



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 903 OF 2016

BETWEEN

KHAMISI KIBEJA MWAKILALU.....CLAIMANT

VERSUS

1. ALII SAID

2. ZAKY ALII T/A MWEMBE TAYARI HOTEL.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Abdiwahid & Associates, Advocates for the Claimant

Khalid Salim & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 28th November 2016. He states he was employed by the Respondents as a Cook, in May 2005. His contract was terminated by the Respondents on 24th August 2016, without notice and valid reason. He was not heard, and was simply asked not to report to work. He never went on annual leave. He lastly earned a daily rate of Kshs. 500 as of the date of termination. He asks the Court to find termination was unfair, and grant him the following orders against the Respondent:-

- a. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 180,000.
- b. 1 month salary in lieu of notice at Kshs. 15,000.
- c. Annual leave pay over a period of 3 years at Kshs. 45,000.
- d. Service pay for 1 year at Kshs. 297,000.
- e. Certificate of Service to issue.
- f. Costs.
- g. Interest.

2. The Respondents filed their Statement of Response, on 23rd February 2016. They concede to have employed the Claimant as a Cook. They concede also, to have terminated his contract. They state termination was fair. Sufficient notice was given to the Claimant. He was given a fair hearing, and paid all lawful terminal dues. They pray that the Claim is dismissed with costs to the Respondents.

3. The Claimant, and the 2nd Respondent, both gave evidence for the respective Parties, and closed the hearing, on 21st February 2018.
4. The Claimant confirmed in his oral evidence, his employment history, and the terms and conditions of employment, as commonly pleaded by the Parties. He earned Kshs. 170 per day on recruitment, and Kshs. 500 daily upon departure. Termination was on 24th August 2016. No reason, or notice, was given to him leading to termination. He was not paid terminal dues. He worked without break. He was not subscribed to National Social Security Fund. Cross-examined, he told the Court he was employed in 2005. He was not issued a written contract. The Respondents' business was also known as Raha Leo Hotel. He was paid Kshs. 500 daily. It is not true that he worked from 2010. He was not notified about termination. He was told not to report to work the following day.
5. Zaky Alii told the Court the business belongs to his Father. The Claimant was employed in the year 2010. There was no letter of employment. The Claimant was on casual terms. He was a Dough Maker, not a Cook. Cross-examined, Zaky told the Court that the Claimant made chapattis. Employees were on casual terms. Attendance register was not available before the Court. Zaky's Witness Statement filed in Court did not agree entirely, with his oral evidence. He did not have County Government Licenses, indicating when the business opened. Zaky owns the business today.

The Court Finds:-

6. The Respondents conceded in their Statement of Response at paragraph 4, that the Claimant was employed by the Respondents. Nowhere in the Pleadings filed by the Respondents, is it indicated that such employment was on casual terms.
7. Job Identification Card exhibited by the Claimant, indicates the Card issued in the year 2005. This tallies with the date of employment given by the Claimant, and contradicts Respondents' assertion, that they employed the Claimant in the year 2010.
8. The Respondents plead that they gave the Claimant sufficient notice of termination, and a fair hearing. In his evidence, Zaky gave not the slightest of detail on notice and hearing given to the Claimant, leading to the date of termination, 24th August 2016. He said nothing by way of justifying termination. He did not show when, why, or how, fair hearing took place. No employment offence, or default of any nature, was attributed to the Claimant, to justify the claim by the Respondents, that they accorded the Claimant a fair hearing. Termination was not based on any substantive ground, or fair procedure. It was unfair. ***The Claimant merits, and is granted, compensation for unfair termination, the equivalent of 12 months' salary at Kshs. 180,000.***
9. **He is allowed the prayer for 1 month salary in lieu of notice at Kshs. 15,000.**
10. He was employed in the year 2005, and left in 2016. His evidence was that he worked throughout without a break. He worked over a period of 11 years. He asks the Court to grant him annual leave of 3 years. He did not in his evidence show, during which year he did not take annual leave. He worked for over 11 years. He pleads he was entitled to 21 days of annual leave, but claims 30 days of annual leave, over a period of 3 unspecified years. In his Submissions, he merely states that he ought to be awarded 'annual leave dues accrued.' There is no evidence of outstanding annual leave. The prayer is declined.
11. The Respondents did not give any rebuttal to the claim, that the Claimant was not subscribed to the N.S.S.F. They did not show that they had any alternative Social Security Plan made available to the Claimant. The Claimant deserves, and is granted, service pay under Section 35 [5] of the Employment Act 2007. He worked from May 2005 to August 2016. He had 11 complete years of service. His last pay was Kshs. 15,000 monthly. **He is granted 15 days' pay for every complete year of service, translating into Kshs. 82,500 as service pay.**
12. **Certificate of Service to issue.**
13. **Costs to the Claimant.**
14. **Interest granted at 14% per annum from the date of Judgment till payment is made in full.**

IN SUM, IT IS ORDERED:-

- a. Termination was unfair.**
- b. The Respondents shall pay to the Claimant: equivalent of 12 months' salary in compensation for unfair termination at Kshs. 180,000; notice pay at Kshs. 15,000; and service pay at Kshs. 82,500- total Kshs. 227,500.**
- c. Certificate of Service to issue.**
- d. Costs to the Claimant.**
- e. Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.**

Dated and delivered at Mombasa this 6th day of July 2018.

James Rika

Judge