REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 235 OF 2014

CHRISTOPHER O. OMOLO……..…..CLAIMANT

VS

SEVERIN SEA LODGE…….……..RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues by the claimant following his voluntary retirement from his employment with the respondent. The total dues sought amount to Kshs. 841,743 as per the amended statement of claim filed on 18.3.2015.

2. The respondent denies liability to pay the said terminal dues and avers that the claimant was employed by her on casual basis only as and when his labour was required.

3. The suit was heard on 8.2.2016 and 11.5.2016 when the claimant testified as Cw1 and the respondent called Mr. Mark Mwadonga as Rw1. Thereafter both parties filed written submissions.

Claimant's case

4. Cw1 told the court that he started working for the respondent on 21.8.2011 as a Security guard. The contract was orally discussed. His salary was kshs.7300 gross but paid weekly intervals of ksh 1825. He was working for 8 hours per day but from 1.5.2012 the hours were increased to 12 hours and the pay was also increased to kshs.520 per day. On 1.9.2012, the pay was further increased to kshs.625 per day. He was however not receiving service charge pay like the other employees.

5. From 1.8.2013 to 31.10.2013, Cw1 was engaged under a seasonal contract still as a security guard and he joined trade union. His pay however changed to monthly salary of Kshs. 19,254 basis plus Kshs. 6,505 House Allowance. He was also paid service charge like the other unionisable employees.

6. After the seasonal contract lapsed, the claimant continued working for the respondent still as a security guard but his pay changed from monthly salary to Kshs. 786 per day being paid on weekly intervals and the service charge was discontinued. He never the less continued working under the said terms until 20.3.2014 when he resigned on account of old age.

7. When the resignation notice lapsed on 20.4.2014, the claimant requested for his terminal dues but he was told by the HR Manager that he was not entitled to any terminal benefits because he was only

employed on casual basis. The claimant was aggrieved and brought this suit claiming Kshs. 841,743 as his accrued benefits including salary arrears, allowances, service charge, over time, public holidays worked, plus retirement benefits.

8. On cross examination, Cw1 admitted that the daily wage he was receiving as casual employee was as per the Government Wage Order and that it was inclusive of House allowance. He also confirmed that he was no longer claiming special duties allowance and public holidays. He however contended he was entitled to retirement benefits although he was a contributor to the NSSF. He maintained that he worked continuously from 2011 till the day he resigned and at no time was he told that he was a casual employee.

Defence case

9. Rw1 is a Senior Personnel Clerk for the respondent. He confirmed that the claimant worked for the respondent from 2011 to 2014. That he started as a casual employee in 2011 but from 1.8.2013, he was engaged under a seasonal contract for 3 months. That after the lapse of the seasonal contract, Cw1 continued working until 2014 when he resigned. That at the time of his engagement, the claimant was 57 years old.

10. Rw1 further explained that Cw1 was working for 5 days in a week and take 2 off days. That he was paid for all the public holidays and overtime worked. That he was also paid all his allowances for night duties. That he was paid service charge during the time he worked under the seasonal contract but not when he was serving on casual basis.

11. On cross examination Rw1 confirmed that the claimant worked for the respondent for 3 years. He further confirmed that the respondent and KUDHEIHA had a Collective Agreement (CBA) between 2010 and 2012 and another one between 2012/2013. Rw1 further admitted that the claimant was only given appointment letter only for the seasonal contract between August and October 2013.

12. Rw1 denied that the claimant was not entitled to service charge pay while serving as a casual and contended that he was neither paying union dues nor Agency fee to the union while serving as a casual employee. He however admitted that under clause 21 of the CBA all unionisable employee were entitled to payment of service and that only the management staff were excluded from receiving service charge.

13. Rw1 also confirmed that clause 19 of CBA bars employment on temporary basis for more than one year. He admitted that, no notice was given to the claimant after lapse of the 3 months seasonal contract that his terms of employment were changing from the CBA to the Government Wage Order on casual basis.

Analysis and Determination

14. There is no dispute that the claimant was employed by the respondent continuously from 21.8.2011 to 20.4.2014. There is also no dispute that the term of service took the form of three phases. The first phase fell between 21.8.2011 and 31.7.2012, when the claimant engaged under a verbal contract and paid wages under the Government Wage Order. The second phase was between 1.8.2013 and 31.10.2013 when the claimant was given a written seasonal contract whose wages and other terms of service were governed by the CBA between the respondent and the claimant's union (KUDHEIHA). Lastly, the third phase was between 1.11.2013 and 20.4.2014 in which the claimant's wages were paid under the Government Wage Order. The issues for determination are:-

a. Whether the three phases of the Claimant's service constituted one continuous term or distinct and separate contracts.

b. Whether the claimant was unlawfully excluded from the benefits guaranteed under the CBA during phase one and three of his term of service.

c. Whether the claimant is entitled to the reliefs sought.

