



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NUMBER 909 OF 2017**

**BETWEEN**

**EVERLINE ICHECHI.....CLAIMANT**

**VERSUS**

**MOMBASA CONTINENTAL RESORT.....RESPONDENT**

Rika J

Court Assistant: Benjamin Kombe

Nyange Sharia Advocate instructed by Kituo Cha Sheria for the Claimant

Oluga & Company Advocates for the Respondent

---

**JUDGMENT**

1. The Claimant filed her Statement of Claim on 6<sup>th</sup> December 2017. She avers, she was employed by the Respondent Hotel as a Masseur, between 1<sup>st</sup> January 2008 and 9<sup>th</sup> March 2017.

2. Her contract was terminated by the Respondent on the latter date, in circumstances she feels, amounted to unfair termination of employment. Her last salary was Kshs. 29,175 monthly. Termination was without reason or notice. Procedure was unfair. She prays the Court to grant Judgment as follows:-

- a. Declare termination was unfair.
- b. 1 month salary in lieu of notice at Kshs. 29,175.
- c. Salary for the months of March, April & May 2017 at Kshs. 87,522.
- d. Annual leave for 2015 to 2017 at Kshs. 66,348.
- e. House allowance at 15 % of the basic salary at Kshs. 83,250.
- f. Service charge August 2015 to February 2016 at Kshs. 93,905.
- g. Service charge March to November 2016 at Kshs 45,000.
- h. Service charge December 2016 at Kshs. 10,000.
- i. Service charge January 2017 at Kshs. 5,000.

j. Service charge February 2017 at Kshs. 50,000.

k. Uniform and shoes at Kshs. 54,000.

l. 12 off-days in 2017 at Kshs. 11,669.

m. 12 months' salary in compensation for unfair termination at Kshs. 350,088.

Total...Kshs. 885,957.

n. Certificate of Service to issue.

o. Any other relief.

p. Costs.

3. The Respondent filed its Statement of Response on 4<sup>th</sup> July 2018. Its position is that the Claimant was an Employee of the Respondent. Her contract was not terminated unfairly by the Respondent. She had a series of disciplinary cases. These included absence from her duty station, failure to take lawful instructions, rudeness and absconding from duty. She was warned severally. She was issued notice to show cause why, she should not be disciplined, and opted to ignore the notice. She was paid terminal dues amounting to Kshs. 238,264, which was paid in 4 equal monthly installments. This was paid between July 2017 and October 2017, and comprised: salary up to 5<sup>th</sup> March 2017; unpaid service charge up to 5<sup>th</sup> March 2017; 7 pending off-days and 1 public holiday; service of 9 years; and gratuity based on the same period of 9 years. She absconded and the question whether termination was unfair cannot arise. She avers termination was on 9<sup>th</sup> March 2017, and cannot claim salary for the whole of March, April and May 2017. She was paid salary for up to 5<sup>th</sup> March 2017. She took annual leave in 2015 and 2016. Her salary was consolidated. She received service charge due to her. She is not entitled to any payment with respect to shoes and uniform. She was paid her off-days, which were 7 days, not 12 days as pleaded. The Respondent asks the Court to dismiss the Claim with costs.

4. The Claimant and the Respondent's Manager Mary Wangeci Ngunju, both gave evidence, and rested their respective cases, on 18<sup>th</sup> June 2019. The last appearance in Court was on 20<sup>th</sup> September 2019, when Parties confirmed filing of their Closing Arguments.

5. Ichechi told the Court she is a resident of Shanzu, Mombasa County. She was employed by the Respondent as a Masseur for 10 years.

6. She used to massage, among others, Respondent's Board of Directors Chairman. She would not absent herself deliberately. She used to be called to duty, even when it was her off-day. She replied to warning letters received from the Respondent. She could not reply to those she did not receive. She handed over upon termination. She was paid about Kshs. 180,000 through m-pesa, upon termination. Details of payment were not supplied to her by the Respondent. She only came to learn there was a letter of termination, when she approached Kituo Cha Sheria. She was never called to a disciplinary hearing.

