



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

CAUSE NUMBER 311 OF 2015

BETWEEN

EVANS ATUTI NYARIBO .....CLAIMANT

VERSUS

SAROVA WHITESANDS BEACH RESORT & SPA.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

---

*Omollo Onyango & Company Advocates for the Claimant*

*Ndegwa Muthama Katsiya & Associates, Advocates for the Respondent*

---

**JUDGMENT**

1. Through his Amended Statement of Claim filed on 7<sup>th</sup> September 2017, the Claimant states he was employed by the Respondent Hotel, as a Waiter, beginning April 2006, earning a daily rate of Kshs. 500. He worked for 8 years. He was alongside other Employees, informed by the Respondent's General Manager, on 1<sup>st</sup> July 2014 that positions for Casual Employees had become redundant. There was no notice. The Employees were not paid any redundancy benefits. The Claimant prays for Judgment against the Respondent in the following terms:-

- a. 1 month salary in lieu of notice at Kshs. 15,000.
- b. Severance pay at Kshs. 60,000.
- c. Annual leave over a period of 8 years at Kshs. 120,000.
- d. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 180,000.
- e. Service charge at Kshs. 25,000.
- f. House allowance at Kshs. 6,000.
- g. Traveling allowance at Kshs. 4,000.

**Total... Kshs. 410,000.**

- h. Declaration that termination was unlawful.

- i. Declaration that the Claimant was entitled to 1 month leave after every year worked.
- j. Costs.
- k. Any other suitable relief.

2. The Respondent filed Amended Reply to Statement of Claim, on 3<sup>rd</sup> November 2017. Its position is that the Claimant was engaged by the Respondent on casual terms, on separate occasions in the years 2008, 2012 and 2013. He was engaged based on availability of work. He was paid Kshs. 500 daily. His contract was not terminated unfairly. It was the Claimant who terminated his contract through desertion. He did this after he had served the Respondent with Court Summons, in a separate Claim for work injury. The issue of fair hearing and notice does not arise. He is not entitled to severance pay as he left employment on desertion. He did not work in continuity but on separate temporary contracts. He was never in continuous employment for 12 months to merit annual leave. His prayers are without merit.

3. The Claimant initially gave evidence in the absence of the Respondent on 13<sup>th</sup> July 2016. Ex-parte proceedings were set aside with the consent of the Parties, recorded on 15<sup>th</sup> November 2016. The Claimant was reheard on 3<sup>rd</sup> December 2018. Respondent's Human Resource Manager, Timothy Gikonyo Waweru, gave evidence for the Respondent on 18<sup>th</sup> February 2019. The Cause was last mentioned in Court on 21<sup>st</sup> March 2019, when Parties confirmed the filing of their Closing Submissions.

4. The Claimant restated that he worked as a Waiter, earning Kshs. 500 daily. He was employed in April 2006. There was no letter of employment. There was no notice of termination. A new Manager was brought in. The Claimant and his Co-Employees were told that the new Manager wished to work with permanent staff, not casuals. The Claimant did not work after this. He had several letters of commendation. His record was clean.

5. Cross-examined, he testified that he was employed in April 2006. He found a notice pinned on the notice board, ending employment of casuals. The notice did not have the Claimant's name. The Claimant was a long-serving casual. Many Employees were affected. The Claimant did not meet the new Manager. He did not rely on hearsay in accepting termination. He was injured in 2013. He did not receive commendation letter after the injury of 2013. Redirected the Claimant told the Court he never received a letter from the Respondent, enquiring about his alleged abandonment of work.

6. Timothy Gikonyo Waweru told the Court that the Claimant was employed by the Respondent on casual basis. Commendation letters issued to the Claimant and other Employees were for particular function. They issued to all participants, including interns and casuals. The Respondent did away with casuals because upon commendation, the casuals would allege they had been converted to regular terms. The Respondent did not terminate Claimant's contract. It is true he was injured at work. The Respondent reported the workplace accident and injury to the Directorate of Occupational Safety and Health [DOSHS]. The Claimant was compensated. The Respondent called him after desertion, but he never showed up.

7. Waweru testified on cross-examination that he was employed in 2009. He found the Claimant already at work. He did not know if the Claimant was employed in 2006. Waweru did not have any document, to establish the Claimant was a casual. It would require an assessment of his nature of work, to determine if he was casual from 2006 to 2014. He was issued appreciation letters. He participated in all events over which he was appreciated. He even participated in an event involving the President of Kenya. He was commended for good work. The workplace accident was brought to the attention of DOSHS. The Respondent filled the relevant form, in making the report. It was not indicated that the Claimant was a casual in the form. He was compensated by the same Insurance which covered work injury for regular Employees. Waweru did not recall when the Claimant was last in employment. He did not have any document showing the Respondent made any efforts to reach the Claimant, after he allegedly deserted. Waweru was not aware that the Claimant was recalled and laid off on redundancy. He is not entitled to the prayers sought in the Claim. Redirected, the Witness told the Court there was no provision for renewal of the contracts.

**The Court Finds:-**

8. The Claimant worked for the Respondent Hotel as a Waiter, for 8 years starting in 2006, ending on 1<sup>st</sup> July 2014. He was paid a wage Kshs. 500 daily.

9. He was involved in work which was central to the Respondent's business. He did not perform work peripheral to the core function of Respondent's business.

