



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 109 OF 2014

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION
INSTITUTIONS AND HOSPITAL WORKERS**

[KUDHEIHA]..... CLAIMANT

VERSUS

NORTH COAST BEACH HOTEL..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Alex Thuita Industrial Relations Officer for the Claimant

Mrs. Mwangi instructed by Lawrence Mungai & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. This Claim is brought by the Claimant Trade Union on behalf of its 2 Members, Messrs. Wanga Barasa Edwin and Lazarus Kombe Kalama [Grievants]. It is alleged that the first Grievant was initially employed on casual basis as Food and Beverage Waiter on 1st March 2009. He later was made the Food and Beverage Supervisor. The second Grievant was employed on 1st March 2009 on casual basis as a Storekeeper. He was subsequently engaged on contractual basis. On 13th September 2013, both Grievants' contracts were terminated by the Respondent. The Respondent wrote to the Grievants advising their contracts would not be renewed. They considered this decision amounted to unfair and unlawful termination, and through their Trade Union filed the Statement of Claim on 26th March 2014 in which they seek:

- a. A declaration that termination was unfair;
- b. The Grievants be paid terminal benefits comprising underpayment of salaries, 13 days worked in September 2013, 2 months' salary in notice pay, annual leave pay, shoe allowance, acting allowance and August service charge;

- c. 12 months' salary in compensation for unfair termination;
- d. They are issued Certificates of Service; and
- e. Costs of the Claim.

The total sum claimed by Wanga, under the various heads is Kshs. 915,302, while Lazarus seeks a total of Kshs. 781,660.

2. The Respondent filed its Response on 10th June 2014. Its position is that it engaged the Grievants on various fixed term contracts, until such a time the Grievants were advised there would be no renewal. They were not employed on casual basis. They accepted the contractual terms under which they worked. They cannot claim their contracts were unfairly terminated; the contracts lapsed, and were not renewed. The claim for notice pay has no foundation. The claim for underpayment of salaries similarly is misplaced, as the terms of employment were contained in the contracts of employment. Before being engaged under contract, the Grievants served as Casual Employees, and cannot claim house rent allowance. The Claim should be dismissed with costs to the Respondent.

3. The first Grievant testified on 14th July 2014. On 15th October 2014, the Parties' Representatives informed the Court they wished to close their respective briefs, and adopt the Pleadings, Evidence and Submissions on record. They confirmed the filing of their Closing Submissions on 20th November 2014 and were advised the Award would be delivered on 16th February 2015.

4. Wanga confirmed he was first employed on casual basis as a Food and Beverage Waiter, on 1st March 2009. He worked as a Casual Employee. He was paid a monthly basic salary of Kshs. 4,896. He was issued the first written contract on 1st June 2011. His salary was revised to Kshs. 10,733 per month- all inclusive. He was made the Acting Supervisor subsequently, but his salary remained the same. There was no acting allowance paid to him. He was then made the substantive Food and Beverage Supervisor. His salary remained the same. The contracts were being renewed after every 6 months, except the last one which was for 3 months. The Grievant expected the contract to be renewed. However on 13th September 2013, he was informed by the Respondent there would be no renewal.

5. He was a Member of the Claimant Union. There was a Collective Bargaining Agreement concluded between the Parties, applicable to the Grievants. He was not remunerated in accordance with the CBA.

The Court Finds:-

6. The Claimant Union and the Respondent had concluded several Collective Bargaining Agreements. It is not contested that the Grievants' individual contracts of employment, were subject to these labour contracts.

7. The Grievants worked from 1st March 2009 to 13th September 2013. They worked uninterruptedly for 4 years. There were 3 CBAs, which governed their terms and conditions of service over the 4 years. The first was effective for 2 years beginning 1st July 2008; the second for 2 years beginning 1st July 2010; and the last for 2 years from 1st July 2012.

8. Central to all these CBAs is Clause 19. It regulated Employees such as the Grievants, who were characterized initially as Casual Employees, and subsequently as fixed term Employees. Clause 19 across the 3 CBAs, states:

*'' [a] The Employer may employ persons on a temporary/ seasonal basis for a period to be specifically advised to the Employee- **Such period not to exceed 1 year.** Temporary/ seasonal employment may only be offered for genuine temporary / seasonal purposes or projects. Such Employees shall be subject to the same terms and conditions of service as other Employees in accordance with Section 35 [1] [c] of the Employment Act 2007.*

[b] The Employer shall not terminate the services of a temporary/ seasonal Employee after completion of an aggregate of one year service or less and employ a new Employee in his place, nor shall the Employer re-employ the temporary/ seasonal Employee within a short period of time to avoid employing that temporary/ seasonal Employee on a permanent basis.

[c] Should the temporary/ seasonal Employee then be engaged in permanent employment for the same Employer, the provisions of Clause 1 of the CBA relating to probationary terms will not apply.’’

