



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 334 OF 2015

BETWEEN

IRASTO OCHIENG OPIYO.....CLAIMANT

VERSUS

SEVERIN SEA LODGE.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Odhiambo S.E. & Company Advocates for the Claimant

Sichangi & Partners, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 21st May 2015. He states he was employed by the Respondent between 1st November 2005 and 21st March 2013. He was suspended for 1 week on the latter date, and upon return, was told to go home he would be recalled later. He was not recalled. He considered his contract unfairly terminated. He prays for Judgment against the Respondent the following terms:-

- a) 1 month salary in lieu of notice at Kshs. 12,350.
- b) Service pay at Kshs. 55,000.
- c) Annual leave pay at Kshs. 85,450.
- d) Unpaid overtime at Kshs. 500,175.
- e) Service charged but not paid.
- f) Damages for unlawful termination at Kshs. 148,200.

Total...Kshs. 1,557, 750.

g) A declaration that termination was unlawful and unfair.

h) Costs.

i) Interest.

2. The Respondent filed its Statement of Reply on 9th September 2015. Its position is that it employed the Claimant on various seasonal contracts beginning 1st November 2005. While not on seasonal contracts, he was engaged as a Casual Employee. These contracts were separate and distinctive. He left in April 2013 on his own volition, without notice to the Respondent. He earned a daily rate of Kshs. 250 on employment, and Kshs. 415 as of the time he left. He is not entitled to the prayers sought. The Respondent prays for dismissal of the Claim with costs to the Respondent.

3. The Claimant gave evidence and closed his case, on the 19th October 2015. He told the Court he was employed on different seasonal contracts. While not working under such contracts, he was placed on casual terms. He was initially a Cleaner, and was later promoted to a Barman. He worked up to May 2014. He was paid salary for May 2014, at Kshs. 12,350. He was called by the Respondent sometime in May 2014, and informed he had been sacked. He was asked to return the work uniform and badge. He was a Glass Washer/ Assistant Barman by the time he left.

4. He was allowed off duty days, but never annual leave. At most he would be allowed 7 days off. He was allowed to rest mostly on Sundays. He worked for almost 9 years. He worked 3 to 4 excess hours daily. He was not compensated. He prays for overtime over a period of 9 years. He was not issued with notice of termination or pay in lieu thereof. Service charge was paid at Kshs. 7,000 per month. He claims service charge over a period of 9 years. He prays for compensation. He was issued a Certificate of Service on 19th March 2014. It confirms he worked from 2005. It is not true that he was paid all his terminal dues.

5. On cross-examination, the Claimant told the Court he did not sign any letter in 2013. He would get off duty of 7 days. He does not have any claim on N.S.S.F. His dues were remitted. Overtime work was done with the approval of the Heads of Departments. An Employee did not have to report he had worked overtime. As casual, he did not pay trade union dues. He did not work 30 continuous days while casual. He was paid a total of Kshs. 13,399 in terminal dues. He did not have termination letter in Court. He was not recalled to work. He did not decline to go back to work. Redirected, the Claimant told the Court he did not keep records on overtime; the Respondent did.

6. The Respondent testified through its Senior Personnel Clerk, Mwandonga Yawa Chome on 9th September 2016 and 27th March 2017 when Respondent's case rested. He testified that the Claimant was employed by the Respondent as Casual Employee, in 2005. He was given various seasonal contracts. While not on seasonal contracts, he worked on casual terms.

7. He earned service charge while on seasonal contracts, but not while on casual terms. The terms of engagement were dictated to by business environment. The Respondent did not terminate his contract of employment; the Claimant vanished in 2013, as he had done in 2008. The Respondent enquired about Claimant's whereabouts from Claimant's workmates. His pay slip of April 2006 shows he received service charge of Kshs. 4,815. The item was regulated under clause 21 of the applicable service charge. He went on leave as shown in Leave Passes exhibited by the Respondent. He was paid all his annual leave dues. He acknowledged payment.