10. He not only worked for an aggregate number of years, which would justify conversion of casual employment into regular employment under Section 37 of the Employment Act, but was involved in the core business of the Respondent, earning him commendation upon commendation. The Court is entitled under Section 37 of the Employment Act 2007, upon evaluation of the evidence, to declare an Employee alleged to have been employed on casual terms, to be an Employee on regular terms, upon whom all the rights, protections and guarantees under the Act are accessible.

11. He was garlanded for exemplary performance during the luncheon hosted by His Excellency the President Mwai Kibaki on 30<sup>th</sup> and 31<sup>st</sup> January 2013; he was advised in February 2013, that a Guest named Kitonga Muli, appreciated the Claimant for having made the Guest's stay memorable; he was lauded for long hours and hard work, in making Oriflame International Convention in January 2010 a success; he was appreciated for his long hours and tireless work in September 2008 which made certain functions by various groups, hosted by the Respondent a success; and in December 2008, he was appreciated for participating in the hosting of Respondent's Director Jimmy Kariuki's wedding. There were many laudatory messages from the Respondent to the Claimant, which cannot all fit on one page. Suffice it to say, the messages span across the years, and not only show there was continuity in Claimant's service to the Respondent, but also that the role performed by the Claimant was integral to the Respondent's business. It was not a role that would be said to be casual in nature, where

mutuality of obligations rose and set with the sun, within a span of 24 hours and no more.

12. The Human Resource Manager explained that the Respondent decided to do away with Employees it considered casual, because once they were recognized and commended for good work, they would allege they were permanent Employees.

13. This explanation does not support the position that the Claimant deserted. He was among the Employees considered as casuals, who the Respondent wished to do away with. There was a new Manager who desired to do away with casuals. Unfortunately little thought appears to have been made in taking into account the role the Claimant discharged, and the number of years he had discharged this role.

14. The Court has not seen evidence establishing that there was any redundancy situation at the Hotel. It was just a case of plain termination, where the Employer sought to get rid of Employees it had for long placed in the cadre of casual employment, fearing perhaps that conversion would impose on the Respondent unwelcome employment obligations.

15. The question ultimately is whether the Respondent had valid reason to terminate Claimant's contract of employment after 8 years of exemplary service; whether termination adhered to minimum statutory standards of procedural fairness; and whether the Claimant merits the remedies sought.

16. There was no valid reason justifying relieving the Claimant of his Waiter's job. Termination was not procedurally fair.

17. ***The Claimant is allowed the prayer for notice pay at Kshs. 15,000.***

18. He did not leave on redundancy, and the prayer for severance pay has no foundation.

19. He had worked for 8 years. His record was exemplary as shown by the serial letters of commendation. He did not have any warnings as far as the record shows. He would have expected to go on rendering exceptional service. Termination was carried out in very outmoded fashion, where an Employer denies having made the termination decision, and casting the Employee in the mould of a mindless deserter. Why would an Employee who had invested so heavily in a good name, with garlands all over his career, suddenly wake up in the morning and desert?

20. ***The Claimant is allowed the prayer for compensation for unfair termination, equivalent of 10 months' salary at Kshs. 150,000.***

21. He prays for annual leave for all the 8 years worked. The Claimant worked for 8 years, but as suggested in his Pleadings, he did not work invariably all days in those 8 years. He described himself as a casual which would suggest to the Court that he had a leeway, and could take days off to rest, without inviting disciplinary sanctions upon himself. He must have rested on certain occasions with the understanding of the Respondent. It is not likely that he did not have a number of days each year, which would amount to 21 days of annual leave, during which he was not serving Customers at the Hotel. It does not follow that because the Court has concluded he ought to be treated as a regular Employee under the Act, that he is owed annual leave of 8 years. He described himself as a long term casual, who was paid a daily wage. He had the leeway in determining his hours of work, and must have found time in those 8 years, to rest as intended by the provision for annual leave. The prayer is not well-founded and is declined.

22. He prays for service charge. He did not explain to the Court which legal provision, contractual clause or wage instrument, this item is based. He did not provide the formula for its calculation, giving an amount of Kshs. 25,000. This is just a figure pleaded in a factual vacuum. Service charge, as explained to this Court in other relevant proceedings involving the Hotel Industry, is normally an item which is agreed upon between the relevant Trade Union and the Employer, in a CBA, which is entrusted to the Union for distribution among its Members, as an incentive. The Claimant has not placed his prayer for service charge in this context. The prayer is rejected.

23. Similarly, the prayer for traveling allowance is not based on any disclosed legal provision, contractual clause or wage instrument. It is pleaded at Kshs. 4,000. It is not known what method of computation gave the Claimant an amount of Kshs. 4,000 in traveling allowance. Over what period does the amount apply? The prayer is declined.

24. The Claimant pleads house allowance at Kshs. 6,000. Again he fails to show over what period this applies. He worked for 8 years. He was paid a daily wage of Kshs. 500. Daily rates under the various Wage Orders include the housing element. The prayer has no merit and is declined.

25. ***No order on the costs.***

26. ***Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

IN SUM, IT IS ORDERED:-

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

***b. The Respondent shall pay to the Claimant notice at Kshs. 15,000 and compensation for unfair termination equivalent to 10 months' salary at Kshs. 150,000 – total Kshs. 165,000.***

***c. No order on the costs.***

***d. Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.***

Dated and delivered at Mombasa this 14<sup>th</sup> day of June 2019.

James Rika

Judge