



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 440 OF 2014**

**BETWEEN**

**DANIEL KIVANGO MALULUI ..... CLAIMANT**

**VERSUS**

**MOMBASA CONTINENTAL RESORT t/a**

**KENGA EQUATORIAL CONTINENTAL HOTELS LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Tindika & Company Advocates for the Claimant*

*Mburu Kariuki & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his statement of Claim, on the 11<sup>th</sup> September 2014. He states he was employed by the Respondent Hotel as a Reservation Clerk, on 26<sup>th</sup> November 2012. He was made the Acting Reservation Coordinator on 3<sup>rd</sup> August 2012. He was entitled to 30% of the applicable minimum wage of the acting grade, in addition to the current earnings. On 21<sup>st</sup> January 2013 he ceased the acting role and reverted to his core position. He was advised the position of Coordinator had become redundant.

2. He was involved in a road traffic accident on 26<sup>th</sup> April 2013, sustaining fracture of the elbow. He was admitted and treated at Jocham Hospital. The Respondent had promised it would reimburse him medical expenses, which was not done. He was transferred from the Front Office on 19<sup>th</sup> August 2013 to House-keeping, to do linen work. He could not perform this role because of his broken bones. When he complained to the Human Resources Manager, he was advised to take compassionate leave and ruminate over the transfer. He took 14 days of leave on 20<sup>th</sup> August 2013 and was to report back on 3<sup>rd</sup> September 2013. On 27<sup>th</sup> August 2013, he received a letter from the Human Resources Manager, alleging the Claimant had absconded. On 12<sup>th</sup> September 2013 he was issued with a letter of termination. He was not given notice. He was not given reason for the decision. His pay slip shows he earned a basic salary of Kshs. 18,194 and house allowance of Kshs. 6,806 monthly. He was not heard. He prays for Judgment against the Respondent for:-

- a) 1 month salary in lieu of notice at Kshs. 18,194.
- b) Balance of salary for the position of Coordinator at Kshs. 83,194.
- c) Reimbursement of medical expenses at Kshs. 177,111.
- d) Compensation for unfair termination equivalent to 12 months' salary at Kshs. 281,328.

Total.....Kshs. 496, 827

- e) Costs and interest.

3. The Respondent filed its Response on 11<sup>th</sup> September 2014. Its position is that the Claimant worked for the Respondent initially on contract. He was appointed on permanent basis on 26<sup>th</sup> November 2012. He went on leave on 14<sup>th</sup> July 2013, which was to expire on 16<sup>th</sup> August 2013. He did not report back after expiry of his annual leave period.

4. He was called on phone by the Human Resources Manager on 19<sup>th</sup> August 2013. He explained he had an accident. He applied for compassionate leave which was granted on 20<sup>th</sup> August 2013, but not approved by the Managing Director. He did not report from 21<sup>st</sup> August 2013. There was no communication about his whereabouts, and on 9<sup>th</sup> September 2013, the Respondent terminated his services. The Respondent urges the Court to dismiss the Claim.

5. The Claimant gave evidence on 22<sup>nd</sup> September 2015, and 1<sup>st</sup> March 2016 when he closed his case. Security Manager Fredrick Munyambu gave evidence for the Respondent on 3<sup>rd</sup> November 2016, when hearing closed. The matter was last mentioned on 7<sup>th</sup> February 2017, when Parties confirmed the filing of their Submissions and Judgment scheduled for delivery.

**Claimant's Evidence:-**

6. The Claimant restated his employment history as set out in his Pleadings. He was issued a letter dated 3<sup>rd</sup> August 2012, to act as Reservation Coordinator. His bosses were fired and the Claimant was left to work alone. His acting role was withdrawn on 21<sup>st</sup> January 2013. The CBA between Hoteliers' Association and KUDHEIHA, regulating industrial relations at the workplace, provided for acting capacity for a maximum of 3 months. The Claimant worked for 6 months and merited confirmation in the role.

