



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 288 OF 2013
HASSAN SULEIMAN MWANGEM & 17 OTHERS.....CLAIMANT
VS
BOABAB BEACH RESORT MOMBASA.....RESPONDENT

JUDGMENT

Introduction

1. The claimants brought this suit on 11.9.2013 and amended it on 26.2.2014 and again on 11.8.2014. All the claimants were employed by the respondent on seasonal contracts between 2006 and April 2013. They were also members of a trade union which had a Collective Bargaining Agreement (CBA) with the respondent and which governed their contract of employment. The last seasonal contract for all the claimants lapsed on 30.4.2013 and they were never renewed because according to the claimants, the respondent told them that the business had gone down. The claimants have however denied the business was low and averred that the respondent just replaced them with 18 new employees after the claimants inducted them.

2. The claimants have therefore brought this suit claiming terminal dues, severance pay and compensation for unfair termination of their employment by the respondent through unlawful redundancy.

3. The respondent has denied the claimants' allegation that they were terminated on redundancy and avers that the claimants employment lapsed automatically after effluxion of the time agreed between them and her. She further avers that she failed to renew the claimant's contracts after they lapsed because the business was low. Lastly she avers that after the lapse of the said contracts, she paid all the claimants their terminal dues and employed new staff to replace the claimants under similar seasonal contract as she had done to the claimants.

4. The suit was heard on 21.10.2015 and 30.11.2015 when the documentary evidence was produced by consent and claimants called Hassan Suleiman Mwangema and Philip Muthai as Cw1 and 2 while the respondent called Silvester Maundu Mbandi as Rw1. Thereafter only the respondent did file written submission.

Claimants' case

5. Cw1 stated that he joined the respondent as a Room steward in March 2006 as a casual employee and without any written contract. That from 1.1.2009, he was given a written contracts appointing him for continuous periods ranging between 9 and 10 months and then went for one or two weeks break before

resuming another cycle. That the said arrangement went on until 2003 when the management of the respondent changed. That the new management told the claimants that the old staff were no longer required and that a new set of employees would be hired.

6. Cw1 contended that he was never served with any notice before termination and was also not paid any terminal dues as required under the Collective Bargaining Agreement. He therefore prayed for terminal dues for all the claimants as pleaded in his claim. He however admitted that he went for his annual leave during the break given before the renewal of the seasonal contracts. He contended that he was never issued with any shoes during his service as required under the contract.

7. On cross examination he admitted that sometimes there was low business. He maintained that his last contract was from 1.8.2012 to 30.4.2013 and admitted that he knew the time when it was to end but denied that he signed that contract.

8. On further cross examination he explained that he was claiming 2 months notice because that is what was provided under the Collective Bargaining Agreement for employees of 5 years service. He maintained his claim for gratuity and shoes allowance on ground that they were also provided under the Collective Bargaining Agreement. He admitted that the break between the seasonal contracts ranged between one week to two months.

9. Cw1 stated that he worked for the respondent as a Barman from 1.12.2009 to 30.4.2013 when he was verbally told that his job was over because the company was engaging new staff to replace the old lot. He therefore prayed for maximum compensation for loss of business plus severance pay, salary in lieu of notice and shoes allowance. He also prayed for underpaid salary for himself, David Ochieng and David Masese because although he was discharging duties of Waiter Grade 3 they were earning Kshs.2,000 less than the correct salary for Waiter Grade 3 while the other two were Room stewards but they were being paid as cleaners. In addition, he prayed for a proper certificate of service.

10. On cross examination Cw2 admitted that Alex Masese was actually employed as a cleaner. He further admitted that the employment contracts indicated when the contract period was to end. He also admitted the Hotel industry has high and low season. He denied that there was low tourism in 2013 and maintained that it is only in 2014 when the tourism went low. He maintained that new employees were employed to replace the claimants.

Defence case

11. Rw1 is the General Manager for the respondent. He testified that the claimants were employed by the respondent under seasonal contracts between 2008 and March 2013. That the said seasonal contracts were 6 months each and the claimants were paid their terminal dues after the lapse of the contracts.

12. Rw1 explained that the claimants' contracts were never renewed after the March 2013 because the business was low due to terror threats and the General election. He denied that new staff were recruited to replace the claimants immediately after the lapse of their contracts and contended that the new staff was employed in July 2013 after advertising the vacancies on her Notice Board. That up to now she is still recruiting new staff. That 3rd claimant was re-employed in 2013.

13. Rw1 denied that the claimants were declared redundant and maintained that their seasonal contracts lapsed automatically on 30.4.2013. He further maintained that the claimants knew when their contracts were to expire and as such there was no need for notice to be served before the lapse of the contracts.

