REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 525 OF 2014

JOSEPH R. MATOKA……..……..……CLAIMANT

VS

SEVERIN SEA LODGE……..……..RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant employment by the respondent on 21.5.2014. It is the claimants' case that his termination was without prior notice and valid reason as required by the law.

2. The respondent has denied that the claimant started working for her in 2008. She avers that the claimant worked as a Glass Man under separate and distinct contracts on casual basis between 1.5.2011 and 28.4.2014. That during the said period the claimant was paid daily wages inclusive of house allowance as prescribed by the law. That when his last contract ended in April 2014, the claimant never presented himself to the respondent for a further contract. That the claimant is not entitled to the reliefs sought in the suit because they are founded on the Collective Bargaining Agreement (CBA) which was only applicable to permanent and seasonal contract employees only.

3. The suit was heard on 27.7.2015 when the claimant testified as Cw1 and the respondent called Firdaji Kanji, Joseph Amala Okoth and Hezron Onwong'a as Rw1, 2 and 3 respectively. Thereafter both parties filed written submissions.

Claimants' case

4. Cw1 explained that he was employed on 15.12.2008 as a Glass Man earning a weekly wage. In 2011, he requested for and he was given 3 weeks training as a Bar man but thereafter he continued with the duties of Glass washer. On 28.4.2014, the General Manager Mr. Andrew Muir and the HR Manager (Rw1) called all the employees to a meeting and told them that due to low business, there would be no work after 30.4.2014 until further notice. The employees were then given a Disclaimer Forms to sign when reporting back to work. That the effect of signing the said form was to forfeit all the claims before the lay off on 30.4.2014.

5. Cw1 was never called back to work and he never signed the Disclaimer form. He stated that he was terminated effective 30.4.2014. That the termination was unfair, unjust and unlawful and prayed for maximum compensation plus terminal dues. He maintained that he served continuously except for one

month break during low business. He also contended that he was working overtime. He prayed also for service charge stating that he was denied the same during his service. He maintained that he was entitled to the service charge but he was discriminated against when the other unionisable employees were paid.

Defence case

6. Rw1 is the HR Manager for the respondent. She stated that Cw1 was employed as a Glass washer from August 2011 on casual basis whenever his services were required. That he was employed on daily basis and paid according to the General Wage Order for casual workers. That the daily wage was inclusive of House Allowance. She produced a Cash Register showing the said payment which was increased with time. That Cw1 was not a member of the union and as such the CBA did not apply to him. That he could not benefit from the terms and conditions of service under the CBA.

7. On 28.4.2014, she held a meeting with the staff and she told them that, due to terror threat, their contracts were possibly not going to be renewed. She denied that their employment was terminated. She maintained that between May and July there is usually low business season. She admitted that she gave Disclaimer Forms to the casual workers and that Cw1 never presented himself for employment consideration in May 2014. She denied that Cw1 was terminated. On cross examination, Rw1 admitted that Cw1 worked an average of 20 days every month continuously. She further admitted that the employees were employed as permanent or seasonal contracts depending on experience and performance after assessment by the Head of the Department.

8. Rw2 is the Chairman of the works committee at the respondent. He explained that the said committee shares out the service charge among the permanent and seasonal contract workers. That service charge is shared among workers who are union members and others who pay Agency fee to the union. That the confirmation of the status of the workers for purposes of showing the benefit is given by the HR office.

9. Rw3 is the Industrial Relations Officer for the Kenya Union of Domestic, Hotel, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA). He confirmed that the union has a CBA with the union of Kenya Hotel Keepers and Carters Association of which the respondent is a member. That the CBA benefits all the unionisable staff in the industry. That service charge under the CBA is payable to all paid up union members and non-members who pay Agency fees who are employed by the respondent. That the duty to notify the non-members to pay the Agency fee is upon the employer. That after Cw1 left work he reported to the matter to the unions office but he advised him to first report to the Works Committee and the matter ended there.

10. After the hearing, both parties filed written submission.

Analysis and Determination

11. The court has considered the pleadings, evidence and the submissions presented before it. There is no dispute that the parties herein related as employer and employee upto April 2014. The issues for determination are:-

(a) What was the nature of the employment relationship

(b) Who terminated the relationship

(c) Whether the termination was unfair

(d) Whether the reliefs sought should issue.

Nature of the Employment Contract

12. The claimant contents that he joined the respondent in 2008 and worked continuously upto April 2014 when he was laid off with other staff members. That he was never given any written contract but was

receiving his pay on weekly intervals. The above position was corroborated by Rw1 who maintained that although Cw1 worked every month between 2011 and April 2014, he only served an average of 20 days per month and not complete month. That such service was on casual basis and only when his services were needed.

13. The claimant has however submitted that from December 2008 when he joined the respondent till May 2014 when he was terminated is 5 years 4 months and urged that the terms of his contract of employment had converted from casual to regular contract under the Employment Act (EA) as provided under section 37 of the said Act. The said provision states that where an employee is employed for a continuous period of not less than one month or to perform a task which cannot reasonably be expected to end within a period or a number of working days amounting in aggregate to the equivalent of three months or more, the contract of the casual employee shall be deemed to be one where, wages are paid monthly and section 35(1) (c) of the Employment Act shall apply. The said section requires service of at least 28 days in writing before termination. Paragraph (c) of section 37 above provides that an employee whose contract of service has been converted under sub section (1) works continuously for two or more months from the date of employment as casual employee, he shall be entitled to such terms and condition of service as he would have been entitled had he not initially been employed as casual employee.