7. He was involved in a road traffic accident on 26<sup>th</sup> April 2013. He was admitted for 3 days at Jocham Hospital. He informed his boss about this. His boss passed over to see him at the Hospital on the same day. The Human Resources Manager led a team from the Hotel which visited the Claimant at the Hospital. He was advised to forward receipts, for expenses incurred, which the Respondent would refund. He was discharged from Hospital on 28<sup>th</sup> April 2013. He spent a total of Kshs. 177,111 at the Hospital. The CBA provided that once an Employee spent his own money in medical expenses, it would be refunded by the Employer.

8. He reported to work on 11<sup>th</sup> June 2013. He was placed on compulsory leave. He had accumulated 46 off-days. The compulsory leave was to compensate for these days. He resumed on 13<sup>th</sup> July 2013. He was given another 30 days of leave at the discretion of the General Manager. Leave was normally approved by Head of Department or the Human Resources Manager. He reported back on 19<sup>th</sup> August 2013.

9. He was called again by the Human Resources Manager and given a letter of transfer to the house-keeping department. His hand was still in a sling. House-keeping was more physical and unsuitable to the Claimant. He was offered 14 days of compassionate leave on 20<sup>th</sup> August 2013. He was to report back on

3<sup>rd</sup> September 2013. On 27<sup>th</sup> September 2013, the Human Resources Manager called the Claimant, asking the Claimant to read his e-mail. He did so and found a letter alleging he had absconded, and should report to work within 48 hours. When he reported, he was told to go home he would be recalled. One of the Directors, Muriuki, told the Claimant he was not happy about the treatment the Claimant was receiving from the Management. This Director advised the Claimant to write to the Head Office in Nairobi, communicating his grievance, which the Claimant did, but received no reply. He eventually reported on 12<sup>th</sup> September 2013, and was issued the letter of termination. He was not called at any time before this and taken through a disciplinary hearing for absconding.

10. The Human Resources Manager told the Claimant the General Manager had directed the Claimant clears with the Respondent, and vacates the building. The Claimant received nothing in terminal dues. He was told he owed the Hotel money.

11. Cross-examined, the Claimant told the Court he did not have a document showing he reported his accident and injury to the Manager. He called and reported. As a Reservation Clerk, his role was to receive calls and reserve rooms. His letter of appointment stated he was a Reservation Clerk. Company Management knew of the Claimant's injuries. It is not true that the Claimant rejected transfer to house-keeping and deserted. Linen Clerk was supposed to carry linen. The Claimant could not be able to discharge this role. His hand was still in a sling. He closed his evidence on redirection with the clarification that he was appointed as a Reservation Clerk. The Human Resources Manager made the decision to grant the Claimant compassionate leave.

**Respondent's Evidence:-**

12. Munyambu testified that the Claimant applied to go on compassionate leave. Before it was granted, he proceeded on leave. There was an Application Form, to be completed, and signed by different Officers. There was no approval until the General Manager signed. The General Manager had not signed the Form.

13. Munyambu was aware the Claimant was injured out of the course of duty. He did not report to Respondent's Clinical Officer. There is money budgeted to assist Employees in case of accident. The Clinical Officer would prepare a report to facilitate assistance to the Employee. The Claimant did not follow this process. Where one was injured out of the line of duty, he was to meet the costs of his treatment under clause 10 of the contract of employment.

14. The Claimant was transferred to Laundry Department after the accident. He was offered light duties. He could not continue performing at the Front Office. He refused to work and applied for compassionate leave. He left without approval. Leave was to run from 20<sup>th</sup> August 2013 to 2<sup>nd</sup> September 2013. He was summoned to return to work. He declined. The Respondent has a policy which stipulates if an Employee disappears for 14 days, the Employee is dismissed. The Respondent therefore terminated the Claimant's contract. The shop-steward was informed. Fair procedure was observed.

15. The Claimant was appointed to stand in for Reservation Coordinator. He was appointed through a letter dated 3<sup>rd</sup> August 2012. He was to be given 30% of the applicable wage. Munyambu was not sure, if this was paid. The substantive holder of the position returned and Claimant's acting appointment was revoked. The position of Reservation Coordinator was made redundant. Termination was fair.