7. On cross-examination, the Claimant told the Court that she reported after 7<sup>th</sup> March 2017 but did not work. She used to massage others, besides the Chairman. She did not include the prayer for notice pay in her letter of demand before institution of the Claim. Her last day at work was 8<sup>th</sup> March 2017. She claims salary for March, April and May 2017. She took annual leave when the Chairman was absent. She filled Leave Form. She took 21 days' annual leave in October 2016. The contract did not allow for carrying over of unutilized annual leave days without Respondent's consent. She did not obtain consent with regard to the year 2015. Her Leave Form of 26<sup>th</sup> May 2016 did not indicate any leave balance. She wore her personal clothes to work. The uniform supplied to her was torn and undersize. The contract provided for basic salary and house allowance separately. Her pay slip of January 2016 shows basic salary at Kshs. 21,909 and house allowance at Kshs. 7,265. Pay slip shows she received service charge. She was paid a net sum of Kshs. 180,696 in terminal benefits. Redirected, Ichechi underscored that she was not issued termination notice, and was denied the benefit of a disciplinary hearing.

8. Ngunju told the Court that the Claimant was employed to massage others across the board, not just the Chairman. The Respondent sat with the Claimant severally and attempted to make her understand that she was meant to serve all, not just the Chairman.

9. Warning letters issued to the Claimant. She was suspended in 2015. She gave an explanation and was pardoned. In December 2016 she was issued a cautionary letter for sending a 3<sup>rd</sup> Party to collect the Parlour keys. She was in charge of the Parlour, and had to sign for the keys. She was provided uniform and was supposed to wear it to work. The Chairman complained about a failed massage reservation. A warning letter followed on 16<sup>th</sup> December 2016. The Respondent issued the Claimant a letter to show cause why she should not face disciplinary action, for being absent for 5 days. She did not respond. The letter of termination issued.

10. The Respondent paid service charge. It was normally 2% of net revenue. It was paid to Employees and their Union. It was not possible for 1 Employee to earn Kshs. 93,905 in service charge. Pending service charge was paid to the Claimant as shown in the letter of termination. She was paid terminal dues as conceded in her evidence. She took annual leave in 2015/2016. Her Leave Form did not show any balance. Days could only be carried forward if authorized by the Respondent. She did not work in April and May 2017.

11. Ngunju agreed on cross-examination that the Claimant worked for 10 years. Warnings issued from around 2015. There were no problems before this. Ngunju was not there when the letter of warning issued. Termination was on account of Claimant's absence from duty. The Respondent did not avail attendance register to the Court. There was no document to show the Claimant received uniform. The Claimant was paid terminal dues. She was not given specifics of terminal dues paid. Ngunju was not able to say how service charge was computed. There

was no letter calling the Claimant to a disciplinary hearing. Redirected, Ngunju told the Court the Respondent would have responded appropriately, had the Claimant replied to the notice to show cause. What she received in terminal dues was after- tax. Warning letters were handed to the Claimant.

### **The Court Finds:-**

12. There is common evidence from the Parties, that the Claimant worked for the Respondent Hotel as a Masseur, from January 2008 to March 2017, a period of 10 years. Her letter of appointment is dated 4<sup>th</sup> January 2008. Her letter of termination is dated 14<sup>th</sup> March 2017, and stated termination was with immediate effect. The date of termination can fairly be stated to be 14<sup>th</sup> March 2017, not 7<sup>th</sup> or 8<sup>th</sup> of March 2017.

13. It is not in doubt that the Claimant was paid salary up to and including 5<sup>th</sup> March 2017. ***She is owed and granted salary for 9 days from 6<sup>th</sup> to 14<sup>th</sup> March 2017, at Kshs. 10,099.*** Her prayer for salary for the rest of March, April and May 2017 has no foundation and is declined.

14. Her contract made provision for basic salary and separate house allowance. The prayer for house allowance in arrears is without basis and is rejected.

15. Clause 9 of the contract granted the Claimant an equal share of service charge, payable on the 15<sup>th</sup> day of the following month. The Respondent offered her service charge up to the 5<sup>th</sup> March 2017. The Claimant without disclosing to the Court her formula, claims service charge for 5 periods ranging between August 2015 and February 2017. The total claim for service charge is Kshs. 203,905. The Court is not able to grant this. The Claimant needed to give the prayer greater legal and factual foundation, in particular, by disclosing the mode of computation giving her the amount sought. It was not for the Respondent to adduce evidence on computation of service charge, as suggested by the Claimant's Counsel, in his cross-examination of Ngunju. The prayer is declined.

