



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 336 OF 2016

BONIFACE KINEENE MWANGANGICLAIMANT

VERSUS

JOHN THUKU WATUTHU t/a

MARISTELLA ADVENTURES BEACH HOTELRESPONDENT

J U D G M E N T

I N T R O D U C T I O N

1. The claimant was employed by the respondent the manager of Marestella Adventures Beach Hotel on 3/9/2012 earning ksh.15200 per month. He worked until September 2015 when the respondent send a lorry on diverse dates to ferry away all the equipment and goods from the hotel. When the claimant contacted the respondent, the latter told him that he had closed the business and his services were no longer required. The claimant was aggrieved and brought this suit contending that he had been unfairly terminated on account of redundancy without following the procedure provided by the law. He therefore prays for compensation for unfair and wrongful termination of his employment contract plus terminal benefits.

2.The respondent never filed any defence and therefore the suit proceeded exparte on 23/11/2016 when the claimant testified as CW1. Thereafter the claimant filed written submissions which I have considered herein.

ANALYSIS AND DETERMINATION

3. After considering the Musterrolls and Mpesa payment statements, its clear that the claimant was employed by the respondent from September 2012 to September 2015. It is also an undisputed fact that the claimant was terminated by the respondent after he closed his business and ferried away all the equipment and goods. The issues for determination are:

(a) Whether the termination of the claimant's employment contract was unfair.

(b) Whether the claimant is entitled to the reliefs sought.

UNFAIR TERMINATION

4. Under Section 45 (2) of the Employment Act, termination of employment by the employer is unfair

unless the employer proves that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, it is common knowledge that the respondent did not participate in the trial. Consequently he did not discharge his burden of proving the reason and fair procedure as required under Section 45(2) of the Act.

5. On the other hand, I find that the uncontested testimony by the claimant proves on a balance of probability that his contract of service was terminated unfairly on account of redundancy without following the mandatory provision of Section 40 of the Act. Under the said section an employer is barred from terminating the contract of his employee on account of redundancy without first serving the employee and labour officers with a redundancy notice of at least 30 days. In this case the said mandatory notice was never served and as such the termination of the claimant's contract on account of redundancy was unfair.

RELIEFS

6. The claimant prays for ksh.17000 being one month salary in lieu of notice. The master roll shows that he was earning Ksh.15000 per month. I therefore award him ksh.15000 in lieu of notice. In addition I award him ksh.180,000 his 12 months salary as compensation for unfair termination. In making the said award I have considered the fact that the claimant did not contribute to his termination through misconduct.

7. In view of the foregoing award of compensation, I decline to award severance pay. Likewise the claim for unremitted NSSF deductions is dismissed for lack of evidence. According to the Musterrolls produced, no NSSF deductions are evident. Also the claim for holidays and off days worked is dismissed for want of particulars and evidence. The claim for accrued leave days is however allowed for the three years worked. The claimant prays for one month leave per year but I will only award 21 days per year totaling to 63 leave days earned. The claimant will therefore get $ksh15000 \times 63 / 26 = 36346.15$. He will also have certificate of service as prayed.

DISPOSITION

8. For the reason that the termination of the claimant's contract of service was unfair, I enter judgment for the sum of Ksh.231346.15 plus costs and interest. He will also have certificate of service.

Dated, signed and delivered this 28th April 2017

O.N. Makau

Judge