16. Cross-examined, Munyambu testified the Claimant would be entitled to acting allowance in accordance with the CBA. The letter from the Respondent to the Claimant dated 21<sup>st</sup> January 2013, states the position became redundant. The assumption was that the acting appointment ended on this date. He acted for more than 6 months. The CBA provided if one acted for more than 3 months, he should be converted to a substantive job-holder.

17. The Witness told the Court he had worked in the Security Department for 7 years, and never worked in the Human Resources Department. His role is to investigate cases. He did not investigate anything about the Claimant. He was aware the Claimant was involved in an accident, and went back to work after

this. The General Manager did not sign his Leave Application Form. It was therefore, not approved. He was to report back on 3<sup>rd</sup> September 2013. Termination letter states he failed to report back on 3<sup>rd</sup> September 2013. Linen work was lighter than Front Office work. The Respondent has a medical cover for Employees. Munyambu did not know if the Claimant reported his accident and injury to the Clinical Officer. The Witness did not know if the Claimant was heard before termination. He testified on redirection that the role of Reservation Coordinator ceased to exist. No confirmation could be made to a redundant position. Employees are covered when injured in the course of duty.

### **The Court Finds:-**

18. The Claimant was employed by the Respondent Hotel as a Reservation Clerk, on 26<sup>th</sup> November 2012. He had worked for the Respondent from 1<sup>st</sup> October 2011 on contract. From 1<sup>st</sup> August 2012, he was appointed to act in the position of Reservation Coordinator. He acted in this position until 21<sup>st</sup> January 2013, when he was advised the position had become redundant, and he would revert to the position of Front Office Reservation Clerk.

19. There are medical records showing he was involved in a road traffic accident on 26<sup>th</sup> April 2013, admitted at Jocham Hospital on the same date, and discharged on 28<sup>th</sup> April 2013. After discharge, there is evidence he went back to work, and was placed on compassionate leave, and on other occasion, advised to utilize his accumulated off –duty days, in what he characterized as compulsory leave.

20. On 19<sup>th</sup> August 2013, the Claimant was transferred from Front Office to House-keeping department to do laundry. He appears to have disagreed with the Respondent, on the nature of linen work, arguing his hand was still in a sling. He would not be able to do linen work. On the advice of the Respondent, he was granted another 14 days of compassionate leave, beginning 19<sup>th</sup> August 2013, ending 3<sup>rd</sup> September 2013. The Leave Application Form is signed by the Head of Department and the Human Resources Manager. The Claimant was recalled before 3<sup>rd</sup> September 2013, ostensibly on the allegation that he had taken leave without authorization of his Employer, and therefore deemed to have absconded. His contract was terminated on 9<sup>th</sup> September 2013 on the ground that the Claimant failed to report to work. His consolidated monthly salary at time was Kshs. 25,000.

21. The Court does not agree with the Respondent that the Claimant was away without the leave of the Respondent. The Leave Application Form was filled by the Claimant on the advice of the Respondent. He was supposed to have a compassionate break, and think over the lateral transfer, imposed on him by the Respondent to the linen section. He felt that linen work was physically more of a challenge, than front office work. The Respondent advised him to take leave. The Form was signed by the Head of Department and the Human Resources Manager among others. The Court is not persuaded that approval would only be complete, upon the General Manager signing the Form. It was not logical for the Head of Department and Human Resources Manager to advise the Claimant to take compassionate leave, sign the Leave Application Form, and recall the Claimant after he had proceeded on leave based on their advice and authorization. The Court was not shown past Leave Application Forms signed by the General Manager, to confirm that without his signature, there was no approval. Once the Claimant's Line Manager signed, and advised him to take leave, the signature of the General Manager remained an issue only, between the Line Manager and the General Manager, the Court would think.

22. The Respondent was always aware the Claimant had suffered injury as a result of the road traffic accident. Rather than seek to reasonably accommodate him, the Respondent searched for grounds to justify terminating his contract of employment. Given the frequent leaves the Claimant was subjected to after the accident, it would seem the Respondent was not comfortable retaining him in employment. The Court was not made to understand why it was necessary in the first place, to remove the Claimant from the front office, where he had always served. His feeling was that front offices work was lighter than linen work, having regard to his injury. If he could fit at the front office with his injury, why transfer him to more arduous linen department, and generate a dispute leading to termination? Whereas the Respondent has the prerogative to manage its business and assign Employees duties, the Respondent did not exercise its prerogative reasonably considering the Claimant's injury.

