



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**

**AT MOMBASA**

**CAUSE NO. 222 OF 2014**

**KENEDDY MICHIRA MANGERERE .....CLAIMANT**

**VERSUS**

**SENTIDO NEPTUNE PARADISE RESORT .....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The Claimant has sued the respondent claiming ksh.465,832 being terminal dues accruing from his employment plus compensation for unlawful termination of his employment by the respondent on 22/4/2013. The basis of the suit is that the termination of the employment was done in breach of the Employment Act and the Labour Institutions Act.
2. The respondent has denied liability to pay the damages claimed in the suit and averred that the termination of contract was lawful as the requisite notice was served and the final dues paid to the claimant.
3. The suit was heard on 23/7/2014 and 22/10/2014 when the claimant testified as CW1 while the respondent called Robinson Rua Harre as RW1. After the close of the hearing both parties filed written submissions for consideration in this judgment.

**CLAIMANT'S CASE**

4. CW1 stated that he was employed by the respondent on 1/7/2006 on casual basis as Security Guard until 1/10/2010 when he was issued with a written contract for a fixed term. His terms of service were improved in terms of salary. He also started to receive house allowance and service charge. He started also to enjoy paid off days and holidays. His fixed term was renewed severally and automatically for periods of six months then three months and ended with one month contract. The last contract was in April 2013. It was terminated and CW1 offered to continue serving in the same capacity but on casual basis. CW1 worked as casual for 9 days before he was terminated after he started to claim for his accrued dues in respect of the previous appointment.
5. CW1 explained that he was a union member and as such his rights were protected under the CBA between his union KUDHEIHA and the respondent's Employers Organization. Such rights accruing under the CBA to CW1 included the right to become permanent employee after completion of 3 months continuous service, right to housing allowance, right to new uniform every year, right to be served with 3 months notice before termination of his services, right to leave travelling allowance and right to payment

of gratuity of 1/3 gross pay per year of service after serving between 5 and 10 years. He contended that he served for 7 years.

6. On cross examination by the defence counsel, CW1 clarified that between 2006 and 2010 he was a casual being paid on weekly intervals. He maintained that he joined the union in 1997 before being employed by the respondent and continued making direct payment of union dues. He however explained that after becoming a contract employee, his union dues were paid through check off system from salary deductions. He maintained that from 2006, he served the respondent continuously until April 2013 except for one month during the post election violence in 2008.

7. CW1 admitted receiving 7 days termination notice and thereafter continuing to work on casual basis. He confirmed also that the last contract to sign was for 1-4-2013 to 30/4/2013. He further confirmed that he was paid all his dues in respect of the period he served under fixed term contract between 2010 and April 2013. He maintained that while serving as casual employee in May 2013, he was terminated for demanding terminal dues for the period worked before he was converted into a fixed term employee. According to him the employer compared such demand with an attempt "to milk an elephant". CW1 explained that his demand for the dues was vide a demand letter from Kituo Cha Sheria which led to the CW1 being ordered to remove his uniform and hand over.

8. CW1 clarified that the dues sought in this suit is therefore for the period between 2006 and September 2010 which is a period of 51 months. He denied ever deserting work in May 2013 and maintained that he was dismissed. He admitted that the wages paid while serving as casual was in compliance with the minimum Wages Order which included house allowance.

### **DEFENCE CASE**

9. RW1 is the HR Manager for the respondent for the last 26 years. He confirmed that CW1 worked for the respondent from 28/7/2006 to May 2013 continuously except for the period of post election violence between may and December 2008. RW1 further explained that CW1 served on several fixed term contracts the last one running from 1-4-2013 to 30-4-2013 which was terminated by 7 days notice. RW1 confirmed that the contracts ran continuously without any break.

10. RW1 confirmed that when CW1 was converted into a contract employee, he was put on the payroll and started getting salary, house allowance, night duty allowance and service charge. According to RW1, CW1 was paying all his terminal dues at the lapse of each respective contract including leave earned, leave travelling allowance, public holidays and off days worked at double rate. RW1 maintained that CW1 signed for his terminal dues and discharged the respondent from any further claim. RW1 further maintained that CW1 used to receive uniform. He further stated that he issued CW1 with a certificate of service in December 2013.

11. RW1 explained that the 7 notice terminating CW1's services stated the reason as low business and that all workers were to work as casuals for 2 months. He contended that CW1 deserted after working for 9 days in may but all other employees continued until they were re-employed after the two months. RW1 produced the CBA for 2012-2013 to prove that CW1 did not qualify for gratuity pay at the rate of ½ pay per year of service because he never served for 5 years.

12. On cross examination by CW1, RW1 confirmed that the respondent was a member of an employer Association that had a CBA with CW1's union. RW1 however contended that between 2006 and September 2010, CW1 was not a member of the union and as such he was not entitled to benefit under the CBA's negotiated by the union. According to RW1, CW1's terms of service were regulated by the statutory wage guidelines under which CW1 was paid a consolidated wage.

