



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

CAUSE NUMBER 589 OF 2015

BETWEEN

MARK WAFULA WABWILE.....CLAIMANT

VERSUS

SEVERIN SEA LODGE [E.A.] LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Ameli Inyangu & Partners, Advocates for the Claimant

Sichangji Partners & Associates Network LLP, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 13th August 2015. He states that he was employed by the Respondent Hotel as a Food and Beverage Waiter between the years 2006 and 2010. He was on casual employment between 2006 and 2008. Between 2008 and 2011, he was under contract. He became Assistant Purchase Manager/ Control Clerk from 2011 to May 2015. His contract was terminated by the Respondent in May 2015 on account of redundancy. His last salary was Kshs. 21,833 monthly. He seeks Judgment against the Respondent for: -

- a. Annual leave days for the period 2011 to 2015 at Kshs. 86,833.
- b. Full salary for May 2014 at Kshs. 21,833.
- c. 1 month salary in lieu of notice at Kshs. 21,833.
- d. Severance pay for 6 complete years of service at Kshs. 65,496.

TotalKshs. 195,694.

e. Costs

f. Interest.

g. Any other suitable relief.

2. The Respondent filed its Statement of Response on 2nd October 2015. It admits to have employed the Claimant, but from 2008, not 2006 as stated in the Claim. He was subsequently engaged on seasonal contracts, the last which expired in April 2014. He worked as a Cost Control Clerk between 2011 and 2013. He was a Junior Purchasing Clerk from 2013 to April 2014. He was paid all his pending annual leave days. He was paid all his terminal dues, and acknowledged receipt. He was paid service charge, in accordance with the prevailing CBA. The Respondent has always been ready and willing to pay Claimant's terminal dues. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant testified on 14th March 2017, and 26th June 2017 when he rested his case. On 14th September 2017, the Court was informed that Parties were negotiating voluntary settlement. There was no settlement recorded in subsequent dates. Hearing was fixed for 5th December 2018. The Respondent sought adjournment. The application was declined with an order for closure of the proceedings. Parties were advised to file their Closing Submissions, which they confirmed as filed, at the last mention on 7th March 2019.

4. The Claimant's evidence is that he was employed by the Respondent on 28th April 2006. Initially he was in casual employment. He worked up to May 2014. He received a 7-day notice on 20th May 2014, informing him that the Respondent had experienced economic downturn. His contract was terminated on account of redundancy. He was offered Kshs. 30,000. There was no explanation what this amount entailed.

5. On cross-examination the Claimant testified that he was employed under various seasonal contracts. The last one was from 1st May 2014 to 31st July 2014. The letter of termination is dated 20th May 2017. The Claimant was given notice of 7 days. The contract said if termination was within the first month, notice would be for a period of 7 days. There are leave application forms on record, indicating the Claimant took 14 days of annual leave in 2014. There is a Clearance Form, showing he was paid Kshs. 29,915 on termination. He did not sign any Clearance Form, and did not recall receiving Kshs. 29,915. There was an offer but he did not receive the money.

6. On redirection the Claimant told the Court he received termination letter on 22nd May 2014. It served as both notice and letter of termination. He worked in continuity from 2006. He did not recall signing the Clearance Form. He was offered Kshs. 30,000 which was way below what he expected. He did not recall the number of annual leave days he took.

The Court Finds:-

7. The Claimant worked for the Respondent Hotel, as an Assistant Purchase Manager/ Cost Control Clerk. He worked from the year 2006 to May 2014, not 2015 as stated at paragraph 6 of the Statement of Claim. He worked on various seasonal contracts. His last salary was Kshs. 21,833 monthly.

8. His letter of termination is dated 20th May 2014. It is explained by the Respondent in this letter, that the Respondent had suffered serious downturn in business, compelling the Respondent to take serious measures to cope with the situation. The Claimant was given 7 days' notice of termination, to take effect on 30th May 2014.

9. Subsequently the Claimant was paid basic salary for the full of April 2014 at Kshs. 16,845; house allowance at Kshs. 6,647; 19.5 annual leave days at Kshs. 15,269; and service charge for March 2014 at Kshs. 7,444 – total before deductions at Kshs. 46,205. After contractual and statutory deductions, the Claimant was paid a sum of Kshs. 29,915.

10. Although he unconvincingly testified that he did not recall signing the Clearance Form, the Form has been availed to the Court with the Claimant's signature and name, on the Form. The Court does not doubt that the Claimant signed the Form. If he did not sign, his evidence would have been that he did not sign. What he told the Court is that he did not recall signing. If he had carefully looked at the signature on the Form, he would have recalled signing. The signature is the same signature appearing on various seasonal contracts signed by the Claimant, and also on the Verifying Affidavit on record. The Court is persuaded the Claimant was offered and received the sum of Kshs. 29,915 shown in the Clearance Form.

11. Parties do not dispute that the Respondent experienced a genuine redundancy situation.

12. The Court agrees with the Respondent that redundancy benefits were paid to the Claimant as shown in the Clearance Form, and Payment Voucher preceding that Form.

13. The Voucher indicates that the Claimant was paid pending annual leave days. At paragraph 6 of this Judgment, he is recorded to have told the Court that he did not know how many days of annual leave he utilized. Why claim annual leave of 4 years if he did not know how many days he had taken. The Court is satisfied that the Claimant was paid the correct number of annual leave days he was owed.

14. The salary indicated to have been paid in the Payment Voucher, is April 2014 salary. The Claimant seeks May 2014 salary. He was notified of termination in the letter dated 20th May 2014. It contained a 7-day notice of termination. Notice took effect on 30th May 2014. The terminal dues of Kshs. 29,915, which are particularized in the pay slip of April 2014, contain salary of April 2014. The Claimant was in employment until 30th May 2014. ***In the understanding of the Court he merits full salary for May 2014, which the Court grants at Kshs. 21,833.***

15. He was given a 7-day notice of termination. Although it is argued by the Respondent that the contract allowed the Respondent to issue 7 days' notice, the Claimant was not on a probationary contract. He was on seasonal contracts which were in continuity. He had completed many seasonal contracts before, and each had invariably been renewed. It is doubtful that the work he did- purchasing and cost control- was seasonal work. In any case however, the Claimant was not on probation in his last contract, having worked for the Respondent from the year 2006. The clause providing for 7 days' notice would be legal in probationary contracts. It was not a legal and binding clause, in an employer-employee relationship which spanned 8 years.

16. The Claimant is entitled to the balance of the notice period of 23 days. He is granted notice pay of 23 days at Kshs. 19,313.

17. He prays for severance pay, based on 6 complete years of service. The Claimant explained that prior to the year 2008, he worked on casual employment. He had completed on aggregate 6 years of service at the time his position became redundant.

18. *He is granted severance pay at 15 days' salary, based on 26 working days in a month, for 6 complete years of service, at Kshs. 75,575.*

19. Costs to the Claimant.

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

IN SUM, IT IS ORDERED: -

a. The Respondent shall pay to the Claimant: salary for May 2014 at Kshs. 21,833; notice pay at Kshs. 19,313; and severance pay at Kshs. 75,575- total Kshs. 116,721.

b. Costs to the Claimant.

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

Dated and delivered at Mombasa this 14th day of June 2019.

James Rika

Judge