



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NUMBER 718 OF 2015
BETWEEN
RICKY MWATSUMA DECHE.....CLAIMANT
VERSUS
LEOPARD BEACH RESORT & SPA.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Claimant in Person

Mburu Kariuki & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 21st September 2015. He states he was employed by the Respondent Hotel as a Front Office Cashier. He worked under various periodic contracts, beginning 15th January 2011 to 29th April 2014. He would continue working without a written contract upon expiry of a particular fixed- term contract. He worked the last 15 months, from around 20th March 2013 to 29th April 2014, without a written contract. He was asked to leave the Hotel abruptly on 29th April 2014. He was advised the Hotel would be undergoing renovation. He would be recalled at a later date. He waited for 4 months without a call. He made enquiry and was told by the Respondent his services were no longer needed due to low business at the Hotel. As of the date he left employment, he earned a consolidated salary of Kshs. 27,027. His contract was governed by the CBA in place between KUDHEIHA and the Hoteliers' Association. He feels termination was unfair and prays for Judgment against the Respondent for:-

- a. Equivalent of 12 months' salary in compensation for unfair termination at Kshs. 324,324.
- b. 1 month salary in lieu of notice at Kshs. 27,027.
- c. Unpaid salary for May-November 2014 at Kshs. 162,162.
- d. Annual leave of 3 years at Kshs. 81,081.

- e. Leave travelling allowance at Kshs. 20,270.
- f. Compensation for footwear for 40 months, at Kshs. 20,000.
- g. Service/ Redundancy pay at Kshs. 81,081.
- h. Overtime of 4 months at Kshs. 216,216
- Total Kshs. 932,161

i. Costs and interest.

2. The Respondent filed its Statement of Response on 6th October 2016. It concedes to have employed the Claimant on temporary/ seasonal contracts over the period stated in the Claim. His employment depended on the flow of business at the Hotel. He was informed his position was rendered redundant due to low business. Termination was fair. The Claimant is an opportunist who seeks to benefit unfairly from the hotel industry. The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant testified on 10th October 2016 and on 16th December 2016, when he closed his case. Resident Manager Leopard Beach, Francis Marube, gave evidence on 8th February 2017 when hearing closed. The matter was last mentioned in Court on 15th March 2017, when Parties confirmed the filing of their Closing Submissions and Judgment scheduled for delivery.

4. The Claimant and Marube basically repeated what is contained in Parties' Pleadings and Documents.

5. The Claimant explained on cross-examination that the governing CBA required an Employee who worked for more than 12 months, is converted to regular employment. He worked for 3 ½ years. He agreed that in April 2014 the Hotel was being renovated and there were no guests. It was to reopen in June 2014. The Claimant was to be notified and recalled, on reopening. This did not happen. He was working for Swahili Beach between May and November 2014. As of the date he gave evidence, he worked for another Hotel in Nairobi.

6. Marube confirmed the Claimant worked on temporary/ seasonal contracts. The Claimant left in March 2014. There was no more work at the Hotel. Marube issued him with a letter of service. He computed Claimant's terminal dues which the Claimant did not collect. Marube was hesitant in issuing the Claimant with the service letter, because he expected to recall the Claimant when business recovered.

The Court Finds:-

7. It is not contested that the Claimant was employed by the Respondent as Front Office Cashier. He worked under seasonal/ temporary contracts for 3 ½ years. His consolidated monthly salary of Kshs. 27,027, as of the last date worked is not disputed. It is also agreed he left work on 29th April 2014.

8. There are certain prayers which are clearly without justification. The prayer for overtime pay, at Kshs. 216,216 is not supported by the evidence given by the Claimant. He told the Court that the clocking system at the Hotel would show he worked overtime. He did not make that system available to the Court. He does not say when he worked overtime, or how many hours he worked in excess. He gives no mode of computation of overtime pay, resulting in the sum claimed. The prayer is declined.

