



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 512 OF 2017

[Consolidated with Cause Numbers 509 of 2017, 510 of 2017, 511 of 2017, 513 of 2017, 514 of 2017, 516 of 2017, 517 of 2017, 518 of 2017]

BETWEEN

1. **KENNETH KIRIGIA MATIKI [512/2017]**
2. **PETER HOSEA [509/2017]**
3. **JULIUS MWASINGO [510/2017]**
4. **SOLOMON MKUNDE EZEKIEL [511/2017]**
5. **SHEILA LYONA ILAMOYA [513/2017]**
6. **EDNA LAGAT [514/ 2017]**
7. **FREDRICK TEMBA [516/2017]**
8. **PETER NZIOKA MKUMBU [517/2017]**
9. **PETER AUMA NYANCHIRI [518/ 2017].....CLAIMANTS**

VERSUS

1. **INSUALE AFRICANA LIMITED T/A PANGONI BEACH RESORT**
2. **PANGONI HOTELS & RESORTS LIMITED.....RESPONDENTS**

Rika J

Court Assistant: Benjamin Kombe

Bosire & Partners, Advocates for the Claimants

No appearance for the Respondents

JUDGMENT

1. The Claimants filed their separate Statements of Claim, on 23rd June 2017. They state they were employed by the Respondents on diverse dates, and in various positions. These positions included Senior Chef De Partie, Receptionist, General Manager, Accounts Assistant, Food and Beverage Service Supervisor, Assistant Maintenance Manager, Cashier, and Front Office Manager.

2. They aver their respective contracts of employment were terminated by the Respondents, without notice, hearing and/or justifiable cause,

on 20th September 2016. They were denied terminal dues. They pray the Court to grant them Judgment against the Respondents for:-

- a) Salary in lieu of notice.
- b) House allowance.
- c) N.S.S.F dues deducted and not remitted.
- d) Leave pay.
- e) Leave travelling allowance.
- f) Overtime.
- g) 12 months' salary in compensation for unfair termination.
- h) Unpaid salaries.
- i) Severance pay.
- j) Cumulative off days.
- k) General damages for breach of contract.
- l) Declaration that termination was unfair.
- m) Costs.
- n) Interest.
- o) Any other relief the Court deems suitable to grant.

3. There are Affidavits of Service filed by Court Process-Server, indicating the Respondents were served with the Statements of Claim, the Notice of Summons and Mention Notices. The Respondents filed nothing by way of Response, and did not attend Court any one time. The matters were consolidated on 30th July 2018, and heard under reference file Number 512 of 2017. Claimants Kenneth Kirigia Matiki, Fredrick Temba Zedekia and Peter Nzioki Mukumbu gave evidence on formal proof for the Claimants, on 30th July 2018. The matters were last mentioned on 18th September 2018, when the Claimants confirmed filing of their Submissions.

4. Kenneth told the Court that the Claimants were employed by the Respondents as shown in their Pleadings and Documents on record. He worked as a Chef. The Respondents were unable to pay the Claimants their monthly salaries. The Claimants were advised they would be paid terminal dues. None were paid. Fredrick confirmed the evidence given by Kenneth. He was himself employed by the Respondents as Maintenance Technician. Employees' contracts were terminated and a promise made by the Respondents, to pay their terminal dues. Nothing was paid. No valid reason was given to justify termination. The last Witness, Peter, told the Court the same thing as told by the Co-Claimants. Employees were just told to leave.

The Court Finds: -

5. The consolidated Claims are unchallenged. The Claimants have shown that they were employed by the Respondents on various dates. They worked in diverse capacities, until 20th September 2016, when the Respondents terminated the Claimants' contracts.

6. The Respondents did not give any valid reason or reasons for the decision, as required under Sections 43 and 45 of the Employment Act 2007. There was no hearing under Sections 41 and 45 of the Employment Act. The Respondents promised to pay the Claimants their terminal dues. Nothing was paid.

7. **It is declared termination was unfair.** The Claimants have not supported the prayers for N.S.S.F dues deducted but not remitted, annual leave pay, leave traveling allowance, overtime, severance pay and general damages for breach of contract. There are no statements of accounts from the N.S.S.F, and no pay slips exhibited by the Claimants to support their prayer on N.S.S.F deductions. The leave application forms which are dated in 2016, the year when the Claimants left employment, do not agree with their position on annual leave days owed to them by the Respondents, as of the date of termination. Leave traveling allowance is indicated repeatedly as Not Applicable. The Claimants did not draw the mind of the Court to any law, contract, wage instrument, workplace policy or collective bargaining agreement, which entitled them to leave traveling allowance. There are no records of overtime worked. The hours, days, and years when the Claimants did excess hours are undisclosed. The Claimants do not state that they exited employment on redundancy. They mostly allege that they were not told why, the Respondents terminated their contracts. The prayer for severance pay under Section 40 of the Employment Act is not grounded on the facts. Severance pay is not payable where the reason for termination is unknown. It is payable where the reason is redundancy. There is similarly no evidence to back the prayer for off-days made by some of the Claimants. The prayer for general damages for breach of contract, in light of the order made in favour of the Claimants for statutory compensation, is not proportionate to the economic injuries sustained by the Claimants. It is not a fair and reasonable remedy. Compensation is sufficient. These prayers are declined.

8. The Court is persuaded the Claimants have shown other prayers are merited. The prayers are allowed, as detailed in the various Statements of Claim, as follows:-

- *Notice pay.*
- *House allowance.*
- *12 months' salary in compensation for unfair termination.*
- *Unpaid salaries.*

9. *Costs to the Claimants.*

10. Terminal benefits ought to be paid at the earliest opportunity before, or immediately after, the Employee leaves employment. Where notice of termination has issued, terminal benefits ought to be computed and paid to the Employee, with his salary at the end of the notice period. Even where there is no notice, it is essential that terminal benefits are paid and shown as part of the last pay slip issued to the Employee, on the date he physically leaves employment. The practice, where terminal benefits are paid to Employees long after termination, is an unfair labour practice which must be deprecated. It is important that Employees have social protection on losing their jobs. Timely payment of terminal benefits extends to Employees such protection, diminishing exposure to risks associated with loss of employment. It enables Employees to plan for their hereafter. Terminal benefits, found to have been unreasonably withheld by an Employer, should therefore be paid with interest, from the date of termination. The Claimants were advised by the Respondents they would be paid terminal benefits, at the time it was communicated that the Respondents would not continue employing the Claimants. Nothing was paid. Nothing has been paid to-date, more than 2 years down the line. The Respondents do not even adopt the common Employers' justification on withholding of terminal benefits- that the Employee has not cleared. The Respondents made a promise to pay, sacked their Employees, and paid nothing. Compensation should not be lumped together with terminal benefits, where interest is allowed from the date of termination. Interest on compensation ought to be, where granted, made from the date when the Court assesses compensation, which is the date of Judgment. ***Interest is allowed at 14% per annum from the date of termination, 20th September 2016, on other prayers except compensation and costs.***

IN SUM, IT IS ORDERED:-

a) It is declared termination was unfair.

b) The Respondent shall pay to each of the Claimants, as detailed in the Statements of Claim, the following items:

- *Notice pay.*
- *House allowance.*
- *12 months' salary in compensation for unfair termination.*
- *Unpaid salaries.*

c) Costs to the Claimants.

d) Interest allowed at 14% per annum, on notice pay, house allowance, and unpaid salaries from the date of termination, 20th September 2016, till payment is made in full.

e) Interest on compensation and costs is allowed, at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 23rd day of November, 2018.

James Rika

Judge