13. RW1 admitted that the CBA did not provide for the 7 days terminal notice provided for under the seasonal contract. He also admitted that the CBA provided that after serving for 3 months an employee automatically become permanent staff but denied that CW1 was included in such benefit because he was not a union member. He maintained that CW1 never notified the respondent of his union membership

before September 2010. He maintained that CW1 deserted work without notice after accepting to work on casual basis in May 2013.

### **ANALYSIS AND DETERMINATION**

14. There is no dispute that the parties herein related as employer- employee between 2006 and 2013. There is also no dispute that CW1 worked as casual under a verbal contract between 2006 and September 2010 when he was hired on fixed term contract running continuously without any break between October 2010 to April 2013. It is also not disputed that the last contract lapsed in April 2013 after which CW1 was hired on casual basis but the new contract was terminated after 9 days. Lastly there is no dispute that the accrued benefit being sought are in respect of the period between 2006 and September 2010 only.

15. The issues for determination are whether the termination of contract of employment was unlawful and whether CW1 is entitled to the reliefs sought.

#### **Unlawful termination**

16. In answering the above question the court must consider the reason and the procedure followed in terminating the contract. The court must also consider the relevance of the CBA to the contract between the parties herein. The CBA provided under Clause 19 that an employer could employ persons on seasonal basis provided that such arrangement did not exceed one year and even such contracts were subject to Section 35(1)c of the Employment Act. The said Section entitled an employee to written notice of 28 days before termination. The said Clause 19 of the CBA further protects seasonal employees against bad labour practices which would make the employer avoid employing the said seasonal employees on permanent basis.

17. It is common knowledge that CW1 served continuously without any break in consecutive fixed term contract between October 2010 and April 2013. That is more than one year period and the sole purpose was for the respondent to avoid employing CW1 on permanent basis. Before then CW1 had served continuously from January 2009 on casual basis after returning to work after the post election violence of 2008. The court is of a considered opinion that CW1 was a permanent employee within the meaning of Section 35 and 37 even before October 2010 when he was given seasonal contracts. The said seasonal contracts calculated to deny CW1 the benefits of a permanent employee were therefore of no consequence in view of Clause 19 of the CBA.

18. The interpretation of the said clause is to the effect that seasonal contracts were to be resorted to on very special circumstances and not be abused in any way. The said Clause further subjected the said seasonal contracts to the same terms and conditions of service as the other employees in accordance with Section 35(1) (c) of the Employment Act. The claimant was therefore protected from arbitrary termination after completing one year period of seasonal contract. In this court's view CW1 served continuously between January 2009 and 9/5/2013. He started as casual, then under seasonal contract and ended allegedly as casual. Under Section 37 of the Act, the court declares and converts CW1's terms of service to that of permanent employee of the respondent.

19. The reason for failure to renew CW1's last seasonal contract was low business and high cost of maintaining him in the payroll. That was equal to declaring CW1 redundant. Secondly CW1 was entitled to at least 2 months notice in writing before termination under Clause 9 and 19 of the CBA and Section 35(1) (c) of the Act. That was not granted and therefore the contract breached. The redundancy declared by the alleged notice dated 22/4/2013 was however unfair termination because it was done without following the procedure laid down by Section 40 of the Act.

20. In any event the court does not treat the alleged termination of services by the alleged lapse of the fixed term contract as a valid termination at all. The reason for the foregoing that CW1's services never ceased but continued on alleged casual basis. The court believes the evidence of the CW1 that he was summarily dismissed when he served a demand letter in respect of his dues that accrued in the period of service before October 2010 when he became a contract employee. The respondent was not pleased with

the said demand because all through she had avoided such obligation by failing to grant CW1 all his benefits negotiated under the CBA. That dismissal was unfair within the meaning of Section 46 of the employment Act because it was done after CW1 commenced legal proceedings against the employer to enforce a legal right.

### **RELIEFS**

21. In view of the foregoing, the court makes declaration that the termination was unlawful and wrongful. In addition the court awards CW1 ksh.108,792 being 12 months salary as compensation for unfair termination. He will also get ksh.9066 being one month salary in lieu of notice as prayed. The prayer for house allowance, uniform allowance and leave pay are dismissed for being time barred. The reason for the foregoing is that CW1 in his evidence was categorical that the claim was for the period between 2006 and 2010 which is more than 3 years before the time when the suit was filed on 7/5/2014. Lastly the prayer for service pay is dismissed because CW1 was a member of the NSSF and his employer used to remit contributions monthly.

### **DISPOSITION**

For all the reasons and findings above, judgment is entered for the claimant declaring his dismissal from employment unlawful and awarding him **ksh.117,858** plus costs and interest.

Orders accordingly.

**Dated, signed and delivered this 13<sup>th</sup> February 2015.**

**O. N. Makau**

**Judge**