14. As regards the reliefs sought, Rw1 contended that the claimant had not served for five continuous years to qualify for payment of gratuity as per clause 27 of the Collective Bargaining Agreement. He maintained that the Collective Bargaining Agreement took effect from 1.7.2012 and as such the right to shoes allowance started that time and not earlier. He denied that David Ochieng and Cw2 were underpaid and maintained that they were paid as per their letter of appointment.

15. On cross examination Rw1 admitted that he joined the respondent after the claimants had left. That he only learned about them from office records. He admitted that KUDHEIHA (union) has been having a Collective Bargaining Agreement with the Kenya Association of Hotel Keepers since 1970s. He further admitted that since 1995 he has seen the Collective Bargaining Agreement renewed after every 2 years. He also admitted that clause 1 of the Collective Bargaining Agreement provided for a probation period of two months but contended that although all the claimants worked for more than two months, the said clause did not apply to them because they were employed under seasonal contracts under clause 19 of the Collective Bargaining Agreement.

16. As regards the terminal dues sought, Rw1 maintained that all the claimants' terminal dues were paid after the expiry of the contracts and relied on the payslips filed by the defence. He further maintained that some of the claimants were re-employed after the vacancies were advertised internally. That the advertisement was done after the business started picking up in July and August 2013.

Analysis and Determination

17. There is no dispute that all the claimants were employed on seasonal contracts between 2006 and 2013 when their last seasonal contracts lapsed and they were not renewed due to low business due to terror threats and General election during that time. The issues for determination are:-

- a. **Whether the failure to renew the claimants' contracts amounted to declaring them redundant.**
- b. **If the answer to (a) is yes, whether the redundancy declared are the claimants jobs was unlawful and unfair.**
- c. **Whether the claimants are entitled to the reliefs sought.**

Non-renewal amounts to redundancy

18. Clause 19 of the Collective Bargaining Agreement provided that seasonal employment was not to exceed one year and if an employee exceeded one year the employer was barred from terminating him. In this case, none of the claimants ever served for twelve consecutive months during their service. I have carefully perused the seasonal contracts for each claimant and confirmed that they served in cycle of 10 consecutive months starting mainly from July to October, November to January and then February to April. That in May and June the claimants were generally away from work. Consequently going by the Collective Bargaining Agreement, the claimants' employment lapsed automatically every April by affluxion of the time and then they were re-employed from July to August for another cycle of ten months till April the following year.

19. In view of the foregoing, it becomes clear that the claimants would lose remedy in respect of their claims for unfair termination.

20. However, the respondent has not considered Regulation 18 of the Regulation of Wages (Hotel and Catering Trade) Order which provides as follows:-

"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 been converted to regular terms of employment on completion of six months continuous service".

21. In view of the foregoing, the claimants became permanent employees after completing six months of continuous service. However due to their ignorance or otherwise, they accepted to be terminated and then re-employed. The same process replayed itself every year as the claimants served another 6 months after re-employment. That means that the claimants ended up with separate and distinct contracts which were

terminated by mutual agreement.

22. The court is therefore going to only deal with the last cycle of employment between July 2012 and 30.4.2013. There is no dispute that all the claimants served for more than six consecutive months and as such they had become permanent notwithstanding the separate short term contracts they signed. In view of the foregoing observation, the court makes a finding that the claimants were entitled to continue working until retirement unless they were terminated by notice or through other lawful means.

23. There is no dispute that the claimants were never served with any notice prior to the termination of their services. The claimants testified that their contracts were not renewed because there was new management which wanted new staff. That although the respondent alleged that there was low business, the claimants maintained that the employer recruited 18 new staff who were inducted by them before they were laid off. That later the respondent recruited 21 other employees and denied that there were terror threats which reduced tourism business in 2013.

24. Rw1 admitted that the reason for not renewing the claimants' contracts was because of low business due to Terror threats which affected the tourism business.

25. Having found that the claimants had converted to permanent employees, the respondent was barred from continuing to employ them as seasonal or temporary employees and from terminating their services on ground of redundancy without following the statutory procedure. Consequently I find that the respondent in this case constructively declared redundant, the jobs of the claimants on 30.4.2013, when she failed to appreciate that the claimants had converted to permanent employees and let them continue working.

Unfair termination

26. It is now trite that employers are bound by mandatory statutory procedure for declaring redundant, employees jobs otherwise the redundancy is rendered unfair termination and the employer ordered to compensate the employees. Under section 40 of the Employment Act (EA), before the employer declares the employment of employee redundant, he is required in mandatory terms to serve atleast one month notice in writing to the Labour officer and the employee or his trade union if he is a member of a union. Thereafter the employer is enjoined to do fair selection of the employees to be laid off usually based on the principle first in last out. Finally the employees selected for the layoff are paid the redundancy dues.

