REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 16 OF 2016

EVANS OOKO ARINGO.....CLAIMANT

VS

SEVERIN SEA LODGE.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair terminationof the claimant's contract of service by the respondent on 2.4.2015. In total he seeks to recover Kshs.539981. The respondent has however denied liability to pay the said damages and averred that the claimant was terminated for misconduct after following a fair procedure.

2. The suit was heard on 15.6.2017 when the claimant testified as Cw1 and the respondent called Mr. Mark Mwadonga Yawa as Rw1. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

3. Cw1 told the court that he started working for the respondent in December 2012 as a Security guard. He first worked as casual employee for 13 months up to October 2013 when he was given a seasonal contract for 2 months. After expiry of the contract, he continued upto April 2015 under seasonal contracts which ran consecutively. During the periods of casual engagement, the claimant was paid kshs 625 daily but weekly in arrears while during the seasonal contracts, he was paid monthly salary plus service charge. His basic salary was kshs.19254 and house allowance was kshs.6505. He was working for 12 hours per day from 6pm to 6 am or 6 am to 6pm.

4. He testified that during his service he received three warning letters related to clocking in while on duty and a summary dismissal letter on 2.3.2015 accusing him of the same offence. He however appealed against the dismissal and he was reinstated by the letter dated 10.3. 2015 with warning that he should not fail to clock again within the following 12 months.

5. On 1.4.2015, he successfully applied for leave but when he reported back on 25.4.2015 he was served with a dismissal letter dated 2.4.2015. He contended that the termination was unfair because he was not given any prior hearing or paid his terminal dues. He denied ever sleeping on duty or speaking over the phone while on duty as alleged by the termination letter. He however admitted to not clocking in on several dates but not after the reinstatement on 10.3.2015.

6. He prayed for salary in lieu on notice, compensation for unfair termination, plus accrued benefits under the contract of employment as prayed in the claim. He contended that during the time he worked without written contract, he was paid lesser pay than when he was working under a written contract despite the job remaining the same. He was also not paid service charge, travelling allowance, and house allowance; and was not given annual leave during the time he was on casual employment. He however admitted that the service charge paid was not a constant sum because it fluctuated from month to month. He concluded by admitting that he was not a member of the union during the time he was working as a casual employee because he was not deducted union dues.

DEFENCE CASE

7. Rw1 is a Senior Personnel Clerk for the respondent. He confirmed that the claimant worked for the respondent on casual basis until October 2013 when he was given the first fixed term contract for two months effective 1.11.2013 followed by several others, the last one running from 1.2.2015 to 30.4.2015.He contended that the contracts were distinct from the others and its term was fixed and that was normal in tourism industry which has high and low seasons. He however admitted that the Collective Agreement (CBA) limited probation period to three months maximum.

8. Rw1 explained that on 28.3.2015, the claimant was caught sleeping at the guests bench at the Tennis court and he was invited to a hearing on 29.3.2015 in the presence of MrJosephOkoth the chairman of the union. His defence was however not satisfactory and he was dismissed by letter dated 2.4.2015 and paid his terminal dues.He admitted that the claimant applied for leave after the hearing and it was approved.

9. Rw1 maintained that the claimant was not entitled to service charge pay while serving as a casual because he was not paying union dues to the unionbut stated that he was paid service charge during the time he worked under the seasonal contract. He concluded by explaining that after the dismissal, the claimant was paid for 26 leave days inclusive of the 24 leave days taken in April 2015.

ANALYSIS AND DETERMINATION

10. There is no dispute that the claimant was employed by the respondent continuously from 2012 to 2.4.2015. There is also no dispute that the he started as a casual employee but later changed to fixed term contracts which ran consecutively from November 2013 to 30.4.2015. The first phase fell between 2012 and 31.10.2013, when the claimant engaged under a verbal contract and paid wages under the Government Wage Order. The second phase was between 1.11.2013 and 2.4.2015 when the claimant was given written seasonal contracts whose wages and other terms of service were governed by the CBA between the respondent and the claimant's union (KUDHEIHA). The issues for determination are:-

> **(a) Whether the Claimant's service converted from temporary to regular terms contract under the Employment Act.**
>
> **(b) Whether the claimant was unlawfully excluded from the benefits guaranteed under the CBA during period when he served without written contract.**
>
> **(c) Whether the summary dismissal of the claimant was unfair.**
>
> **(d) Whether the claimant is entitled to the reliefs sought.**

Conversion to regular term contract

11. There is no dispute that the claimant's employment was regulated by the minimum terms of service provided by the Employment Act and the Regulation of Wages (Hotel and Catering Trades) Order. Regulation 18 of the said Regulations provides that:-

> **"18 (1) No person shall be employed on temporary or seasonal terms of employment for a period exceeding six months.**

(2) An employee on temporary or seasonal terms of employment shall be deemed to have converted to regular terms of employment on completion of six months' continuous service'.