8. Chome testified on cross-examination that the Claimant was not in employment in January 2008 to May 2009. The Claimant did not tender resignation. Chome was only able to produce the attendance register from 2011 to 2013. On 2nd March 2013, the register indicated the Claimant was at work. He worked for 248 days from August 2011 to March 2013. Leave passes show the Claimant took his annual leave. He left the whole of the year 2008. The Respondent did not have register for this year. Terminal dues were made based on the CBA. A copy of the CBA in Court is unsigned.

The Court Finds: -

9. The Certificate of Service dated 19th March 2014, issued to the Claimant by Andrew Muir, Respondent's General Manager, confirms the Claimant was employed by the Respondent Hotel as a General Cleaner/ Glass Washer, from 1st November 2005 to 21st March 2013.

10. There is nothing to show, from this Certificate that there was break in service in the whole of the year 2008. The Respondent did not supply the Court with the attendance register for the year 2008 as ordered by the Court.

11. The Court must also reject the Claimant's evidence that he worked up to May 2014. The date contained in the Certificate of Service is supported by the Claimant's demand letter dated 24th March 2014, and his Statement of Claim at paragraph 3.

12. He worked for about 8 ½ years.

13. The aggregate period worked, whether under seasonal contracts or casual terms, qualified him to be considered a regular Employee of the Respondent under Section 37 of the Employment Act 2007.

14. He did not prove that he worked excess hours over the period served, amounting to Kshs. 500,175. The item is unsustainable.

15. Similarly the Court has not been persuaded that he is owed service charge of Kshs. 756,000. He did not justify the item under the CBA he states was applicable to him. His Advocate faulted a copy of the CBA filed by the Respondent in Court, while cross-examining Respondent's Witness, for not being signed. The Respondent was able to persuade the Court that service charge was payable when the Claimant was on seasonal contracts, but unavailable while on casual terms. He claims for service pay over a period of 9 years. He worked for about 8 ½ years. He was paid service charge in April 2006 at Kshs. 4,815, as shown in the pay slip, which he did not account for in his Claim. The prayer is not well founded in evidence.

16. The Respondent states that the Claimant left employment in April 2013 without notice. He had similarly disappeared in 2008. The Claimant states he was called by his boss Joseph, and told he had been sacked. He was asked to return the work uniform and badge. He appears to confuse the year when he left to be 2014, instead of 2013.

17. Weighing the evidence of the Claimant against that of the Respondent on the circumstances of separation, the Court is inclined to believe the evidence of the Claimant. It is not likely that the Claimant just walked away. His version of the circumstances of separation is more detailed than that of the Respondent. The Respondent in particular did not satisfy the Court on steps taken to trace the Claimant. It was told to the Court that unnamed Colleagues of the Claimant were approached by the Respondent and asked about his whereabouts. No formal communication is shown to have been made to the Claimant.

18. Termination was instigated by the Respondent who proceeded to tabulate terminal dues at Kshs. 13,399. There was no justification for the decision. Procedural protections available to the Claimant under the Employment Act 2007 were not honoured.

19. ***He is granted the equivalent of 8 ½ months' salary in compensation for unfair termination at Kshs. 104,495.***

20. ***He is allowed the prayer for notice pay at Kshs. 12,350.***

21. The Claimant confirmed on cross-examination that the Respondent paid N.S.S.F contributions on his account. He stated he did not have any claim with regard to this. The prayer for service pay is not sustainable under Section 35 [6] of the Employment Act.

22. There are Leave Passes exhibited by the Respondent indicating the Claimant took annual leave on certain occasions. He did not account for annual leave days shown in these Leave Passes, in his claim. He was off- duty for a considerable number of days, going by the partial attendance report filed by the Respondent. When he served on casual terms, he was not compelled to work every day and seems to have rested on another considerable number of days. There is no good reason to grant annual leave pay as prayed.

23. There shall be no order on the costs.

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

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant, the equivalent of 8 ½ months' salary in compensation for unfair termination at Kshs. 104,495; and notice pay at Kshs. 12,350- total Kshs. 116,845.

c) No order on the costs.

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

Dated and delivered at Mombasa this 23rd day of October 2017.

James Rika

Judge