



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 540 OF 2015**

**PAUL MBITHI MWANGANGI.....CLAIMANT**

**-VERSUS-**

**SAI ROCK HOTEL LTD.....1<sup>ST</sup> RESPONDENT**

**PRIDE INN HOTEL & INVESTMENT LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues and compensation for unfair termination of the claimant's employment contract by the respondent on 28.5.2014. The respondent never filed any defence and as such the suit proceeded exparte on 2.6.2016 when the Court directed that the suit be disposed by written submissions on the basis of the pleadings, witness statements and documents filed.

**Summary of Claimant's Case**

2. The claimant's witness statement dated 28.7.2015 is to the effect that he was employed by the 1<sup>st</sup> respondent in August 2008 as a waiter. That the 1<sup>st</sup> Respondent was under the management of the 2<sup>nd</sup> Respondent. That in October 2009, he was promoted to the position of Head of the Banqueting Department and his salary was increased to Kshs 12,000 per month.

3. On 28.5.2014 the claimant was dismissed by the Human Resource Manager, Ms Rose Baitili on allegation that there was low business. The claimant contends that the termination was unfair and prayed for compensation of 12 months' salary because the procedure followed to declare his job redundancy was not in line with the procedure provided by the Employment Act. That the redundancy was not preceded by a notice to himself and the County Labour Officer. That the Human Resource Manager walked to the place where the claimant was working and verbally told him not to report to work henceforth because it was low season.

**Analysis and Determination**

4. There is no dispute that the claimant was employed on diverse dates between August 2008 and 28.5.2014. The issues for determination are:

**a. Whether the 1<sup>st</sup> Respondent was under management of the 2<sup>nd</sup> Respondent between 2008**

**and 2010.**

**b. Whether the claim against the 1<sup>st</sup> Respondent has merits.**

**c. Whether termination of the claimant's services by the 2<sup>nd</sup> Respondent was unfair.**

**d. Whether the reliefs sought should be granted.**

### **Relationship between the respondents**

5. The claimant stated that she was employed by the first Respondent in August 2008 as a casual but in 2009 he became permanent employee earning a monthly salary. According to a Certificate of Service by the 1<sup>st</sup> Respondent dated 24.9.2014, the claimant was employed by her up to 19.9.2010 as a Food and beverage Service Waiter.

6. The claimant has not adduced any evidence herein to prove that during his engagement with the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent had a legal relationship with the 1<sup>st</sup> Respondent. The Court therefore finds and holds that the respondents are distinct and separate entities and they had no business relationship between 2008 and 2010 when the claimant worked for the 1<sup>st</sup> Respondent.

### **Case against 1<sup>st</sup> Respondent**

7. There is no dispute that the employment relationship between the claimant and the 1<sup>st</sup> Respondent ended on 19.10.2010 as per the said Certificate of Service produced by the claimant. No claim has been brought in terms of the termination of the claimant's services by the 1<sup>st</sup> Respondent on 19.9.2010.

8. Even if there was any claim founded on the said relationship, the same would be time barred because this suit was filed almost 5 years after the termination of the said employment relationship. Consequently I find that the claim against the 1<sup>st</sup> Respondent is bereft for merits and is dismissed.

### **Unfair Termination by the 2<sup>nd</sup> Respondent on 28.5.2014**

9. The contention by the claimant that he was terminated on ground of redundancy on 28.5.2014 by the 2<sup>nd</sup> Respondent has not been denied and/or rebutted in evidence. The Court therefore makes a finding of fact that the termination of the claimant's employment contract with the 2<sup>nd</sup> Respondent was on 28.5.2014 and was based on redundancy because of low business season.

10. The question that follows is whether the proper legal procedure was followed before laying off the claimant. According to the uncontested statement by the claimant, the 2<sup>nd</sup> Respondent's Human Resource Manager Ms Baitili walked to where the claimant was performing his duties and verbally told him that he should not report to work again. That when the claimant enquired as to the reason for such abrupt termination, the Human Resource Manager told him that the business season was low.

11. There was no notice to both the claimant and the labour officer before the said termination and the Court agrees with the claimant's contention that the said redundancy on his job was done unfairly without following the statutory procedure provided for under section 40 of the Employment Act.

12. The said section of the Act provides that before declaring the employment of an employee redundant, the employer shall first serve at least one month notice in writing on the employee or his union (if he is a member of any union) and the Labour Officer. Thereafter a fair selection process must be done to determine which employee should be laid off and thereafter pay all accrued employment dues plus severance pay to the employees selected for the layoff.

13. In this case, the said procedure was not followed and as such the termination was rendered unfair

within the meaning of section 40 and 45 of the Employment Act.

### **Reliefs**

14. Under section 49 (1) the claimant is awarded Kshs 12,000 as one month salary in lieu of notice. He is also awarded Kshs 72,000 being 6 months' salary compensation for unfair termination by the 2<sup>nd</sup> Respondent on 28.5.2014. In awarding the 6 months' salary I have considered the length of service to the 2<sup>nd</sup> Respondent of over 3 years. I have also considered the fact that due to the low business in the Hotel and Tourism Industry in Kenya, of which the Court takes judicial notice of due to its public notoriety, the claimant could not secure an alternative employment in less than 6 months after the unfair termination. Finally, I have considered the fact that the claimant did not contribute to the termination through culpable misconduct.

15. I also award him pay for 24 leave days only being Kshs 11,076.90 because he has not proved that he agreed with the employer to accumulate leave as required under the Regulation of Wages (Hotel and Catering Trade) Order.

16. I however dismiss the claim for severance pay because the claimant is already adequately compensated above for the unfair termination. Likewise I dismiss the claim for overtime for lack of particulars and evidence. The claimant will however be issued with a certificate of service by the 2<sup>nd</sup> Respondent for the period of their relationship which ended on 28.5.2014.

### **Disposition**

17. For the reasons above I enter judgment for the claimant and against the 2<sup>nd</sup> Respondent in the sum of **Kshs 95,076.90** plus costs and interest.

**Judgment dated, delivered and signed this 9th day of September 2016**

**O. MAKAU**

**JUDGE**