



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT
AT MOMBASA
CAUSE 551 OF 2014
(Consolidated With E.R.L.C Nos. 552, 553, 554 & 555 OF 2014)

PHILIP MGHANGA

TAURA CHUMA

MORRIS MALAGHO

JULIUS MAZIA

PHILIP MWENI.....CLAIMANTS

VERSUS

MUMI HOTELS & RESORTS LTD T/A BAHARI BEACH HOTEL RESPONDENT

JUDGMENT

Introduction

1. The Claimants herein were employed by the Respondent from 2001 to 31.1.2007. The Claimants aver that they were dismissed unfairly from their employment because of their decision to join a trade union and for fighting for their rights as employees. They have therefore brought this Suit seeking damages in respect of terminal dues and compensation for unfair and unlawful termination. The Respondent has however contended that the Claimants' were lawfully dismissed for gross misconduct and the dispute herein was resolved and fully settled through conciliation by the Labour Officer.
2. The Suit was disposed of by way of written submissions based on the pleadings, documents evidence and witness statements filed.

Claimant's Case

3. The Claimants have contended that the working conditions at the respondent deteriorated and the management treated them with a heavy hand. As a result the Claimants and other workers joined a trade union to fight for better terms and conditions of their service. Thereafter the employer resorted to harassing them and even caused them to be arrested and detained by the police only to be released without any charges. That finally the Claimants were dismissed for alleged misconduct while the rest of the employees were declared redundant. The Claimants maintains that their dismissal was unfair and unlawful because they were victimized for joining a trade

- union.
- The Claimants have explained that after the dismissal their union reported a dispute with the Ministry of Labour and a conciliation was done whereby the Respondent was found to have unfairly terminated the Claimants and the conciliator recommended for payment to the Claimants of salary in lieu of notice, prorata leave and compensation of three months' salary for wrongful termination. They now claim for two months' salary in lieu of notice, 6 years of service plus 3 months compensation for unfair termination. Their counsel has on the other hand submitted for 2 months' salary in lieu of notice, unpaid leave for the years worked, service pay for the years worked and 12 months compensation for unfair termination. The Counsel has however admitted that the dispute herein is not governed by the employment Act 2007.

Respondent's Case

- The Respondent's case is that the Claimants were casual employees until January 2007 when she terminated all the Claimants for the gross misconduct of threatening to burn down the hotel. Thereafter the Claimants and their trade union, the Kenya Hotels and Allied Workers Union lodged a Trade Dispute number ML/IR/56/15/2007 with the ministry of Labour. That the dispute was conciliated upon between her and the Claimants' Union and resolved through the Memorandum of Agreement signed 6.11.2009. The agreement between the Parties was for payment to the Claimants of salary in lieu of notice, accrued leave, severance pay, public holidays, rest days and overtime if any. The said agreement was confirmed by the same Parties on 18.2.2010.
- The Respondent complied with the agreement reached by paying to all the Claimants 2 months' salary in lieu of notice, service pay for the years served and prorata leave, less PAYE, NSSF and NHIF. The proof of the said payment is contained in the Respondent's documents page 7-18 dated on 29.1.2010 and 16.2.2010.
- The Respondent has therefore submitted that the dispute herein has been effectively resolved by the parties through conciliation which is the machinery established under section 4,5, and 6 of the Trade Dispute Act (TDA) now repealed. That thereafter the Claimants accepted the payment as full and final settlement of their dues from Respondent. That any Claimant who delayed collecting his agreed dues the same was deposited with the Labour officer Mombasa. That such settlement formed a binding contract between the Parties herein and cannot be wished away.
- In conclusion the Respondent submitted that some of the reliefs sought were far-fetched because they were not provided for by the Employment Act that was in force when the cause of action herein arose.

Analysis and Determination

- There is no dispute that the Claimants were employed by the Respondent between 2001 and January 2007 when they were dismissed for gross misconduct. There is also no dispute that they lodged a Trade Dispute with the Minister for labor through their trade union. There is further no dispute that the said dispute was conciliated upon by a Conciliator appointed by the minister and resolved vide a written agreement signed between the Respondent and the union on 6.11.2009. Finally there is no dispute in the fact that the Claimants were paid their dues as resolved through conciliation and signed for the same voluntarily as full and final settlement. The only issue for determination in this dispute is whether the Claimants are entitled to the reliefs sought.

Salary in lieu of Notice

- The Claimants have prayed for 2 months' salary in lieu of notice. The Respondent has however proved that all the Claimants were paid 2 months salary in lieu of notice after the conciliation by the conciliator appointed by the Minister for Labour.

Service Pay

11.The Claimants prayed to 6 years' service pay. They started work in August 2001 and were dismissed on 31.1.2007. The completed years served were therefore 5 and not 6 years. The Respondent has proved that she paid to the Claimants service pay for 5 years served.

Compensation for Unfair Termination

12.The Claimants prayed for 3 months' salary for unfair termination in line with the recommendation by the conciliator. The Counsel for the two sides have however submitted correctly that the dispute herein arose before the Employment Act 2007 was enacted and as such it was governed by the Employment Act then in force. The said repealed Act did not provide for doctrine of unfair termination of employment meaning that, the right to compensation for unfair termination did not exist in law. All what the employer needed to do was to terminate without notice and pay the employee salary in lieu of notice if it was proved that the dismissal was not justified. Consequently the Court finds and holds that the prayer for compensation for unfair termination of the Claimants' services was strange to the law the in force in Kenya. To that end, the conciliator had no legal basis for recommending the payment of three months' salary as compensation for unfair termination of the Claimants.

13.As a parting shot, the court noted from evidence that some of the Claimants' dues were deposited with the Labour Office. Such claimants are advised to go for it if they have not yet collected it.

Disposition

14.For the reasons stated above, the Suit is dismissed. Each party to bear his or her own costs.

Signed, Dated and Delivered at Mombasa this 1st day of July 2016.

ONESMUS MAKAU

JUDGE