



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

**AT MOMBASA**

**CAUSE NO. 799 OF 2015**

**JUMA MWAMTINDI.....CLAIMANT**

**VS**

**AFRICAN PEARL&SPA LUXURY**

**DIANI BEACH BOUTIQUE HOTEL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant was employed by the respondent from 19.12.2013 as a security Guard earning kshs. 9000 per month. He worked until 16.9.2015 when he was given a fixed term contract of 5 months backdated to 1.7.2015 and ending on 30.11.2015. That when he sought to clear with the employer with respect to the previous contract he was dismissed on the same day,16.9.2015 without any prior notice or fair hearing. The Claimant therefore avers that the termination was substantively and procedurally unfair and prays for damages amounting to Kshs. 502,824 made up of one month salary in lieu of notice, twelve months salary as compensation for unfair termination, underpaid salary, 2 years leave, house allowances, unpaid public holidays, unlawful NSSF and NHIF deductions, salary for 16 days worked in September 2015 and certificate of service.

2. The Respondent never entered appearance or filed defence despite being served with summons and mention notice to attend court for directions. As a result the claimant successfully sought directions to dispense with the hearing and instead rely on the pleadings, witness statement and the documentary evidence and file submissions.

3. The issues for determination in this suit are:

- a. Whether the termination of the claimant's employment by the respondent was unfair.**
- b. Whether the reliefs sought should issue.**

**Unfair and unjust termination**

4. Termination of employment is unfair if the employer fails to prove that it was founded on valid and fair reasons and that it was done after following a fair procedure.

**Reasons for the termination**

5. The respondent has not filed any defence to this suit and as such she has not discharged the burden of proving and justifying the reason for terminating the services of the claimant on 16.9.2015 as required under section 43, 45(2)(a) &(b) and 47 (5) of the Employment Act. The claimant's contention that he was dismissed for claiming his dues for the previous contract that was terminated by the issuance of the new one backdated to 1.7.2015 has not been rebutted. Consequently, I find that the respondent has failed to prove on a balance of probability that, the termination of the claimant's employment contract was grounded on a valid and fair reason.

### **Fair procedure**

6. The claimant contended that he was not accorded any chance to defend himself before the dismissal as required under section 41 of the Employment Act. He also contended that he was not served with a prior notice as required under section 36 of the Employment Act. The respondent neither filed any defence nor gave any evidence in this case to prove on a balance of probability that she followed a fair procedure before dismissing the claimant from employment. Under section 41 of the Act, the employer is barred from dismissing his employee on ground of misconduct, physical incapacity or poor performance before first explaining to him, in a language he understands and in the presence of Shop Floor Union Representative or a fellow employee of his choice, the reason for the intended dismissal and then accord the employee and his chosen companion a chance to air their representations for consideration before the dismissal is decided. In this case no evidence has been adduced to prove that such a hearing was accorded to the claimant before the termination of his services. Consequently, I find that the defence has failed to prove on balance of probability that she followed a fair procedure before dismissing the claimant.

7. Under section 45 (2) of the employment Act, termination of an employee's contract of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. In this case the said burden of proving the substantive and procedural fairness has not been discharged on a balance of probability and consequently, the court finds and holds that the termination of the Claimant's employment was unfair and unjust. The first issue is therefore answered in the affirmative.

### **Reliefs**

8. The Claimant has prayed for damages amounting to Kshs. 502,824 made up of one month salary in lieu of notice, twelve months salary as compensation for unfair termination, underpaid salary, 2 years leave, house allowances, unpaid public holidays, unlawful NSSF and NHIF deductions, salary for 16 days worked in September 2015 and certificate of service .

### **Notice and compensation for unfair termination**

9. The letter of appointment provided for one month notice before termination. I therefore award to the claimant kshs 9000 as salary in lieu of notice as prayed. I also award him kshs.54000 under section 49 (1) of the Employment Act, as compensation for the unfair termination of his employment contract. In making the said award I have considered the fact that the claimant had worked for the respondent for a short period but also the fact that he had not contributed to the termination through misconduct.

### **2 years leave**

10. The claim for 2 years leave is declined and instead the claimant is awarded only 24 leave days under the Regulation of Wages (Hotel & catering Trades) order. Under the said Regulation leave can only be accumulated through mutual agreement between the employer and the employee. He will therefore get kshs 9000 x 24/26= kshs.8307.70

### **House allowance arrears**

11. Clause 1 of the appointment letter provides that the salary of kshs.9000 was inclusive of house allowance. The claim for arrears of house allowance therefore dismissed.

### **Underpayment**

12. The basis upon which the claim of underpayment is based has not been demonstrated by pleadings, evidence and submissions. It is therefore dismissed.

### **Unpaid public holidays**

13. Likewise no particulars and no evidence has been adduced to prove the claim for unpaid public holidays for 2 years.

### **Unlawful deductions of NSSF and NHIF and Service Pay**

14. There is no evidence adduced to prove that NHIF deductions were never remitted to the NHIF Fund. It is also not proved that all the NSSF deductions were never remitted to the NSSF Fund. The statement produced as exhibit is only for the period ending 2014. It is a photocopy and it does not state the date when it was generated. However the document confirms that during the period of employment, the remittance of his NSSF deductions was not up to date. I will remedy the said default by awarding the claimant with Service pay for 2 year at the rate of 15 days pay for each completed year of service being  $kshs.9000 \times 15/30 \times 2 = kshs. 9000$ .

### **Salary for 16 days worked in September 2015**

15. There is no dispute that the claimant worked up to 16.9.2015. He is therefore entitled to the salary for the 16 days worked being  $kshs.9000 \times 16/30 = kshs.4800$ . He will however get kshs.4500 as prayed.

### **Overtime**

16. The particulars of the claim for overtime have not been pleaded clearly and no evidence has been tendered to substantiate the claim sufficiently.

### **Certificate of service**

17. The claim for certificate of Service is granted because it is a right guaranteed under section 51 of the Employment Act.

### **Disposition**

18. For the reasons stated above judgment is entered for the Claimant by awarding him the sum of **Kshs. 84807.70** plus costs and interest. He will also be issued with Certificate of Service.

**Signed, dated and delivered at Mombasa this 11th day of November 2016.**

**O.N. MAKAU**

**JUDGE**