23. There is no doubt the Respondent was aware the Claimant was injured and hospitalized. Top Management Officers even visited the Claimant while he was hospitalized. They may have promised to reimburse him the costs of treatment, but is this promise if indeed there was a promise, grounded on the contract?

24. Clause 10 of the contract states the Respondent caters for Employee's minor ailments and injuries at the workplace, at its Clinic, free of charge. In cases of treatment outside the workplace, the Respondent would only provide transport, but all charges arising from such treatment, would be met by the Employee.

25. The Claimant exhibited an incomplete copy of the CBA concluded between Hoteliers' Association and KUDHEIHA. There is no clause pointed out to the Court under the CBA on record, compelling the Respondent to meet the Claimant's costs of treatment, of injuries occasioned through an accident unrelated to the workplace. The Claimant submitted that clause 15 of the CBA required all his medical expenses are met by the Respondent, provided he notified the Respondent within 48 hours that he had been admitted to hospital. The CBA availed to the Court by the Claimant has only 2 clauses- 17 and 18. If the Claimant intended the Court to consider clause 15, the clause ought to have been included in the CBA filed in Court by the Claimant.

26. Section 34 of the Employment Act does not create an obligation on Employers to provide medical attention to Employees, beyond ensuring the Employees have access to Health Schemes such as the National Hospital Insurance Fund. Claimant's pays slip shows he was registered with the N.H.I.F and monthly remittances made on his account regularly.

27. The Court does not think that the prayer for reimbursement of medical expenses, incurred through an accident which was unrelated to the workplace, is merited. There is a clause in the contract signed between the Parties, restricting Respondent's involvement to offering transport to the Claimant to attend hospital. Medical costs were to be met by the Claimant. The law does not compel Employers to meet the costs of Employees' medical bills. The CBA clause submitted to create an obligation on the part of the Respondent, in meeting Claimant's medical bills, was not placed before the Court. This item is rejected.

28. The Claimant worked in an acting capacity, as a Reservation Coordinator from August 2012 to January 2013. He acted for 6 months. The CBA in place states under clause 17, that an Employee would act for a maximum of 3 months. Beyond this, it would require the Employee is confirmed in the substantive position.

29. The Court agrees with the Claimant that he should have been confirmed in the role of Reservation Coordinator after 3 months. As the Respondent did not, and declared the position redundant after the Claimant had served for 6 months, it is reasonable for the Claimant to demand payment of the sum he would have earned as a substantive Reservation Coordinator, less the acting allowance paid. He has in his Closing Submissions corrected this prayer to read Kshs. 27,731, instead of Kshs. 83,194. ***The balance of full salary as Reservation Coordinator is granted at Kshs. 27,731.***

30. Termination as suggested above was not based on valid ground. There is no evidence that the Claimant was charged with any employment offence. He was not heard on any offence as required under Section 41 of the Employment Act 2007. Termination failed on validity of reason and fairness of procedure, under Sections 41, 43 and 45 of the Employment Act 2007. ***The Claimant is granted the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 300,000.***

31. ***He is allowed the prayer for 1 month salary in lieu of notice under clause 17 of his contract and Section 36 of the Employment Act, at Kshs. 25,000.***

32. ***Costs to the Claimant.***

33. ***Interest granted at the rate of 14% per annum from the date of Judgment till payment in full.***

IN SUM, IT IS ORDERED:-

***a) Termination was unfair.***

***b) The Respondent shall pay to the Claimant: balance of salary at Kshs. 27,731; equivalent of 12 months' salary in compensation for unfair termination at Kshs. 300,000; and 1 month salary in lieu of notice at Kshs. 25,000 - total Kshs. 352,731.***

***c) Costs to the Claimant.***

***d) Interest granted at 14% per annum from the date of Judgment till payment is made in full.***

Dated and delivered at Mombasa this 30<sup>th</sup> day of June 2017

**James Rika**

**Judge**