16. She was paid 7 off-duty days and 1 public holiday. She does not seem to have taken this into equation, in her prayer for 12 off-duty days. She has not given details of 12 off-duty days claimed. The prayer fails.

17. She assigns an amount of Kshs. 54,000 to uniform and shoes. Her contract simply states she would be supplied with suitable uniform and name tag. It does not mention shoes. It is not known where the Claimant derives her claim for entitlement to shoes from. The provision for uniform was not reducible to monetary benefit under the contract. The Respondent's evidence is that the Claimant was provided with suitable uniform all along. The Court is not able, even if it was established that the Claimant was not supplied with uniform, to quantify what she should be paid in lieu of supply of uniform. The Claimant needed to direct the mind of the Court to a clause in the CBA, Wage Regulations or other Labour Instruments applicable to the Claimant, allowing her to receive money in lieu of uniform. She has not shown the Court how she arrived at an amount of Kshs. 54,000 as the worth of the uniform she claims was not supplied to her.

18. The pending issues are whether termination was fair; whether the Claimant merits compensation; notice; certificate of service; and costs.

19. The main complaint against the Claimant made by the Respondent, is that she was a perennial absentee. The complaint was made in January 2015, and repeated in December 2016, as well as in March 2017. Other reasons given by the Respondent in its evidence, to justify termination seem peripheral.

20. The Claimant was on 26<sup>th</sup> January 2015 issued a warning letter after she failed to massage Respondent's Chairman. She replied to the warning letter, complaining that she was unable to get a taxi at night to enable her travel to the Hotel and massage the Chairman. She also stated she was unwell at the time she was required to massage the Chairman. She was again issued a warning letter dated 16<sup>th</sup> December 2016, for failing to attend to duty. She explained that she was unwell but could not support her explanation with medical evidence. She was asked to write a letter of apology, which is not displayed anywhere on the record. On 7<sup>th</sup> March 2017, she was issued a letter to show cause, why, disciplinary action should not be taken against her, for failure to report to work, for 5 straight days. She did not respond, and consequently, was dismissed on 14<sup>th</sup> March 2017.

21. The Claimant was quite clearly, a habitual absentee, going by the series of complaints against her, and letters of warning issued by the Respondent against her, exhibited by the Respondent. She did not care to respond to the letter of 16<sup>th</sup> December 2016, and importantly, to that of 7<sup>th</sup> March 2017. Without her response, the Court can only infer that the accusations made by the Respondent, about her failure to report to work for 5 days, was a valid accusation justifying termination under Sections 43, 44[4] and 45 of the Employment Act.

22. The Respondent did not however hear the Claimant, between 7<sup>th</sup> March 2017 and 14<sup>th</sup> March 2017. There was no disciplinary session. Ngunju told the Court there was a disciplinary hearing, but did not assist the Court with a copy of the letter inviting the Claimant to such a hearing, or with the minutes of the hearing. The warning letters and the failure by the Claimant to respond to the letter to show cause, did not take away her procedural rights under Section 41 of the Employment Act.

23. Termination was based on valid reason, but not a fair procedure.

24. The Court has taken into account that the Claimant played a major role, in creation of the circumstances leading to termination of her contract. Her record was tarnished from 2015, when she started failing to massage the Chairman and other Customers. She had worked for 10 years. With the series of warnings in her personnel file, it cannot be said that she would expect to have gone on working for many more years. The Respondent paid her terminal benefits, which included both gratuity and service pay. Her years of Service were recognized and rewarded doubly. She was paid Kshs. 238,264 pretax, in terminal dues. ***She is allowed the prayer for compensation for unfair termination equivalent of 2 months' salary at Kshs. 58,350.***

25. **Certificate of Service to issue.**

26. **No order on the costs.**

IN SUM, IT ORDERED:-

**a. Termination was unfair.**

**b. The Respondent shall pay to the Claimant the balance of salary for days worked in March 2017 at Kshs 10,099 and compensation for unfair termination at Kshs. 58,350 – total Kshs. 68,449.**

**c. Certificate of Service to issue.**

**d. No order on the costs.**

**Dated and delivered at Mombasa this 18<sup>th</sup> day of October 2019.**

**James Rika**

**Judge**