



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 13 OF 2015**

**STEPHEN KILONZO MWANGANGI .....CLAIMANT**

**VERSUS**

**LEOPARD BEACH RESORT .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for terminal benefits accruing from the contract of employment between the parties herein which was terminated by the claimant on 27/12/2013. The total claim is for ksh.486615 but the respondent has denied liability and averred that she has already paid the claimant all his rightful dues as provided by the Collective Bargaining Agreement (CBA). The only issue for determination is therefore whether the claimant is entitled to the reliefs sought.

2. On 25/7/2016, the parties agreed to dispense with the hearing and instead adopted their respective pleadings, documentary evidence and written witness statement and disposed the suit by written submissions.

**CLAIMANT'S CASE**

3. The claimant stated that he was employed by the respondent as a gardener in 2001 on casual basis and after 4 years he was transferred to the Kitchen Department as a cleaner. Later he was promoted to kitchen steward where he worked until he voluntarily resigned by notice dated 28/9/2013 which took effect on 27/12/2013. Thereafter the respondent declined to pay his terminal dues even with the intervention by the Trade Union.

4. The claimant has however produced his own letters dated 20/1/2014 and 12/2/2014 addressed to the respondent acknowledging receipt of unspecified amount of "final dues" according to the respondent's calculation which he disputed and demanded more. According to the claimant the length of service was 14 years and the applicable salary was ksh.10687 plus house allowance of ksh.5998.

**DEFENCE CASE**

5. The respondent's Resident Manager Mr. Francis Mavube filed his written statement on behalf of the defence on 20/11/2016. He stated that the claimant was employed by the respondent on 1/7/2004 as a kitchen cleaner and voluntarily resigned on or about 28/9/2013. He further contended that after the resignation the claimant was paid all his dues and as such he is not entitled to any further payment as

claimed herein. The respondent calculated the terminal dues at ksh.136,126 gross based on a service duration of 11 years 9 months and basic salary of ksh.9709 plus house allowance of ksh.5910.

### ANALYSIS AND DETERMINATION

6. There is no dispute in the fact that the claimant was employed by the respondent from 1/7/2001 to 27/12/2013 when his resignation took effect. There is also no dispute that the respondent paid terminal dues to the claimant after the resignation but the net amount paid to the claimant was not disclosed to the court either through pleadings, evidence or submissions. I will therefore proceed to answer the question whether the claimant is entitled to payment of the dues sought herein.

#### **Dues sought**

7. The claimant seeks the following dues for 13 years worked:

(a) House allowance at 1,737,00 per month from 2001 to 2003.....	62,000.00
(b) Leave allowance at 9,709.....	29,127.00
(c) travelling allowance at 4,400 per year .....	13,200.00
(d) Shoe allowance at 6,000 per year.....	60,000.00
(e) Unpaid salary for 6 years during Renovation .....	58,254.00
(f) Service charge.....	
(g) Gratuity at 9,709 at the rate of 15daysX13 years .....	252,434.00
(h) NSSF deductions not remitted 29x400.....	<u>11,600.00</u>
	<u>486,615.00</u>

8. The respondent calculated terminal dues for 11 years 6 months worked

(a) Leave on prorate 13 days .....	12036
(b) Leave travelling allowance 5 months.....	1750
(c) Gratuity ½ basic salary & house allowance.....	85904
(d) Pending off day (5) double rate .....	5140
(e) Public holidays 2 double rate .....	2016
(f) One month leave .....	9709
(g) Leave travelling allowance.....	4400
(h) Uniform(shoes) December 2012 – December 2013 @ 500 .....	6000
(i) Arrears of salary increment of ksh51 per day from July 2013 – December 2013 (179 days).....	9129

Total .....136126

Less PAYE, NSSF & NHIF

9. In view of my earlier observation herein above, the sum paid to the claimant after resignation and before filing of this suit has not been disclosed to the court. It is therefore not possible for this court to tell what item in the claimants claim was paid or not. There is therefore the risk of the court awarding him what he has already received and thereby give him an unfair enrichment. On the other hand awarding the amounts sought without clear particulars and evidence of what was paid and what was not paid. The court is likely to condemn the respondent unfairly to pay again what she has already paid to the claimant and thereby occasion on her double jeopardy.

### **Gratuity**

10. However, after a careful consideration of the written submissions filed, it is clear that both parties are in agreement that the amount of salary used to calculate gratuity was erroneous and ought to be ksh.9709 plus house allowance of ksh.5910. The claimant is however wrong for missing on 13 as total years of service from 1999. Parties are bound by their pleadings and in this case the claimant has pleaded July 2001 as the time when he commenced employment at the respondent's hotel as a gardener. I therefore upheld the respondent's recalculation of gratuity in her submissions being  $12 \text{ years} \times \frac{1}{2} (9709+5910)=\text{ksh.93,714}$ . Assuming that the claimant was paid ksh.85904 indicated in the calculations disputed by the claimant when the underpayment of his gratuity was  $\text{ksh.98714}-\text{ksh.85904}=\text{ksh.7810}$ .

### **House, leave and travelling allowance for 2001-2003**

11. The respondent has submitted that from 2001-2003 the claimant was paid a daily wage which included house allowance. That was not contested by the claimant and I agree with the defence that a daily wage under the law includes house allowance. I therefore dismiss the claim for house allowance for the said period which in event is time barred under Section 90 of the Act.

12. The claim for leave outstanding for the same period has been calculated by the defence as 13 days equaling to ksh.12038 which was paid as part of the ksh.136126 calculated by the respondent after the resignation.

13. The claim for leave travelling allowance is not disputed. The respondent has submitted that the claimant was entitled to ksh. 4400 per year. I therefore grant him  $\text{ksh.4400} \times 3 = \text{ksh.13200}$  as prayed less ksh.1750 paid after resignation being ksh.11450.

### **Shoes allowance**

14. The claimant claims for shoes allowance for 10 years he worked in the kitchen department at the rate of ksh.500 per month. The respondent admits that the claimant was entitled to the said shoes allowance but only for 12 months between 2012 and December 2013 being ksh.600 as per the calculation done after resignation and the defence submissions. There is however no evidence that the allowance was paid to him during the 9 years before December 2012. The said claim is not time barred since it was a continuing breach/injury under Section 90 of the Employment Act. I therefore grant the claimant 9 years shoes allowance being  $\text{ksh.500} \times 9 \times 12 = \text{ksh.54000}$ .

### **Unpaid salary for 6 months**

15. The claim is dismissed because the period when it accrued is not pleaded. My reading of the claimant's submissions on that item suggests that the claim accrued between 2001-2003. That obviously is term barred claim under Section 90 aforesaid. I therefore disallow the same.

### **Service charge**

16. The amount claimed under this heading was not pleaded and no particulars and evidence were availed to the court. I therefore dismiss it.

**Unremitted NSSF dedications**

17. The claimant claims refund of ksh.11600 being NSSF contributions deducted from his salary which were never remitted to the fund. No evidence in the form of NSSF statement or otherwise from the Fund was adduced to support the allegation that the said deductions were never remitted as required by the law. The order for refund is therefore declined.

DISPOSITION

18. For the reason that the gross amount paid to the claimant as terminal was underpaid, I enter judgment only for him in the sum of ksh.73260 plus half costs. The said sum shall be subject to PAYE only because NSSF and NHIF do not apply.

Dated signed and delivered this 28<sup>th</sup> July 2017

**O. N. Makau**

**Judge**