called Tony Jumlai. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant states that he worked for the Respondents as a security guard for a period of three and a half years. He adds that on 23<sup>rd</sup> December 2014, his services were terminated without notice, on account of redundancy.
4. The Claimant's case is that the termination of his employment was unlawful and unfair. He further claims that he was not paid his terminal benefits. He therefore seeks the following reliefs:

- a) 1 month's salary in lieu of notice.....Kshs. 9,800.00
- b) Severance pay.....11,795.60
- c) Accrued leave.....18,600.00
- d) Payment for 120 off days.....39,192.00
- e) Damages for unfair termination.....117,600.00
- f) Costs plus interest

**The Respondents' Case**

5. In their Response dated 4<sup>th</sup> July 2016 and filed in court on 14<sup>th</sup> July 2016, the Respondents deny that the Claimant was their employee for three and a half years.
6. The Respondents state that the Claimant's employment was lawfully and procedurally terminated. They add that he was paid all his terminal benefits amounting to Kshs. 96,700 which he duly acknowledged.

**Findings and Determination**

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

8. In his witness statement dated 4<sup>th</sup> August 2015, the Claimant states that upon reporting to work on 23<sup>rd</sup> December 2014, he found a notice at the gate notifying him and his colleagues to pick service letters from the office since there was no more work for them. He adds that he had no prior termination notice.

9. The Respondent's witness, Tony Jumlai testified that the Claimant was engaged as a casual employee earning a daily rate and was therefore not entitled to the remedies sought. On his part, the Claimant produced a certificate of service issued to him on 13<sup>th</sup> January 2015. The certificate, which was signed by the Respondents' Chief Executive Officer states that the Claimant commenced work on 6<sup>th</sup> June 2011 and was released from his duties on 22<sup>nd</sup> December 2014.

10. The Court was unable to reconcile the terms of the certificate of service with the averment that the Claimant was a casual employee. An attempt was made by the Respondents to discredit the certificate of service on the ground that it was issued in error but the Court was unconvinced. A certificate of service is a statutory requirement under Section 51 of the Employment Act and once it is issued, an employer cannot retract it by a simple statement that it was issued in error. At any rate, the maker of the certificate of service was not called as a witness to explain the circumstances under which he issued it.

11. The Court therefore adopts the contents of the certificate of service regarding the Claimant's employment period. The averment that he was a casual employee is thus rejected.

12. Back to the termination. From the evidence on record, the Claimant's employment came to an end on account of low business. This falls within the province of redundancy as defined by Section 2 of the Employment Act. By definition, redundancy is at the behest of the employer without any provocation from the employee.

13. Because of this, there are stringent conditions to be met by an employer seeking to terminate employment on this ground. The conditions are mandatory and are codified under Section 40 of the Act. They have to do with notice, selection criteria and payment of statutory dues.

14. In the instant case, the Respondents made no attempt to comply with any of the aforesaid conditions and are therefore guilty of unlawful and unfair termination of employment.

### **Remedies**

15. In light of the foregoing findings, I award the Claimant six (6) months in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondents' conduct in effecting the termination. I further award the Claimant one (1) month's salary in lieu of notice.

16. Since the Claimant's employment was terminated on account of redundancy, he is entitled to severance pay. The Respondents admitted that the Claimant was not allowed annual leave. The claim for leave pay therefore succeeds and is allowed.

17. The claim for off days was not proved and is dismissed.

18. In end, I enter judgment in favour of the Claimant and against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally, in the following terms:

- a) 6 months' salary in compensation.....Kshs. 58,800
- b) 1 month's salary in lieu of notice.....9,800
- c) Severance pay for 3 years (9,800/30x15x3).....14,700
- d) Leave pay for 3 years (9,800/30x21x3).....20,580
- e) Prorata leave for 6 months (9,800/30x1.75x6).....578

**Total.....104,458**

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

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

21. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> DAY OF MAY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Jumbale for the Claimant

Mr. Mochere for the Respondent