



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 767 OF 2015**

**DANIEL OMOSA MACHUKI.....CLAIMANT**

**VERSUS**

**SALAMA BEACH HOTEL LIMITED .....RESPONDENT**

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

**IINTRODUCTION**

1. The claimant was employed by the respondent on 13/10/2010 as a Deputy Security officer earning ksh 20000 basic pay plus house allowance. He served three months probation till 31/12/2010 but by letter dated 12/4/2011, he demoted to the position of Patroller in the security department on account of poor performance. His gross salary was reduced to ksh.18000 per month. He appealed against the said demotion but in vain. Instead he was deployed to the maintenance department on 20/9/2011 to serve as a Mason/Helper but the other terms and condition of service remained unchanged. However his salary was increased progressively through negotiated Collective bargaining Agreement (CBAs) to ksh.16376 basic pay plus ksh.5404 house allowance.

2. On 28/7/2014 he was served with a redundancy notice which was effective 1/9/2014. However on 1/9/2014, he was served with a fresh redundancy notice for two months which was to take effect on 31/10/2014. Thereafter the respondent offered ksh.90000 to the claimant as his terminal dues, but he declined and demanded more based on the salary he would have been earning as Deputy Security officer. He also demanded for arrears of his salary for the position of Deputy Security officer contending that his demotion and subsequent deployment to the maintenance department was unlawful and unfair. He has therefore brought this suit claiming ks.71618 severance pay plus ksh.266,406.40 as accrued salary arrears.

3. The respondent has admitted she employed, demoted and deployed and laid off the claimant as pleaded in his claim but denies that he is entitled to the ksh.438,024.4 sought as severance pay and accrued salary arrears. She however prayed that the claimant be ordered to collect ksh.90000 in full settlement of his redundancy dues which he has refused to collect.

4. The suit came up for pretrial conference on 30/1/2017 when the parties agreed that the termination of employment on account of redundancy was not in dispute and framed following issues for determination by the court.

(a) Whether the claimant is entitled to severance pay.

(b) Whether the claimant is entitled to accrued salary arrears.

In addition, the parties agreed to dispense with all evidence and instead adopted their respective written witness statements and documentary evidence as their testimonies and exhibits respectively. Finally they agreed to file written submissions to dispose the suit.

### ANALYSIS AND DETERMINATION

5. I have carefully perused the witness statements and the exhibits filed by both parties and summarized them in my introductory remarks herein above. I will therefore not reproduce them here but only refer to relevant parts thereof as I endeavor to answer the two questions which I was invited by the parties to determine.

#### **Whether the claimant is entitled to severance pay**

6. The answer is an outright yes. The parties have agreed that the claimant was terminated on account of redundancy under Section 40 of the Employment Act and clause 11(IV) and (V) of the CBA which was the contract documents binding the parties herein. Section 40(1) (e) (f) and (g) of the Act outlines in mandatory terms the benefits due to an employee who is terminated on account of redundancy thus:

*“ (e) the employer has, where leave is due to an employee who is declared redundant, paid of the leave in cash.*

*(f) The employer has paid an employee declared redundant not less than one month’s wages in lieu of notice.*

*(g) the employer has paid an employee declared redundant severance pay at the rate of not less than 15 days pay for each completed year of service”.*

7. On the other hand clause II(IV) and (IV) of the CBAS provides that:

*“the redundant employee(s) will be entitled to the following periods of notice or pay in lieu of such notice or any other entitlement covered by the agreements as follows:*

*(a) An employee with less than 5 years continuous service...two months notice or pay in lieu...*

*(b) Severance pay shall be at the rate of sixteen days pay for each completed year of service. Where an employee has not completed a year of service, then he shall be paid severance pay on prorated basis”*

7. The minimum benefits provided by Section 40 of the Act to an employee declared redundant is therefore one months salary in lieu of notice, accrued leave and severance pay. Under Section 26 of the Act, such minimum benefits cannot be reduced but can be improved on by the parties or other legal provisions. Section 26(1) of the Act provides thus:

*“ (1) the provisions of this part and part VI shall constitute the basic minimum terms of contract of service”.*

8. Section 40 of the Act fall under part VI of the Act and therefore the minimum benefits thereunder cannot be compromised save for improvements as it has been done under clause II f the CBA. What must be appreciated however is that the giving of notice of redundancy does not take away the employees entitlement to salary in lieu of notice. In my view the redundancy notice only serves the purpose of declaration of an intention to terminate the contract. But because the termination is not normal termination in the exercise of freedom of contract but rather due to economic circumstances which cannot be attributed to the employee but the employer himself, the law requires that the employee be paid at least one month salary in addition to his accrued leave and severance pay. Such package is intended to cushion the employees for losing his employment for no fault on his part. It is in my view a tool of

balancing the economic interests and survival for both the employee who is forced to lose his employment for economic benefits of the employer.

