



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 724 OF 2015

CHARLES MAE MWABONJE.....CLAIMANT

VS

SAROVA WHITESANDS BEACH RESORT & SPA.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brings this suit claiming terminal damages and compensation for unfair termination of his employment by the respondent on 1.7.2014. In total he claims for kshs.234,840.00. The respondent has denied any liability for unfair or unlawful termination of the claimant's employment as alleged in the suit. She avers that the claimant was a casual employee receiving payment on daily basis and as such his employment was lawfully terminated without notice under section 35 (1) of the Employment Act (EA).
2. The suit was heard on 24.2.2016 when the claimant testified as Cw1 but the respondent and his counsel never attended the court for hearing. Cw1 told the court that he was employed by the respondent on casual basis as a Gardener from 15.2.2011 which work earned him an appreciation by the respondent through the letter dated 7.1.2012 (Exhibit 1). His starting daily wage was kshs 375/= but it was later reviewed to kshs.412/=. That the said wages were paid weekly in arrears. He was, however, never given any written contract of employment. That he never went for any leave during his period of service save that he was given an unpaid leave of 15 days from 15.10.2014. That when he returned to work on 1.7.2014, his supervisor told him that business had gone down due to terrorism and directed him and his fellow gardener Mr. Chisambo Ndume to go home.
3. Cw1 faulted the procedure followed in terminating his services by describing it as unfair and unlawful. That he was served with any prior notice, paid his terminal dues and issued with certificate of service. He therefore prayed for compensation for the unfair and unlawful termination. He also prayed for service pay because his employer was not contributing to the NSSF or any other pension scheme.

Analysis and Determination

4. After considering the pleadings and the evidence before it, the court finds no dispute in the fact that the claimant was employed by the respondent between 15.2.2011 and 1.7.2014 earning daily wage but being paid weekly in arrears. That he was terminated without prior notice on ground of redundancy. The issues in dispute are:
 - a. **Whether the claimant was protected by law from termination without prior notice.**

- b. **If so, whether his termination on 1.7.2014 was unfair.**
- c. **Whether he is entitled to the reliefs sought.**

Protection from arbitrary termination

- 5. There is no dispute that the claimant was employed continuously for a fairly long period between 2011 and 2014. Under Regulation 18 of the Regulation of Wages (Hotel and Catering Trades) Order, the maximum period one can be employed on temporary basis, like in the present case, is six months. Thereafter the employment relationship converts to regular employment contract. In addition, under section 37(1) of the Employment Act, casual employment is converted to regular contract of employment if he works continuously for a number of days equal to one month or more, or where he is given a task which cannot end within a period of 3 months. Such conversion entitles the employee to the protection of section 35(1) of Employment Act against termination without prior written notice. Further to the foregoing, section 37(3) of the Employment Act provides that, if the employee works for a further two or more months from the date of the said conversion under sub section 1, he shall become entitled to such terms and condition of service as if he did not start his services as a casual employee. In view of the uncontested evidence by Cw1, the court finds on a balance of probability that the claimant had served for more than the minimum period required for conversion of casual employment into regular employment which is protected from termination without notice. Consequently, the court makes declaration under section 37(4) of The Employment Act that the claimant was no longer a casual employee and the respondent was barred from terminating him arbitruavity.

Unfair and Unlawful termination

- 6. In view of the foregoing finding that Cw1 had been converted to regular employee, the procedure for the termination of his services was not fair. There is no doubt that termination on ground of low business was equal to declaring his job redundant. Under section 40 of the Employment Act, an employer is required to serve at least one month notice in writing to the employee and the Labour officer, then do a fair selection of the employees to be laid off and finally pay the affected employees all accrued dues plus severance pay. In this case, no written redundancy notice was served on the claimant and the Labour officer. Therefore on that ground alone, the termination of the claimant's services became unfair and unlawful.

Reliefs

- 7. In view of the foregoing finding, the claimant is entitled to relief under section 49 (1) read with (4) of the Employment Act. He is awarded one month salary in lieu of notice being kshs.12,360.00 as prayed. He is also awarded 24 leave days under Regulation 9 (1) (a) of the said Regulation of Wages (Hotels and Catering Trade) Order being kshs.9,888.00. The reason for not awarding accumulated leave is because no evidence was adduced to show that the parties herein had mutually agreed to have the claimant accumulate his annual leave as provided under the said Regulation 9(1) (a) above. The regulation provided as follows:-

“9(1) An employee shall be entitled:

- a. **after every twelve months of service with an employer to not less than twenty four working days leave with full pay and that leave may, in exceptional circumstances and subject to mutual agreement, be accumulated;”**
- 8. The claimant is also awarded 3 months salary as compensation for the unfair and unlawful termination of his employment being kshs.37,080.00. In making the said award the court has considered the length of period served and the innocence of the claimant in relation to the cause of his termination. Additionally the court has considered the fact that the claimant could, with due diligence secure an alternative manual employment within 3 months. Finally the court declines to grant the claim for severance pay because he has been adequately compensated for the unfair

termination.

Disposition

9. For the reasons stated above judgment is entered for the claimant declaring the termination of his employment unfair and awarding him **kshs.59,328.00** plus costs and interest.

Dated, signed and delivered this 27th day of May 2016.

ONESMUS MAKAU

JUDGE