



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 734 OF 2017

LUKA SHIKUNGA.....CLAIMANT

v

MAASAI DISCOVERY GUEST HOUSE.....RESPONDENT

**JUDGMENT**

1. The Claimant instituted legal proceedings against the Respondent alleging unfair termination of employment and breach of contract.
2. In its *Response*, the Respondent denied that the Claimant was its employee or that there was unfair termination of contract or breach of contract.
3. The Cause was heard on 17 September 2019.
4. The Claimant testified and closed his case after which the Court declined to grant an adjournment sought by the Respondent (reasons on record) leading to the Court closing the Respondent's case.
5. The Claimant filed his submissions on 27 September 2019 while the Respondent's submissions were not on file by this morning.
6. The Court has considered the pleadings, evidence and submissions, and adopted the Issues as framed by the Claimant.

**Employment relationship**

7. The Claimant's testimony was that he was employed by the Respondent as a security guard in 2007 and that he was not issued with a formal contract.
8. However, to demonstrate that the Respondent was his employer, the Claimant relied on secondary evidence rather than a formal contract.
9. The Claimant produced a copy of his job identity card embossed with the Respondent's name as well as a copy of a *Provisional Member Statement of Account from the National Social Security Fund*.
10. The Statement from the *Fund* indicates the name of the Claimant's employer as *Maasai Discovery Guest House*.
11. Further, the Respondent registration number with the *Fund* is shown as 00609491.
12. On the basis of the secondary evidence, the Court is satisfied that the Respondent was the employer of the Claimant from 2007.

**Unfair termination of employment**

13. On the circumstances leading to separation, the Claimant testified that on 15 November 2016, a named director of the Respondent instructed him to report to the *Guest House* instead of a school run by the Respondent to which he had been earlier deployed, and that upon reporting, the Managing Director (named) directed him to take time off.
14. The Claimant further testified that when he later reported back, the Managing Director informed him that the *Guest House* was not doing well and, therefore, he should leave and return in January 2016.
15. The Claimant also testified that repeated visits to the Respondent did not yield any change of fortune until May 2016 when the Managing Director informed him that his services were no longer required.

16. The testimony was not rebutted and remains the only evidence the Court has as to the separation. The Court finds that the Respondent terminated the Claimant's employment due to an unfavourable business environment.

17. There being no suggestion or evidence from the Respondent that a written notice of termination of employment as contemplated by section 35(1)(c) of the Employment Act, 2007 was issued, or that a hearing as required by section 41 of the Act was conducted if there was *misconduct, poor performance or physical incapacity* on the part of the Claimant, the Court finds the Claimant's employment was terminated unfairly (the Court can infer that if this was a case of redundancy, the conditions set out in section 40 of the Employment Act were not complied with).

18. The Respondent did not, in any case, discharge the burden imposed on employers by sections 43 and 45 of the Employment Act, 2007.

### **Breach of contract**

#### **Outstanding salary and wages for November 2015**

19. The Claimant sought Kshs 90,000/- being unpaid salaries for the period January 2014 to November 2015 (he also claimed Kshs 7,990/- earned wages for November 2015).

20. The Respondent did not produce pay records, and the Claimant's testimony remaining unrebutted, the Court will allow both heads of claim.

### **Leave**

21. Annual leave of at least 21 days is a statutory entitlement. The Claimant sought Kshs 108,100/- on account of leave for the whole term of employment.

22. Annual leave which can be carried forward is circumscribed by section 28(4) of the Employment Act, 2007 and in this respect, the Court will only allow outstanding leave for the last year of service (equivalent to 1 month salary).

### **Rest and Public holidays**

23. This head of the claim was in the nature of special damages.

24. The Claimant did not disclose the number of rest days and/or public holidays involved or prove the formula used to arrive at the sums sought.

25. The Court will, therefore, decline to award any relief on account of rest and public holidays.

### **House Allowance**

26. Each employer is under a statutory obligation to provide housing to its employees or pay an allowance to cover rent.

27. For house allowance, the Claimant sought Kshs 218,204/- but did not disclose how he arrived at the sum.

28. The Court will decline to make an award under this head of the claim.

### **Underpayments**

29. The Claimant did not disclose or prove the prescribed/gazetted minimum wages for the area and sector the Respondent operated in (he only introduced the location in the submissions) and the Court finds that he did not prove underpayments.

### **Severance pay**

30. The Claimant was not dismissed on account of his *conduct, performance or physical incapacity*. There was evidence of the Respondent's hostile business environment.

31. The Court will, therefore, find that the Claimant was entitled *severance pay* and will allow Kshs 64,225/- as claimed.

### **Service pay**

32. The Claimant was registered with the *National Social Security Fund* and is therefore not eligible for service pay.

### **Compensation**

33. In the view of the Court, this is not a suitable case to award compensation considering the other heads of claim in which the Claimant has succeeded in.

### **Pay in lieu of Notice**

34. Since the Respondent did not issue any notice to the Claimant, the Court will allow Kshs 10,000/- as pay in lieu of notice.

### **Conclusion and Orders**

35. The Court finds and declares that the Claimant's employment was terminated unfairly, and further that the Respondent was in breach of contract.

36. The Claimant is awarded

|                           |                       |
|---------------------------|-----------------------|
| (a) Severance pay         | Kshs 64,225/-         |
| (b) Pay in lieu of notice | Kshs10, 000/-         |
| (c) Outstanding salary    | Kshs 90,000/-         |
| (d) Leave                 | Kshs 10,000/-         |
| (e) November 2015 salary  | Kshs 7,990/-          |
| <b>TOTAL</b>              | <b>Kshs 182,215/-</b> |

37. Respondent to issue a certificate of service within 15 days.

38. Claimant to have costs.

**Delivered, dated and signed in Nairobi on this 22<sup>nd</sup> day of October 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr Muli instructed by Muli & Co. Advocates

For Respondent Ms Tonui instructed by the Akusala & Co. Advocates

Court Assistant Lindsey