14. This court agrees with the claimant that his service had converted from casual to regular contract of employment with a monthly salary and whose infinite term was terminable upon service of notice in writing. The foregoing finding is supported by the provisions of Regulation 18 of the Regulations of Wages (Hotels and Catering Trades) Order which limits the maximum period within which to employ a person in the hotel industry on temporary basis to 6 months.

Who terminated?

15. There is no dispute that on 28.4.2014, the management represented by Rw1 and the General Manager Mr. Andrew Muir called a meeting with all the respondents' staff including Cw1 and indicated to them that due to low business caused by terror threats, there was no work from May 2014. They were then given Disclaimer Forms to sign when the return to work. The forms were forfeiting all the claims accruing before the Layoff which took effect on 30.4.2014. Cw1 construed the lay off to mean termination of his employment. He was never called back to work after the lay off and he never signed the Disclaimer Form. Rw1 admitted in evidence that there was a staff meeting on 28.4.2014 in which the staff were told that there contracts were possibly not going to be renewed due to low business occasioned by Terror threats. She denied that the employee's services were terminated. She admitted that she gave Disclaimer forms to the casual employees but Cw1 never presented himself for consideration of employment on May 2014. She however admitted on cross examination that when business resumed after low business she used to call the workers back.

16. After carefully considering the evidence tendered by both sides, the court finds on a balance of probability that it is the respondent who terminated the services of the claimant among other employees. The reason for the termination was low business due to insecurity caused by Terror threats. The intention to terminate the claimants' services was announced in the staff meeting convened by the respondent on 28.4.2014. The effective date of the termination was 1.5.2014 according to the evidence adduce herein.

Unfair termination

17. The termination of the claimants' services was through lay off. The reason was valid because the court takes judicial notice that during the year 2014, Hotel business in the Country suffered serious losses due to insecurity caused by terror threats. It is therefore understandable that the managers of the respondent in their managerial prerogative had all the right to decide to lay off all or part of the staff. However such managerial prerogative was subject to the legal procedure and safeguards which shield employees from unfair termination. After considering the evidence before it, the court finds that the termination of the claimants' services was procedurally unfair. Having found herein above that the contract of employment of the claimant had converted to regular employment, and that the termination was through lay off, the court further finds that the layoff was done in breach of the procedure laid down

under section 40 of the Employment Act and clause 11 of the CBA.

18. Under the said section 40 of the Employment Act, before the employer declares an employee redundant, he is required first to serve at least one month notice in writing to the employee or his trade union and the Labour office. Thereafter he must do a fair selection process and then pay the employees affected, all their dues accruing from their employment contract plus severance pay for the years served. In this case, no written notice was served on the trade union and the Labour office as required under section 40 Employment Act. The only notice given was verbal and it was for only 2 days and it was not served on the Labour officer. That default rendered the layoff unfair termination as the respondent never considered the safeguards available for her employees before lay off but wrongfully acted on the misconception that the claimant was a casual employee.

Reliefs

19. In view of the foregoing finding, the court makes declaration that the termination of the claimants' employment by the respondent was unfair, unlawful and wrongful. Under section 49(1) of the Employment Act, he is awarded 6 months salary as compensation for the unfair and unlawful termination. The reason for the award of the six months pay is because the claimant had served the respondent for a long period of time and also the fact that due to the circumstances facing the Hotel Industry, he was not likely to secure another employment within 6 months. The claimant testified that he was earning kshs.510 per day and kshs.13,260.00 per month. He will therefore get kshs.79,560.00 for 6 months.

20. He will also get kshs.13,340.00 being one months salary in lieu of notice as pleaded. The claim for accrued leave days was agreed before trial at kshs.16,746.00. The claims for overtime is however dismissed for lack of particulars and evidence. Likewise the claim for House allowance is dismissed because the daily rate paid to the claim was inclusive of House allowance according to the Remuneration Orders published by the Government. Finally the claim for service charge is also dismissed for lack of particulars and evidence. There is no dispute that the claimant was unionisable employee. He was a member of the trade union during when he served under seasonal contract and that he also used to pay Agency fee during the time when he was serving on casual basis. He was therefore entitled to earn service charge every month during the whole period of service. There is no dispute that such benefit is not a fixed sum and as such the claimant ought to have assisted the court with the basis upon which to make an award. No particulars of the claim were pleaded and no evidence showing how the sum of kshs.455,000.00 was arrived at. Consequently, the court will not grant that claim.

Disposition

21. For the reasons stated above, judgment is entered for the claimant declaring the termination of his employment unfair, unlawful and wrongful and awarding him **kshs.92,900.00** plus costs and interest.

Dated, signed and delivered this 6th day of May 2016.

ONESMUS MAKAU

JUDGE