Separate or one continuous term

15. There is no dispute that the claimant's employment during the first phase was regulated by the minimum terms of service provided by the Employment Act and the Regulation of Wages (Hotel and Catering Trades) Order. Regulation 18 of the said Regulations provides that:-

> **"18 (1) No person shall be employed on temporary or seasonal terms of employment for a period exceeding six months.**
>
> **(2) An employee on temporary or seasonal terms of employment shall be deemed to have converted to regular terms of employment on completion of six months' continuous service'.**

16. In view of the foregoing, it can be inferred that the claimant had converted in to a regular terms employee on 21.2.2012 when he completed six months of continuous service to the respondent. That the said status was not ended by the signing of the seasonal contract of 3 months between 1.8.2013 and 31.10.2013. The reason for the foregoing is the mandatory provision under Regulation 18 aforesaid, which gives no discretion to the employer. Consequently I find and hold that the claimant served the respondent under one continuous term from 21.8.2011 to 20.4.2014.

Exclusion from the CBA

17. There is no dispute that there was a CBA binding the respondent to all the unionisable employees throughout the term of service by the claimant between 21.8.2011 and 20.402014. There is also no dispute that the claimant did not join or pay union subscription during his term of office except during the time of the seasonal contract between 1.8.2013 and 31.10.2013. That he also never paid any Agency fee to the union during the period because he was not a member of the union. He was therefore not legally entitled to enjoy the benefits negotiated by the union under the CBA.

18. Although under section 59(1) (a) and (3) of the LRA provides that the terms of the CBA shall be incorporated into the contract of employment of every employee who is employed by a party to the CBA and who is covered by the CBA, the said broad presumption is fetered by section 49 (1) and (5) of the Act which require that for unionisable employee to benefit from a CBA, he must be a paid up union member or he must pay Agency fees. During his first phase of his contract, between 21.4.2011 and 31.7.2013, the claimant was not a paid up member of KUDHEIHA and he was not paying Agency fees to the union. He could therefore not benefit from the CBA negotiated by the union. Likewise after the lapse of his seasonal contract on 31.10.2013, he never continued to pay his union subscription although he never formally resigned from the union. He was therefore not entitled to continue benefiting under the CBA. Consequently the answer to the second issue for determination is in the negative.

Reliefs sought, underpaid salary and House allowance

19. The claimant testified that he was paid less pay than he had expected and produced as exhibits, schedule of the alleged under payment for the whole period of his service. However no basis was shown for the alleged unpaid salary and House allowance. As correctly contended by the defence, the claimant was paid under the Government Wage Order published under section 48 of the Labour Institutions Act. That the daily wages paid to the claimant during the first and the third phase of his term of service was inclusive of House allowance and it was within the minimum wage allowed under the said Wage Orders. Having already found that the claimant was lawfully excluded from the benefits under the CBA, and that the daily wage paid to him was within the minimum provided by the Wage Orders, I find and hold that the claim for unpaid salary and House allowance is bereft of merits and I dismiss it.

Service charge

20. Service charge is a benefit negotiated under the CBA and as such since the claimant was not a paid up member of the union, and that he never paid any Agency fee during the period he is claiming the service charge, the claim is not well founded and I dismiss it.

Overtime and hours worked

21. No particulars were pleaded and no evidence was adduced to prove this claim on a balance of probability. I therefore dismiss the said claim for overtime and extra hours worked.

Off days worked

22. No particulars were pleaded and no evidence was adduced to prove the claim for off days worked. The undisputed evidence by Rw1 shows that the claimant used to work for 5 days in a week and rest for 2 days. Consequently, I dismiss the said prayer.

Night Allowance

23. Likewise, no particulars were pleaded and proved by evidence. The issue was only explained from the bar by counsel in submissions after realizing that Cw1 never explained it in his testimony. Consequently, I also dismiss the claim for night allowance.

Travelling Allowance

24. The claim for this allowance is based on the CBA and in view of the finding herein above that the claimant was excluded by operation of the law, this claim must therefore fail.

Retirement Benefits

25. The claimant prayed for retirement benefit in respect of his 2 1/2 years of service based on his basic salary plus House Allowance. Having found that the claimant could not benefit from the CBA, I find that his remedy can only lie with the Regulation of Wages (Hotel and Catering Trades) Order aforesaid and the NSSF act. Under the said regulations, the claimant is however barred from the said relief because he worked for less than the 5 years which is the minimum length of the service required before one qualifies for payment of any gratuities on retirement. Consequently the claim for retirement benefit is dismissed. That leaves the claimant with only the benefit available under the National Social Security Fund where he and the respondent contributed during his term of office as demonstrated by the NSSF statement produced as exhibit.

Disposition

26. For the reasons stated above, the suit is dismissed with no order as to costs.

Signed, dated and delivered this 7th day of October, 2016.

ONESMUS MAKAU

JUDGE