9. This Clause answers most of the submissions made by the Respondent with regard to the status of the Grievants, and in particular whether they served under fixed term contracts with no expectancy of renewal. In the view of this Court, the Clause required the Grievants who had served for 4 years, to be treated as regular Employees, on indeterminate contracts of employment. By the time they were issued the first fixed term contracts on 1st June 2011, they had already completed in aggregate, more than 1 year in employment. The Respondent therefore issued the 6 month, 3 month- term contracts after 1st June 2011 to avoid employing the Grievants on permanent terms. This was against the CBA. The CBA bound the Respondent not to terminate the Grievants’ contracts after they had served for 1 year. They became regular, not seasonal or temporary Employees, to whom the unfair termination law under the Employment Act 2007 applied. The decision of the Court in ***Anne Theuri v. Kadet Limited [2013] e-KLR***, would not apply to this dispute in light of the express terms contained in Clause 19 of the CBAs.

10. Consequently, even before looking at the various claims for terminal benefits, the answer with respect to the claim for unfair termination must be in favour of the Grievants. The Respondent refused to renew their contracts arguing that the fixed terms contracts had expired. The Grievants agreed to the terms of those contracts. The terms and conditions of employment contained in the CBA superseded all other terms and conditions of employment applicable to the Grievants. In event of conflict, the law stipulates the terms and conditions that confer superior benefit to the Employee are to be upheld. The Grievants were entitled to regular employment; should have been treated as regularly engaged; and enjoy the substantive and procedural rights on termination of employment, under Section 41, 43 and 45 of the Employment Act 2007.

11. The Respondent offered no substantive justification, and did not adhere to fair procedure, in terminating the Grievants contracts. ***They are entitled to compensation which the Court allows at 7 months gross salary due to the Grievants as of 13th September 2013.***

12. The Respondent attached to its Statement of Response 1st Grievant’s pay slips, for the period July 2011 to January 2013. There was no explanation for the non-production of the 1st Grievant’s pay slips for the period before July 2011 and after January 2013. The pay slips for Lazarus were attached to the Claim, but similarly did not represent the whole period of service. The Muster Rolls filed by the Respondent only indicate the days worked. They do not contain the sums paid to Grievants for their labour.

13. The samples of pay slips availed to the Court nonetheless, do not support the Claimant’s case for underpayments. The amounts listed in the Claim as underpayments, and irregularly re-computed in the Closing Submissions, are not supported by the pay slips. The Claimant did not assist the Court in understanding the computation for underpayments, and the situation was not made any better by the recalculation done in the Closing Submissions, without the participation of the Respondent. The Court has time and again stated that Closing Submissions should not serve as a forum for adducing additional evidence; it is simply a forum for arguing one’s case on the basis of the recorded evidence. The Claimant muddled its case for underpayments by shifting position. There was need to focus on the sums indicated in the pay slips, against what should have been paid under the CBAs. The claims for underpayment of salaries have not been established and are rejected. The claim for acting allowance likewise has no support in fact. The pay slips show consistent payment of acting allowance to Wanga. He did not explain to the Court what the acting allowance which he claims, beyond what was paid, is for. The claim for acting allowance is declined.

14. The Respondent did not avail evidence contradicting the Claimant on payment of 13 days’ salary for

work performed in September 2013. **The Respondent shall pay to the Grievants 13 days' salary based on the gross monthly pay, payable as of the date of termination.**

15. **The Grievants merited 2 months' notice of termination or 2 months' salary in lieu of such notice, under Clause 9 [a] of the CBA. They are granted 2 months' salary in notice pay, based on their last salaries.**

16. The Respondent did not show that the Grievants went on annual leave or sold their leave days, as contemplated under the CBA. Clause 12 granted them 26 days of paid annual leave. **They are allowed 65 days of annual leave for the period 2009 to 2011 as claimed, to be calculated based on the salaries paid during the respective periods.**

17. Clause 12 of the CBA granted the Grievants leave traveling allowance. They did not take leave and were consequently not paid leave traveling allowance. **The claim for leave allowance is allowed, based on the rates applicable under the various CBAs, for the specified periods.**

18. Clause 16 of the CBA stipulated the Employer would provide the Grievants with uniforms and footwear. If not, the Employer would compensate the Employee. The claim for compensation for non-provision of footwear is merited. However, it is not to be calculated at the rate of Kshs. 500 for 54 months. Different rates applied in each CBA between 2009 and 2013. **The claim for shoe allowance is allowed, to be computed under Clause 16 of each CBA for the relevant period.**

19. Clause 21 of the CBA required the Respondent to pay service charge to the Grievants. It is an item which was shown to have been paid in the pay slips preceding the termination. It should have been no different for the month of August 2013, which is claimed by the Grievants. **The prayer for service charge for August 2013 is allowed.**

20. No order on the costs.

In sum, IT IS ORDERED:-

[a] Termination of the Grievants' contracts of employment was unfair;

[b] The Respondent shall pay to each grievant 7 months' gross salary in compensation, based on the last such salary paid to the Grievants;

[c] The Respondent to pay the Grievants terminal benefits comprising - 13 days' gross salary for work done in September 2013, 2 months' salary in notice pay, 65 days' salary worth of annual leave, leave traveling allowance, shoe allowance and service charge - all calculated as indicated in this Award;

[d] The Award shall be satisfied within 30 days of its delivery;

[e] The Respondent shall release the Grievants' Certificates of Service to them forthwith; and

[f] No order on the costs.

Dated and delivered at Mombasa this 6th day of February 2015

James Rika

Judge