



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 379 OF 2015

[FORMERLY MOMBASA RMCCC NO 635 OF 2007]

BROWNSON KITERIA.....CLAIMANT

VS

PEMBA INVESTMENTS LIMITED T/A

NEPTUNE BEACH HOTEL.....RESPONDENT

JUDGMENT

Introduction

1. This matter was initially filed in the Chief Magistrate’s Court at Mombasa as Mombasa CMCC No 635 of 2007. By an order issued by my brother, **Rika J** on 18th May 2015, it was transferred to this Court for hearing and disposal.
2. The Claimant’s claim is by way of a Complaint dated 26th February 2007 and amended on 20th August 2007. The Respondent filed a Defence dated 10th April 2007 and amended on an unspecified date.
3. When the matter came for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Charity Kithinji. The parties also filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a Stores Porter from 7th February 1994 until 15th April 2004 when his employment was terminated. He claims that the termination of his employment was unlawful and further that he was not paid his terminal dues.

5. The particulars of the Claimant’s claim are as follows:

- a) Leave dues for 10 years.....Kshs. 60,578.00
- b) Severance pay for 10 years.....43,270.00
- c) 4 months’ salary in lieu of notice.....34,616.00
- d) 15 days’ salary arrears for March 2004 to April 2004.....8,178.00
- e) 3 pending weekly rest days.....1,730.76
- f) 8 public holidays.....2,307.68
- g) Damages for wrongful dismissal
- h) Costs plus interest

The Respondent's Case

6. In its Defence as amended, the Respondent admits that the Claimant was its employee but denies unlawfully terminating his employment.
7. The Respondent states that the Claimant worked on seasonal contract basis until 15th April 2006 when his contract was lawfully terminated.
8. The Respondent avers that it has always been ready and willing to pay the Claimant's terminal dues in the sum of Kshs. 23,990 but the Claimant had refused to receive the said amount.

Findings and Determination

9. There are two (2) issues for determination in this case:
 - a) Whether the Claimant has made out a case of unlawful termination;
 - b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

10. On 15th April 2004, the Respondent wrote to the Claimant as follows:

"DEAR BROWNSON,

TERMINATION OF SEASONAL CONTRACT

As you are already aware, the expiry date of the seasonal contract you signed with us in September, 2003 is 04/12/2004.

This is a typographical error as already discussed with you at length. Since you insist that this contract should be left till the stated date i.e. 04/12/2004 and given that low occupancies have already hit us, we are left with no alternative than to terminate the contract as per the termination clause therein, with effect from 15/04/2004.

Arising from the above you will be paid one month's gross salary being termination notice alongside the March 2004 salary which you are yet to be paid.

Yours Sincerely,

(Signed)

HENRY OKOLA,

PERSONNEL MANAGER

NEPTUNE GROUP OF HOTELS"

11. From the evidence on record, it emerges that the Claimant was employed on fixed term seasonal contracts. The Claimant himself filed two such contracts running from 1st January 2003 to 31st March 2003 and from 4th September 2003 to 4th December 2004.
12. The latter contract was however terminated midstream ostensibly, because the stated expiry date of 4th December 2004 was a typographical error. No evidence was adduced to explain how such a material error occurred.
13. Moreover, having been on a fixed term contract, the Claimant had a legitimate expectation that he would serve the entire contract. If indeed the Respondent made an error, it must take responsibility for it. It cannot be allowed to shift this burden to the Claimant.
14. Parties entering into fixed term contracts are bound by the terms and conditions contained therein. With this in mind, I find and hold that the remedy available to the Claimant in terms of damages would be the salary he would have earned had he served the full term of his contract.

Remedies

15. I therefore award the Claimant the equivalent of seven (7) months' salary.
16. In light of the finding that the Claimant served on self-executing fixed term contracts, the claim for leave pay is only payable with regard to the term of his last contract. For the same reason, the claim for severance pay is not sustainable.

17. The claims for notice pay, salary for the month of March 2004 plus salary for days worked in April 2004, prorata leave plus leave travelling allowance, public holidays and off days are admitted and are payable.

18. Ultimately, I enter judgment in favour of the Claimant as follows:

a) 7 months' salary (Kshs. 7,476x 7).....	Kshs. 52,332
b) 1 month's salary in lieu of notice.....	7,476
c) Salary for March 2004.....	7,476
d) Salary for 15 days in April 2004.....	3,738
e) 17 days prorata leave pay (7,476/30x17).....	4,236
f) Leave travelling allowance.....	500
g) 8 public holidays (7,476/30x8x2).....	3,987
h) 6 off days (7,476/30x6).....	1,495
Total.....	81,240

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 11TH DAY OF DECEMBER 2019

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JUDGE

Appearance:

Mr. Nalela for the Claimant

Mr. Kanyi for the Respondent