9. Flowing from the foregoing, I would find and hold that the claimant is entitled to two months gross salary in lieu of notice and severance pay at the rate of 16 days pay per completed year of service under Clause II (iv) (a) and (v) of the CBA. The claimant has however only prayed severance pay and as such he will not get more than what he has prayed for in his pleadings.

10. The claimant has prayed for ksh.71718 as the severance pay due to him but he has not demonstrated how he arrived at the said sum either by evidence, pleadings or submissions. On the other hand, the respondent calculated the severance pay due to the claimant at ksh.40,310.54 using the rate of 16 days basic per year of service for the four completed years of service. She has however urged the court to compel the claimant to collect from her ksh. 90000 in full settlement of his redundancy dues without demonstrating at how she arrived at the ksh.90000.

11. Let me state that neither Section 40(1) (g) of the Act nor clause 11(v) of the CBA provides that severance pay shall be calculated based on the employees basic pay as submitted by the defence herein. Both the Act and the CBA provides that severance pay shall be calculated based on the employees “fifteen days pay and sixteen days pay” respectively. In my view the drafters of the law and the CBA intended that severance pay shall be based on the employee’s gross pay and not basic pay otherwise nothing was easier than specifically providing for basic pay if that is what was intended.

12. In this case therefore, it is my finding that the claimant is entitled to severance pay at the rate of his monthly gross pay less service charge which was a fluctuating benefits considering the payslip for September 2014, the claimants basic salary was ksh.16376 plus house allowance of ksh.4,404 totalling to ksh.21780. I therefore award the claimant as his rightful severance pay  $ksh.21780 \times 4 \text{ years} \times 16 \text{ days}/26 = 53,612.30$ .

### **Accrued Salary arrears**

13. The claimant contends that he was demoted, deployed and his salary reduced without following due process. According to him the employer breached the contract by changing the terms of his written contract without consulting him and without giving him any chance to defend himself. He therefore contends that he is entitled the lost portion of his salary in arrears from April 2011 till October 2014 when he was terminated. The respondent has opposed that the claim and contended that she acted fairly by not terminating the claimants services on ground of poor performance but instead she retrained him and gave him a less demanding position at the salary negotiated by his trade union. He therefore denied the claim for accrued salary.

14. After careful consideration of all the material presented to the court, I am in agreement with the claimant that it was unfair and unlawful for the respondents to demote him from the position of Deputy Security officer to the position of patroller and also to reduce his salary from ksh.25000 to ksh.18000 per month without consulting or according him a hearing. It was also unfair and unlawful for the respondent to deploy him from the security department to the maintenance department without consulting or according him any hearing. Such conduct amounted to condemnation without hearing and it was an affront to Section 10(5) of the Act which provides:

*“(5) where any matter stipulated in subsection (1) changes, the employer shall in consultation with the employee revise the contract to reflect the changes and notify the employee of the changes in writing”.*

15. Section 10(1) of the Act provides that a contract of service shall state the particulars of employment which include but not limited to the job description of the employment and the remuneration and the benefits. It has however to be appreciated that the said violation or breach was committed in April 2011 and September 2011 and the claimant acquiesced or condoned by not filing any suit to challenge it in time. Instead he brought this suit on 8/10/2015 after he was terminated on account of redundancy that

was more than four years after the said violation.

16. Under Section 90 of the Act, the said claim is time barred for being filed after the expiry of the limitation of 3 years and therefore the court lacks jurisdiction to entertain it. Section 90 of the Act bars anyone from filing suit founded on employment after the expiry of 3 years. This claim is therefore declined.

#### DISPOSITION

17. For all the reason stated above, I enter judgment in favour of the claimant for the sum of ksh.53,612.30 plus costs and interest at court rates from the date of filing suit. The said sum shall be subject to statutory deductions.

Dated, signed and delivered this 13<sup>th</sup> October 2017

**O. N. Makau**

**Judge**