



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO.599 OF 2014
VIVIAN AZANGU MATUNDA.....CLAIMANT
VS
SWAHILI BEACH RESORTS LIMITED.....RESPONDENT
JUDGMENT

Introduction

1. The claimant was employed by the respondent under fixed term contracts between 1.12.2011 and 31.1.2014 as an Accountant. The contracts had the effect of continuous service of 2 years one month. Claimant never joined Trade Union but he used to pay Agency fees as required under the law in order to benefit from the Collective Agreement (CBA) negotiated by the union. The services of the claimant were terminated by the respondent through her letter dated 31.1.2014 which alleged that the contract of employment had ended on 31.12.2013. The letter offered to pay the claimant dues in respect of 39 leave days not utilized, 39 days leave travelling allowance, 16 public holidays worked, 6 off days not taken and service charge for January 2014.
2. The claimant was not satisfied and he lodged a complaint with the labour officer who demanded for only salary for January 2014 and service charge for December and November 2013 amounting to kshs.48,992.00 all of which was paid on 7.3.2014. Still not satisfied the claimant instructed his lawyer to demand for more dues amounting to kshs.83,123.40 as offered by the respondent in the separation letter dated 31.1.2014 plus a Certificate of Service. When the demand was not granted, the claimant brought this suit in person seeking to recover his terminal dues plus compensation for unlawful termination based on his last salary of kshs.40,076.00 per month. In total he prays for kshs.680,458.00 plus certificate of costs.
3. The respondent has denied liability to pay the said kshs.680,458.00. According to her the claimant made his claim on 27.2.2014 for kshs.48,998.00 vide Form LD64 and she settled it in full on 15.3.2015 and as such she was fully discharged for complying with the said Form LD 64. She has however offered to pay kshs.74,730.00 in line with the demand letter by the claimants lawyer dated 6.5.2014.
4. The suit was heard on 9.11.2015 and 3.12.2015 when the claimant testified as Cw1 and the respondent called Mr. Walter Ouma as Rw1. Thereafter both parties filed written submission.

Analysis and Determination

5. There is no dispute that the claimant served under fixed term contracts which ran consecutively between 1.12.2011 and 31.1.2014. The issues for determination arising from the pleadings, evidence and submissions are:-

- a. **Whether the contract of employment between the parties herein were governed by the CBA negotiated by the respondent and the recognized Trade Union.**
- b. **Whether in view of the foregoing the claimant's employment could be terminated without notice.**
- c. **Whether the claimant is estopped from bringing this suit after the respondent paid the initial claim made by the Labour officer through Form LD 64.**
- d. **Whether the reliefs sought should be granted.**

Application of the CBA

6. There should no dispute that the employment contract between the parties herein was governed by the CBA. Rw1 admitted that the claimant used to pay Agency fees to the union in accordance with Section 49 of the Labour Relations Act, a fact which was confirmed by the payslips produced by the claimant. Consequently, the court makes a finding of fact that the CBA applied in the claimant's employment contract with respect to the terms and conditions of service negotiated.

Notice of terminate

7. Under clause 19 of the CBA produced by the respondent, she was entitled to employ persons for seasonal contracts for a period not exceeding one year. That such seasonal contracts may only be made for genuine temporary/seasonal purposes or projects. That such employees are subject to the terms and conditions of service as other employees in accordance with the provision of section 35(1) (c) of the Employment Act 2007. The claimant herein served continuously for over 2 years without a break. He had therefore become permanent employee after serving continuously for one year. His termination has also become subject to notice under section 35(1) (c) and clause 9(a) of the CBA. He was entitled to 2 months prior notice in writing before termination or payment of 2 months salary in lieu of notice.

Estopped from suing

8. The respondent contends that by complying with the demand by the claimant through the Labour officer vide Form LD 64 she was discharged from further claims by the claimant. No law or judicial precedents were cited to support that contention. The court therefore finds that without a valid discharge agreement duly signed by the claimant, the respondent cannot shield herself behind the cover of estoppel. The claimant is therefore not barred from bringing the claims made in his suit and the court will proceed to consider the whole claim on merit.

Reliefs

9. In view of the findings above, the claimant was entitled to Notice before termination is awarded two months salary in lieu of notice being kshs.80,152.00. He will also get pay for leave earned during the 2 years' service. Under clause 12 (a), he was entitled to 26 days annual leave after every 12 months service. In this case he is awarded pay for 52 days annual leave for the 2 years served being $kshs.33,272 \times 52/30=57,671.50$. He is however not awarded leave travelling allowance under clause 12(c) of the CBA because he never went for any leave. He will however get kshs.9,300.00 being the service charge for January 2014 as prayed and admitted by the employer.
10. Finally the claimant is awarded compensation for unfair and unjustified termination. The reason for termination cited by the respondent is that the claimants fixed term contract had lapsed by afflation of time. As stated above however, that reason was not valid and was indeed not fair because the claimant's service had already converted to regular contract for an indefinite period terminable by notice. As regards procedure, no prior notice in writing was served and no lawful redundancy was declared on the claimant's office. Likewise no misconduct or poor performance or incapacity was cited and proved against the claimant. The termination was therefore not in accordance with any procedure known under the Employment Act (EA) and the termination was

rendered unfair. Under section 49 (1) of the Employment Act read with sub section (4) thereof, the court awards the claimant 4 months salary for unfair and unjustified termination of his employment contract. The award works to kshs.40,076 x 4=160,304.00. The reason for the said award is because the claimant did not contribute to the termination through misconduct. In additions the court has considered the fact that the claimant had not served for a long period of time to warrant higher award.

Disposition

11. For the reasons stated above, judgment is entered for the claimant declaring the termination of his employment unlawful and awarding him **kshs.307,427.50**. He will also get costs and interest.

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

ONESMUS MAKAU

JUDGE