



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 330 OF 2015

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS [KUDHEIHA] CLAIMANT

VERSUS

DIANI REEF RESORT & SPARESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Hezron Onuong'a Industrial Relations Officer for the Claimant

Aziz & Associates, Advocates for the Respondent

JUDGMENT

1. This dispute revolves around non-payment of service gratuity by the Respondent, to 11 of its former Employees, who left employment on 30th November 2014, through a redundancy process. The 11 Employees [Grievants] are:-

I. Mejumaa Kamoleh

II. Mbaru Mtsonga Mwakunje

III. Doreen Mueni

IV. Noela Mwaka

V. Charles Rafiki Charo

VI. Dima Kafahamu

VII. Samuel Muli

VIII. Rosina Wambua

IX. Hussein Salim

X. Samuel Ouma

XI. Hussein Lumasia

2. The 11 were employed in various departments including food production, front office, and house-keeping. Others served as supervisors, room stewards and waiters.

3. The Claimant's position is that the Respondent is a member of the Hoteliers' Association, which has concluded CBA with the Union.

4. The Claimant holds Employees were entitled under clause 27 [b] of the CBA, to termination gratuity. The Clause states that where an Employee terminates, or is terminated [more appropriately where his/ her contract is terminated], there will be a long service gratuity paid under the categories set under the provision.

5. The Respondent's position is that it paid all the Employees severance pay, under clause 11 of the CBA. Clause 27[b] deals with termination gratuity, and there is no correlation between the 2 clauses. Therein is the kernel of the dispute.

6. The Claim was filed on 20th May 2015. The Response was filed on 15th June 2015. The Claimant seeks an order against the Respondent for payment of Grievants' rightful service gratuity; costs; and interest. The Respondent prays for dismissal of the Claim with costs to the Respondent.

7. Parties agreed to have the dispute determined on the strength of the record.

The Court Finds:-

8. Although the Claimant variously gives the number of the affected Employees as 11 or 13, the ones whose names are given, number 11. The Court shall proceed on the understanding that there are 11 Grievants.

9. It is common ground the 11 left employment on 30th November 2014, upon their positions being declared redundant by the Respondent.

10. The Parties were governed by a CBA concluded between the Hoteliers' Association, to which the Respondent is a member, and the Claimant Union representing the Grievants.

11. The Claimant holds the Grievants should have received severance pay under clause 11 which deals with redundancy, as well as receive termination gratuity, based on the number of years served, under clause 27[b] of the CBA. The Respondent holds severance paid under clause 11 was the totality of the Grievants' terminal benefits, and the 2 clauses are mutually exclusive.

12. Clause 11 under the CBA is titled 'redundancy' and adopts the statutory standards contained in Section 40 of the Employment Act 2007. The Employer is required to pay to the Employee 16 days' wages, for each completed year of service. Where the Employee has not completed a year in service, severance is paid on pro-rata basis.

13. Clause 27 is titled 'termination gratuity.' The clause as discussed above, applies where an Employee terminates, or his contract is terminated. Termination gratuity is payable for voluntary, as well as involuntary termination. Redundancy is involuntary termination, and on the face of it, would seem to the Court covered under both clauses.

14. It is first to be noted that neither the severance clause, nor the termination gratuity clause, is expressed to be mutually exclusive of the other. Second, in its notice of redundancy to the Union dated 31st August 2014, the Respondent offered both severance pay, and gratuity where applicable. The Respondent did not endeavour to show when gratuity was or was not applicable. If it was not applicable, it should not have been mentioned at all in the notice of redundancy. Third, the Employment Act 2007 binds Parties to apply statutory standards, which are, expressed under Section 26 of the Employment Act, as minimum conditions of employment. The term used is basic minimum, which the Court thinks is an overkill, because something basic, is minimum.

15. Under Section 26 (2) of the Employment Act 2007, where the terms and conditions of employment are regulated by any regulations, as agreed in any Collective Bargaining Agreement or any contract between the Parties, or enacted by any other written law, decreed by any judgment, award or order of the Industrial Court are more favourable than the terms provided under Part V on Rights and Duties in Employment, then such favourable terms and conditions shall apply.

16. Parties to CBAs and individual contracts frequently improve on the minimum provisions of the law, and grant better terms and conditions of employment. Regulations applicable to terms and conditions of service in various industries, expressed through wage orders, frequently also supplement the bare provisions of the law. The law may give 1 month salary in lieu of notice, 21 days of paid annual leave etc. while wage orders give 2 months' salary in lieu of notice or 27 days' of paid annual leave. The Parties may go beyond Section 35 [6] of the Employment Act which makes ineligible for service pay, Employees who are subscribed to the N.S.S.F, by granting such Employees service pay regardless of membership.

17. The Court's view is that Clauses 11 and 27 [b] of the Parties' CBA were not mutually exclusive. Payment of severance pay did not discharge the Respondent from its obligation to the Grievants, under clause 27[b]. The Parties adopted in their CBA, standards higher than given in the Employment Act 2007.

IT IS ORDERED: -

a) The Respondent shall pay to the Grievants termination gratuity under clause 27 [b] of the prevailing CBA.

b) Interest granted on the above at the rate of 14% per annum from 30th November 2014.

c) No order on the costs.

Dated and delivered at Mombasa this 16th day of June 2017

James Rika

Judge