



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 18 OF 2017

ASTLEY MWANYALE KAFULO.....CLAIMANT

VS

MEDINA ENTERPRISES LIMITED T/A MEDINA PALMS....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Astley Mwanyale Kafulo against his former employer Medina Enterprises trading as Medina Palms in Watamu. The claim is contained in a Memorandum of Claim filed in court on 14th June 2017. The Respondent filed a Statement of Defence on 2nd August 2017.
2. The parties attempted an out of court settlement but failed to agree on the issue of unfair termination. They therefore chose to file submissions on this issue.

The Claimant's Case

3. The Claimant was employed by the Respondent as a Waiter in the Food and Beverage Department. He earned an all-inclusive monthly salary of Kshs. 16,000.
4. The Claimant states that at the end of January 2017, he was asked by the Operations Manager/Human Resources Manager to proceed on a one month leave effective 1st February 2017. Upon resuming duty on 8th March 2017, the Claimant was issued with a termination notice. No reason was given for the termination. The Claimant sought the intervention of the Works Committee but was notified by the Shop steward that since he was on contract, there was nothing the Works Committee could do to assist him.
5. The Claimant states that the action by the Respondent was in contravention of the law and the Collective Bargaining Agreement between the Kenya Association of Hotel keepers and Caterers and his Union, the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA).
6. The Claimant's complaints to his Union did not bear fruit.
7. The Claimant further states that the Respondent failed to implement salary increments negotiated by his Union. In his Memorandum of Claim he sought reinstatement without loss of benefits or in the alternative:

- a) Redundancy dues in accordance with Section 40 of the Employment Act and Clause 11 of the CBA dated September 2015
- b) One month's salary in lieu of notice.....Kshs. 21,805
- c) Severance pay for 9 months.....10,064
- d) Prorata leave from June 2016 to March 2017.....16,354
- e) Salary increment arrears as per CBA of 2015.....15,084
- f) House allowance increment arrears as per CBA of 2015.....37,134

- g) Compensation for unfair termination.....261,660
- h) Damages for loss of employment.....261,660
- i) Costs plus interest

The Respondent's Case

8. In its Statement of Defence filed in court on 2nd August 2017, the Respondent admits having employed the Claimant as a Waiter in the Food and Beverage Department at its Hotel in Watamu, effective 1st June 2016. He earned a gross monthly salary of Kshs. 16,000 inclusive of house allowance.

9. The Respondent further admits that it required the Claimant to go on leave and that upon resuming duty on 8th March 2017, the Claimant was issued with a notice of termination of employment on account of operational requirements and business downturn. The Claimant was paid two months' salary in lieu of notice.

10. Regarding the claim on implementation of the CBA dated September 2015, the Respondent states that it had been exempted from the full import of the CBA owing to business downturn.

11. The Respondent contends that the Claimant is not entitled to bring a claim for unfair termination under Section 45(3) of the Employment Act as he had not worked for a period of 13 months.

Findings and Determination

12. Following partial settlement of the Claimant's claim, the only issue pending determination by the Court is whether the Claimant is entitled to compensation for unfair termination of employment.

13. The termination of the Claimant's employment was communicated by letter dated 8th March 2017 stating *inter alia*:

"Dear Astley,

RE: NOTICE OF TERMINATION

Reference is made to employment offer issued to you on 1st June 2016 for the position of Waiter.

*As per the terms set out on the offer letter, either party may terminate employment without cause by providing **one (1) month** written notice or pay in lieu of notice.*

However, since you are a registered member of the Kudheihia Workers Union (Membership No. K040233), your termination of employment will be governed by the terms set out in the CBA as highlighted below.

*In accordance to (sic) the Collective Bargaining Agreement between Kenya Hotel Keepers & Caterers Association and the Kenya Union of Domestic Hotels Educational Institutions and Allied Workers, employment shall be terminated by either party giving **two (2) months notice** or **two (2) months** pay in lieu.*

*Due to the current operational requirements, we hereby notify you that your employment with **Medina Enterprises Limited** will be terminated **immediately**. This decision is not a reflection on your performance. We have been pleased with the qualities you have exhibited during your tenure of employment with us.*

We place on record our appreciation of your dedicated service to the company.

In the event of future vacancies arising, for which, given your past experience and the nature of the position, you may be suitable, you will be notified thereof by the company, and may be offered such employment.

We appreciate the service you have rendered to the company. Please accept our best wishes for your future.

On leaving you shall be entitled to;

- 1. **Two (2) months salary** in lieu of notice*
- 2. **4 leave days** earned (pro-rata)*
- 3. Service charge for the month of **February 2017**.*

Less:

4. Any amount owed to the Company.
5. Withholding tax as per the law.

PAYMENT OF BENEFIT PREMIUMS

The following benefits will cease effective **immediately**;

1. Medical cover.
2. House allowance; consolidated in your gross salary.

Sincerely,

(Signed)

Kana Mwendwa

Operations & Human Resource Manager

(Signed)

Max Cheli

General Manager/Director

14. In opposing the claim for unfair termination, the Respondent states that the Claimant was employed for a fixed term of nine (9) months running from 1st June 2016 to the end of February 2017. In its Statement of Defence however, the Respondent admits having sent the Claimant on leave until 8th March 2017, the date he was issued with a termination letter. It would appear therefore that the Claimant was in the Respondent's employment beyond February 2017. The result is that the Respondent's averment that the Claimant was on a nine month fixed term contract is unsupported by evidence and is thus rejected.

15. In the written submissions filed on behalf of the Respondent on 28th June 2018, reference was made to several decisions among them **Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR** where it was held that fixed term contracts terminate automatically by effluxion of time and in such cases, a claim for unlawful termination does not lie.

16. The instant case is however somewhat different as the Claimant stayed in the Respondent's employment past the nine month fixed term pleaded by the Respondent. It follows therefore that the Claimant was entitled to due process prior to termination of his employment, which the Respondent failed to afford him. Consequently, the Court finds and holds that the Claimant is entitled to compensation.

17. In reaching this decision, I am fully aware that the Claimant had not attained the thirteen months' service threshold provided under Section 45(3) of the Employment Act, 2007. I am however persuaded by the decision by **Lenaola J** (as he then was) in **Samuel G. Momanyi v Attorney General & another [2012] eKLR** that the said provision is unconstitutional.

18. Having taken all factors into account, I award the Claimant the sum of Kshs. 48,000 being three (3) months' salary in compensation for unfair termination. In making this award, I have considered the Claimant's length of service as well as the Respondent's conduct in effecting the termination.

19. The award 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 MALINDI THIS 24TH DAY OF SEPTEMBER 2018

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JUDGE

Appearance:

Mr. Mwabonje for the Claimant

Mr. Okuto for the Respondent