



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 162 OF 2017

BENCHARD DENDECHE.....CLAIMANT

VS

AFRICA PEARL HOTEL LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By this claim, the Claimant seeks compensation for unfair termination of employment and payment of final dues. The claim is found in a memorandum of Claim dated 27th February 2017 and filed in court on 2nd March 2017.

2. The Respondent filed a Memorandum of Appearance on 4th July 2017 but did not file a reply. The Court therefore heard the Claimant *ex parte* on 12th March 2018.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 4th January 2015, in the position of Accountant. He earned a monthly salary of Kshs. 30,000. On 8th August 2015, the Claimant was driving the Respondent's motor vehicle Registration Number KBG 684A, in the course of duty, when it stalled.

4. The motor vehicle was towed to the Respondent's premises and a mechanic engaged to assess the cost of repair. The Respondent instructed the Claimant to pay for the repair of the motor vehicle, if he wanted to be retained in employment.

5. The Claimant's employment was subsequently terminated by letter dated 1st February 2016. The Claimant avers that the termination was unlawful and unfair and therefore claims the following:

- a. Pay in lieu of notice.....Kshs.. 30,000
- b. Gratuity for 1 year.....15,000
- c. 12 months' salary in compensation.....360,000
- d. 1 year leave allowance.....30,000
- e. Salary for January 2016.....30,000
- f. Unremitted NSSF dues for 13 months.....5,200
- g. Unremitted NHIF dues for 13 months.....5,200
- h. Salary for days worked in February 2016.....4,000
- i. Certificate of service
- j. Costs plus interest

Findings and Determination

6. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

7. The Claimant's employment was terminated by letter dated 1st February 2016 stating as follows:

“RE: COMPLETION OF SIX MONTH EMPLOYMENT CONTRACT

This is to inform you that your contract of employment was for a period of **six months** which ended on **1st January 2016** and the same has not been renewed and will not be renewed. The one month period that you have worked for, was for you to fully update your books of accounts which by the end of your contract had not been updated. It was your undertaking that the full update and reconciliation was to be done within two weeks from my departure on 28th December 2015.

We regret that up to date the said books have not been updated or reconciled as you undertook to do. We have no reason to continue keeping you in employment your contract having ended on **1st January 2016**.

You will get your full and final settlement for the month of January 2016 upon returning any company property in your possession and clearing all debts you have with the hotel manager Mr. Eric Kahindi.

Wish you all the very best for your career and engagement elsewhere.

Yours Sincerely

Afrika Pearl Hotel.

(Signed)

Gilles Mourat,

Managing Director”

8. This letter informs the Claimant that his contract would not be renewed. However, by the time the letter was issued, the Claimant had worked for a full month after the contract expiry date being 1st January 2016.

9. If the Respondent's letter had been issued on the last day of the contract whose term was fixed, the Court might have been persuaded that the Claimant having served the full term of his contract had no further expectation from the Respondent. This is in line with our emerging jurisprudence on fixed term contracts (see *Teresa Carlo Omondi v Transparency International[2017] eKLR*).

10. The case here is however diametrically different. The Respondent knowingly retained the Claimant in its employment after expiry of his fixed term contract. In his final submissions filed on 13th April 2018, the Claimant drew the attention of the Court to previous incidences where he had been issued with backdated contracts. With this in mind, it appears reasonable and barring any other reason for termination of employment, that he would have expected to continue working for the Respondent even without a written contract.

11. Consequently, the Court finds and holds that by the time of leaving employment, the Claimant's contract of employment had in fact been renewed by conduct of the parties. That being the case, any termination of employment would be subject to the conditions and dictates of Sections 41 and 43 of the Employment Act, 2007. This finding is bolstered by the undertones of poor performance carried in the Respondent's letter dated 1st February 2016.

12. To rely on the ground of poor performance or even misconduct, the Respondent would be required to subject the Claimant to due process as set out in law. This did not happen and having rejected the end of contract theory, the Court finds the Respondent guilty of unlawful and unfair termination of the Claimant's employment.

Remedies

13. Flowing from the foregoing, I award the Claimant five (5) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service coupled with the Respondent's conduct in the termination transaction.

14. I further award the Claimant one (1) month's salary in lieu of notice as well as salary for the month of January 2016.

In the absence of any leave records to the contrary, the claim thereon succeeds and is allowed.

15. No basis was laid for the claim for gratuity which consequently fails and is dismissed. Any unremitted NSSF and NHIF dues would be payable to the respective statutory body and not to the Claimant as an employee. These claims are therefore also without basis and are dismissed.

16. In the end, I enter judgment in favour of the Claimant in the following terms:

a. 5 months' salary in compensation.....Kshs. 150,000

b. 1 month's salary in lieu of notice.....30,000

c. Salary for January 2016.....30,000

d. Leave pay for 1 year (30,000/30x21).....21,000

Total.....231,000

17. This amount will attract interest at court rates from the date of judgment until payment in full.

18. The Claimant is also entitled to a certificate of service and costs of the case.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MAY 2018

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JUDGE

Appearance:

Mr. Anaya h/b Mr. Otwere for the Claimant

No appearance for the Respondent