9. He prays for compensation for footwear at Kshs. 20,000. He did not draw the attention of the Court to any clause in his seasonal/ temporary contracts or the CBA, granting him footwear. Clause 16 of the KUDHEIHA CBA cited by the Claimant, states shoes would be provided by the Respondent as, and when necessary. The provision depended on the nature of work to be performed. The Claimant did not show the Court in what way he would require specific footwear, to discharge the role of a Front Office Cashier. He did not in any case, show the Court how he arrived at the amount of Kshs. 20,270 as compensation for

non-provision of the item. The prayer is rejected.

10. The Hotel would close occasionally for renovation every year. At one time it was closed after being gutted down by fire. This evidence is common to both Parties. There are Leave Application Forms too, showing the Claimant variously applied for, and was granted annual leave, notwithstanding that he, alongside other staff did not work when the Hotel was closed. The prayers for annual leave pay and leave travelling allowance, seen against this background have no merit and are declined.

11. Most unmerited in the entire Claim, is the prayer for unpaid salary for the period May- November 2014. The Claimant believes his contract was terminated on redundancy at the end of April 2014. Why would he expect a salary in May 2014? He admitted he went to work for Swahili Beach from May 2014. He was still earning his monthly bacon from Swahili Beach in November 2014. Why would he expect salary from the Respondent while he was working for a competitor in the industry? This prayer is illogical and is declined.

12. Paragraph 5 of the Statement of Response indicates the Claimant was informed his contract been terminated on account of redundancy. The Respondent ought to have invoked Section 40 of the Employment Act 2007, rather than ask the Claimant to go home in the hope of a recall in the future, when business improved. The law of redundancy was not followed at all, with the result that termination was unfair, under Section 40, 43 and 45 of the Employment Act 2007.

13. It is not doubtful that as of April 2014, the Claimant merited treatment of a regular Employee under the CBA, and Section 37 of the Employment Act 2007. Clause 19 of the CBA states the Hotel could employ an Employee on seasonal contract for a period to be specifically advised to the Employee. Such period would not exceed a year. Read with Section 37 of the Employment Act 2007, it is the view of the Court that the Claimant had worked in aggregate, for a period warranting him to be treated as a regular Employee, with access to all benefits, guarantees and protections available to regular Employees under the Employment Act 2007. He is in order to ask the Court to consider him a regular Employee.

14. Section 40 of the Employment Act 2007 justifies his prayer for severance pay, which he pleads as redundancy/service pay. The rate of severance pay under clause 11 of the CBA is given at 16 days' wages for every complete year of service. ***The Court allows the Claimant severance pay at this rate, based on 3 complete years of service, at Kshs 27,027 divide by 26 working days = Kshs. 1,039 daily x 16 days x 3 years = Kshs. 49,896.***

15. The Respondent's submission that the Claimant was not clear whether his Claim is on unfair termination, or unlawful redundancy, is way of the mark. If redundancy does not confirm to the procedure set out under Section 40 of the Employment Act; if redundancy is not a genuine reason for termination under Section 43 and Section 45 of the Employment Act; and if the process which essentially is a termination process, is not underpinned by the principles of fairness and natural justice under the Employment Act 2007, the result is that redundancy amounts to unfair termination, for which compensation is one of the remedies.

16. The Claimant's contract as suggested above was unfairly terminated. Whereas the Respondent was faced with a genuine economic problem justifying redundancy, the Respondent totally ignored the law on redundancy, as set out under the Employment Act and the CBA regulating the Parties. ***The Claimant is granted the equivalent of 12 months' consolidated salary in compensation for unfair termination at Kshs. 324,324.***

17. Clause 11 [4] [a] of the CBA states an Employee with less than 5 years' experience, would receive 2 months' notice of termination on account of redundancy, or 2 months' salary in lieu of notice. ***The Claimant is granted 2 months' salary in lieu of notice at Kshs. 54,054.***

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

19. No order on the costs.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b)The Respondent shall pay to the Claimant: severance pay at Kshs. 49,896; the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 324,324; 2 months' salary in lieu of notice at Kshs. 54,054- total Kshs. 424,274.

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

d) No order on the costs.

Dated and delivered at Mombasa this 29th day of June 2017

James Rika

Judge