



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**CAUSE NO. 270 OF 2013**  
**MUTUA MULI.....CLAIMANT**  
**VERSUS**  
**BOABAB HOLIDAY RESORT.....RESPONDENT**  
**JUDGMENT**

**Introduction**

1. This is a claim for accrued employment dues by the claimant against the respondent. The respondent has however denied liability to pay the dues sought and averred that she paid to the claimant all his lawful dues after his summary dismissal from employment.

2. The suit was heard on 24.2.2014 and 21.7.2016 when claimant testified as CW1 and the respondent called her General Manager Mr. David Kasharo Chai as RW1. Thereafter both parties filed written submissions.

**Analysis and Determination.**

3. After careful consideration of the pleadings, evidence and submissions, it is clear that the claimant worked for the respondent as a waiter from 1997 to 2.3.2000 when he was dismissed for absenteeism from work; that he was reemployed from 15.4.2000 as waiter and later promoted to Barman under seasonal contracts which ran consecutively till 2.12.2005 when he was appointed on permanent basis in the same position of Barman; that on 20.11.2012 the claimant miscondacted himself by in subordinating his seniors and creating disturbance at the work place; that the claimant was accorded a disciplinary hearing and was found guilty of the said misconduct and was dismissed from employment; that the claimant appealed against the dismissal but he withdrew the appeal and demanded that he be paid his employment benefits. Finally, there is no dispute that the claimant was paid Kshs34,906 as his final dues after termination. The only issues for determination herein is whether claimant is entitled to the Kshs416,731 sought against the respondent or any part thereof.

**Entitlement to Kshs.416,371.**

4. The claim for the Kshs.416,371 is broken down as follows:

**(a) Four months salary in lieu of notice totaling to Kshs.72,216.**

**(b) Salary arrears due to underpayment as from 1.7.2007 to 3.12.2012 totaling to**

**Kshs.151,748.**

**(c) Shoes allowance for 15 years being Kshs.90,000.**

**(d) Arrears of termination gratuity amounting to Kshs.102,407.**

### **Notice**

5. The claim for 4 months salary in lieu of notice is dismissed for lack of merits by withdrawing his appeal, the claimant accepted that his dismissal was fair, just and lawful.

### **Salary Arrears.**

6. The claimant contended that his salary was underpaid from 1.7.2007 to 3.12.2012 by being paid under the salary scale for waiter (Grade 3) instead of the scale for a Barman (Grade 4). That his last salary in 2012 was Kshs.15, 417 instead of Kshs.18, 000 yet the salary review was done by the union at the start of the year. RW1 denied that the claimant was underpaid in his salary. He produced extract payroll to prove that the claimant's final salary was Kshs.16, 271.

7. After careful consideration of the final evidence presented to the court, I am of the considered view that the claimant has not proved his claim for salary underpayment on a balance of probability. The evidence on record is scanty and it does not prove that he was paid the salary for a waiter (Grade 3) instead of Barman (Grade 4) from 1.7.2007 to the time he was dismissed in December 2012. I therefore dismiss that prayer.

### **Shoes Allowance**

8. The claimant prays for Kshs.500 per month for 15 years which translates to Kshs.90,000. RW1 denied the claim and averred that the CBA which provided for shoe allowance was only applicable to the parties herein from 10.4.2007 to 15.12.2011. I therefore award him shoes allowance of Kshs.500 per month from April 2007 to December 2011. That translates to 56 months times Kshs.500 equals to Kshs.28,000.

### **Gratuity Arrears.**

9. There is no dispute that the claimant was reemployed on 15.4.2000 and worked until December 2012 when he was dismissed. It is not in dispute that as at the time of claimant's dismissal, the respondent was no longer bound by the CBA because she had withdrawn membership from the employment organization which signed the CBA.

10. The respondent was also not bound to pay the claimant any terminal benefits under the contract employment dated 2.12.2005 and the Regulation 19 of the Reputation of Wages (Hotel and Catering Trade) Order. The appointment letter never provided for payment of gratuity while Regulation 19 aforesaid, only provides for gratuity upon retirement at the age of 55 years and above. This prayer for gratuity is therefore dismissed because the claimant has not proved on a balance of probability the basis for granting the same. Consequently, the claimant will have to content with the ex gratia payment of Kshs.34,905 made to him by the responded after dismissal.

### **Disposition.**

11. For the reasons stated above I enter judgment for the claimant in the sum of **Kshs.28,000** plus half costs and interest from the date of filing suit.

**Signed, dated and delivered at Mombasa this 20<sup>th</sup> day of January, 2017.**

**O.N. MAKAU**

**JUDGE**