



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 6 OF 2018

RASHID ABDALLAH.....CLAIMANT

VS

THE BEAUMONT RESORT LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 13th February 2018 and filed in court on 14th February 2018, the Claimant has sued the Respondent for unfair termination and failure to pay terminal dues. The Respondent filed a Statement of Response on 8th March 2018 to which the Claimant responded on 21st March 2018.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Manager, Emmanuel Mjomba Mmeku.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in 2011 as a gardener, initially on casual basis. In 2015, he was issued with a contract of service.
4. The Claimant further states that he was sent on compulsory leave in December 2017. He was subsequently terminated. The Claimant's case is that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) Leave pay for 6 years.....Kshs. 49,100
- b) Salary in lieu of notice.....11,700
- c) Service pay.....35,100
- d) Rest days worked (Saturdays).....121,680
- e) Accumulated overtime.....138,240
- f) 12 months' salary in compensation.....140,400
- g) Costs plus interest

The Respondent's Case

5. In its Statement of Response dated 8th March 2018 and filed in court on even date, the Respondent states that the Claimant was employed as a general hygiene/garden attendant on contractual basis effective 1st November 2015.
6. The Claimant was suspended from employment due to attempted theft of the Respondent's property .He was also accused of conducting personal business during working hours.

7. The Respondent adds that on 5th October 2017 the Claimant was issued with a show cause letter. He was further issued with a warning letter dated 11th October 2017. The Respondent states that the Claimant wrote an apology letter admitting the contents of the warning letter.

8. The Claimant was suspended for ten (10) days by letter dated 9th December 2017.

9. The Respondent denies the Claimants claim save for service pay in the sum of Kshs. 12,187, which the Respondent has always been willing to pay.

Findings and Determination

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

- a) Whether the Claimant has made out a case for unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

11. In its Statement of Response, the Respondent accuses the Claimant of attempted theft and conducting personal business during working hours. Both accusations, if proved, would fall within the realm of misconduct. What the Respondent should have done in this case was to serve the Claimant with formal charges in this regard as required under Section 41 of the Employment Act, 2007. Instead, the Respondent resorted to issuing the Claimant, who was admittedly illiterate, with a myriad of warning letters. Finally, the Respondent sent the Claimant on two weeks' compulsory leave after which his employment stood terminated.

12. What is clear is that the Respondent failed to subject the Claimant to the mandatory disciplinary procedure set out in Section 41 of the Employment Act and the allegations made against the Claimant were therefore untested and unproved at the shop floor.

13. As a result, the Court finds that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

14. In light of the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service and the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice. The claim for service pay is admitted to the tune of Kshs. 12,187.50. I will therefore allow this claim to this extent only.

15. According to leave records filed by the Respondent, the Claimant took his annual leave up to 2017. The claim thereon thus fails and is dismissed. The claims for rest days and accumulated overtime were not proved and are also dismissed

16. In the end, I enter judgment in favour of the Claimant as follows:

- a) 6 months' salary in compensation.....Kshs. 70,200.00
- b) 1 month's salary in lieu of notice.....11,700.00
- c) Service pay.....12,187.50
- Total.....94,087.50**

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

18. The Claimant will have the costs of the case.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF DECEMBER 2018

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JUDGE

Appearance:

Mr. Obaga h/b Mr. Sebastian for the Claimant