27. In this case no notice of the redundancy was served on the claimants or their union and the Labour officer. The respondent fallaciously repeated the same mistakes she had been doing before of terminating services but the claimants were now wiser and challenged her decision. After considering the evidence presented to the court and the law, I find and hold that the respondent declared redundant the claimants employment without complying with section 40 of the Employment Act and the Collective Bargaining Agreement and as such the termination of the claimants became unfair.

Reliefs

Notice

28. Clause 19 of the Collective Bargaining Agreement protected the claimants from termination without notice as provided under section 35(1) (c) of the Employment Act. All the claimants worked for less than one year in the last phase which I have considered herein above in declaring that they were unfairly terminated. They are therefore each awarded one month salary in lieu of notice based on the last salary except the second claimant who withdraw the claim on 8.11.2015.

Compensation

29. Under section 49 of the Employment Act, I award each claimant except the second claimant, 4 months salary as compensation for unfair termination. In making the said award, I have considered the

fact that they did not contribute to the termination through misconduct. In addition I have considered the fact that they could not secure alternative employment within a period of less than the 4 months due to the slump in the hotel industry due to the terror threats alluded to by Rw1.

Severance pay

30. The period of service considered herein, between July 2012 and April 2013 is less than one year and as such the claimants are not awarded any severance pay. In addition I have already deemed redundancy to be unfair termination and ordered compensation and as such the claimants will have to content with that discretionary award.

Certificate of Service

31. I agree with the claimants that the certificate of service given to all of the claimants except Mr. Joshua Kitela Ngungu were not in accordance with the provisions of section 51 of the Employment Act. However after perusing page 72 of the Collective Bargaining Agreement, I noted that the Certificate of Service given to the said claimants were in all fours with the Collective Bargaining Agreement. The foregoing notwithstanding the law must prevail over the Collective Bargaining Agreement because parties cannot oust the law of consent. Consequently I direct the respondent to issue to each claimant, except the second and the twelve claimant, another Certificate of Service as provided for under section 51 of the Employment Act.

Leave

32. This claim is dismissed because I have perused the leave records for the claimants and have noted that they utilized or they were paid for the 20 leave days earned during their last contract.

Foot wear

33. Rw1 admitted that the claimants were entitled to shoes allowance of kshs.500 per month under the Collective Bargaining Agreement from July 2012 when it became effective. I therefore award each claimant Kshs. 5,000 for the ten months from July 2012 to April 2014.

Termination gratuity

34. Under clause 27 (b), termination gratuity was a benefit only available to the employees who served for a minimum of 5 years. In this case none of the employees served for 5 years continuously and as such they are all disqualified from claiming termination gratuity.

35. The summary of each claimants' award is calculated as follows:-

1. Hassan Suleiman Mwangema

Notice	13,390
Compensation	<u>53,560</u>
	<u>66,950</u>

2. Paul Onyango Owuor

Notice	13,085
Compensation	<u>52,340</u>
	<u>65,425</u>

3. **Sheila Nyanjao Kinuthia**

Claim withdrawn on 8.11.2013

4. **Lucas Olima**

Notice	13,085
Compensation	<u>52,340</u>
	<u>65,425</u>

5. **Fredrick Nganga Njau**

Notice	16,091
Compensation	<u>64,364</u>
	<u>80,455</u>

6. **Khamis Kalume Mudzomba**

Notice	13,085
Compensation	<u>52,340</u>
	<u>65,425</u>

7. **Erick Onyango Amollo**

Notice	13,390
Compensation	<u>53,560</u>
	<u>66,950</u>

8. **Omar Piko Dume**

Notice	13,390
Compensation	<u>53,560</u>
	<u>66,950</u>

9. **Ali Khalifan Nyawa**

Notice	13,390
Compensation	<u>52,332</u>
	<u>65,415</u>

10. **Onesmus Mwangolo Mwatuwa**

Notice	13,390
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Compensation 53,560

66,950

11. **Edward Mwangea Mutua**

Notice 13,390

Compensation 53,560

66,950

12. **Joshua Kitala Ngungu**

Notice 13,390

Compensation 53,560

66,950

13. **Paul Njuguna Kinuthia**

Notice 13,390

Compensation 53,560

66,950

14. **Mohamed Hamisi Madonga**

Notice 13,390

Compensation 53,560

66,950

15. **Ali Juma Mwarua**

Notice 13,390

Compensation 53,560

66,950

16. **Alex Masese Basweti**

Notice 13,086

Compensation 52,340

65,426

17. **Philip Challos Muthai**

Notice 13,390

Compensation 53,560

66,950

18. **David Ochieng**

Notice 13,085

Compensation 52,340

65,425

Disposition

36. For the reasons stated above I enter judgment for all the claimants, except the second claimant in aggregate sum of **kshs.1,142,495** plus costs and interest. The claimants will also be issued with Certificate of Service as directed above.

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

ONESMUS MAKAU

JUDGE