12. In view of the foregoing, it is clear that the claimant had converted in to a regular terms employee as at 12.10.2013 when he was given the seasonal contract of 2 months between 1.11.2013 and 31.12.2013 because by then he had served for over 6 months.The subsequent fixed term contracts also ran consecutively from January 2014 until 2.4.2015 when he was summarily dismissed. Consequently, even counting the minimum 6 months from the 1.11.2013 when he started working on seasonal contracts, it is obvious that the claimant had already converted from temporally employee to regular term employee by dint of the regulation 18 aforesaid as at 2.4.2015 when he was dismissed.The reason for the foregoing is the mandatory provision under Regulation 18 aforesaid, which gives no discretion to the employer.

Exclusion from the CBA

13. There is no dispute that there was a CBA binding the respondent to all the unionisable employees throughout the term of service by the claimant between 2012 and 2.4.2015. There is also no dispute that the claimant did not join or pay union subscription or Agency fee during his term of office except during the time of the seasonal contract between 1.11.2013 and 2.4.2015. He was therefore not legally entitled to enjoy the benefits negotiated by the union under the CBA.

14. Although under section 59(1) (a) and (3) of the LRA provides that the terms of the CBA shall be incorporated into the contract of employment of every employee who is employed by a party to the CBA and who is covered by the CBA, the said broad presumption is fettered by section 49 (1) and (5) of the Act which require that for unionisable employee to benefit from a CBA, he must be a paid up union member or he must pay Agency fees. During the period when he served without a written contract, the claimant was not a paid up member of KUDHEIHA and he was not paying Agency fees to the union. He could therefore not benefit from the CBA negotiated by the union. Consequently the answer to the second issue for determination is in the negative.

Unfair termination

15. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason cited in the dismissal letter was sleeping on the job and failing to perform duties as per the laid down procedures. A closer look at the particulars of the misconduct outlined in the letter reveals that all except one were committed before 10.3.2015 when his appeal against an earlier dismissal was concluded in his favour but warned not to fail to clock in within 12 months of that date. Thereafter he was accused of sleeping on the job on 28.3.2015. The burden of proving that offence was on the respondent but she never called any eye witness or produced any other form of evidence to prove that the claimant was found sleeping on the job. Consequently, I find and hold that she has failed to prove and justify the reason for dismissing the claimant as required by section 43 and 47 (5) of the Act.

16. In addition to the foregoing I am satisfied that the respondent has failed to prove that she followed a fair procedure before summarily dismissing the claimant. Section 41 of the Act provides that before terminating the services of his employee on ground of misconduct, poor performance or physical incapacity, the employer shall first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reasons for the intended termination and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided.

17. In this case the reason for the summary dismissal was misconduct but as required by the foregoing provision, the claimant was never invited to any oral hearing in the company of a fellow employee or shop floor union representative and accorded a fair hearing to defend himself before his dismissal on 2.4.2015. Although RW1 alleged that the claimant was accorded a hearing on 29.3.2015, that was hearsay because he did not participate in the same and he did not produce any written proceeding to support his

allegation. Even if the hearing was held, which is not true, there is no proof that it was in consonance with section 41 of the Act. The respondent has therefore also failed to prove on a balance of probability that the dismissal of the claimant was done after following a fair procedure.

18. Having found that the employer has in this case failed to prove a valid and fair reason upon which the summary dismissal was grounded, and that fair procedure was followed, I proceed to hold that the dismissal was unfair within the meaning of section 45 of the Act.

Reliefs sought

19. In view of the finding herein above that the termination of the claimant's contract of service was unfair, under Section 49 of the Act I award to her kshs.25759 being salary in lieu of notice plus kshs. 257590 being 10 months' salary as compensation for unfair termination. In awarding the said compensation, I have considered the fact that the claimant served the respondent for over 2 years and also the fact that he did not contribute to the termination through misconduct.

Underpaid salary and House allowance

20. The claimant testified that he was paid less pay than he had expected and produced as exhibits, schedule of the alleged under payment for the whole period of his service. However no basis was shown for the alleged unpaid salary and House allowance. As correctly contended by the defence, the claimant was paid under the Government Wage Order published under section 48 of the Labour Institutions Act during the period he served without a written contract. That the daily wages paid to the claimant during the said period was inclusive of House allowance and it was within the minimum wage allowed under the said Wage Orders. Having already found that the claimant was lawfully excluded from the benefits under the CBA, and that the daily wage paid to him was within the minimum provided by the Wage Orders, I find and hold that the claim for unpaid salary and House allowance is bereft of merits and I dismiss it.

Service charge

21. Service charge is a benefit negotiated under the CBA and as such since the claimant was not a paid up member of the union, and that he never paid any Agency fee during the period he is claiming the service charge, that is, when he was serving as casual, the claim is not well founded and I dismiss it.

Night Allowance

22. Noparticularsof the unpaid night allowances were pleaded and proved by evidence. Consequently, I also dismiss the claim for night allowance.

Travelling Allowance

23. The claim for this allowance is based on the CBA and in view of the finding herein above that the claimant was excluded by operation of the law, this claim must therefore fail. The rest of the reliefs sought under paragraph 10 of the Claim also lack particulars and evidence I therefore dismiss them save for the certificate of service which I grant.

Disposition

24. For the reasons stated above, I enter judgment for the claimant in the sum of kshs. 283,349 Plus costs and interest.

Signed, dated and delivered this 24th day of November, 2017.

ONESMUS MAKAU

JUDGE