



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NUMBER 9 OF 2013

**BETWEEN**

LENNOX NDUME MISUNGA ..... CLAIMANT

**VERSUS**

HOTEL SAPPHIRE LIMITED ..... RESPONDENT

Rika J.

Court Assistant – Mr. Kombe

Mr. Olewe instructed by Mbugua Mureithi & Company Advocates for the Claimant

Mr. Ojode instructed by Ojode Udoto & Onjoro Advocates for the Respondent

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ISSUE IN DISPUTE: TERMINAL BENEFITS

AWARD

(Rule 27(1) (a) of the Industrial Court (Procedure) Rules 2010)

1. The Claimant was employed by the Respondent Hotel, as its Food and Beverage Cashier, on the 16th February 1999. He resigned voluntarily on 16th November 2012. He earned a salary of Kshs.12,283 per month, as per his letter of employment.
2. He was not allowed to take his annual leave, and was not compensated in lieu of such leave, for the period in employment. Through the intervention of the Labour Office Mombasa, he was finally allowed to take annual leave from 12th November 2012. He was to resume on 14th December 2012.
3. He did not have a letter of employment, until the Respondent was compelled through the advice of the Labour Office, to issue the Claimant with such a letter dated 1st November 2012.
4. On the same date, the Respondent wrote to the Claimant advising that the Respondent had decided “to reward you your 312 days of accrued leave since 1st February 1999 to 31st October 2012”
5. The leave schedule detailing the accrual of annual leave days, was given to the Claimant, by the

Respondent.

6. The Claimant applied to utilize 32 days of the 312 pending annual leave days, between 12th November 2012 and 13th December 2012, according to the Leave Pass, attached to the Claim as appendix 3.

7. It was while on leave, on 16th November 2012, that the Claimant wrote to the Respondent, opting to resign. He demanded to be paid his terminal dues.

8. This did not go down well with the Respondent. On 22nd November 2012, the Respondent informed the Claimant it had revoked its offer to the Claimant of 1st November 2012. The Claimant was advised by the Respondent his notice period would run concurrently with his accrued leave, and his last working day would be 16th December 2012. He would be paid the following terminal benefits:

- (a) Salary and house allowance up to and including 16th December 2012.
- (b) 54 days of annual leave, accrued from March 2009 to-date, plus 8 pending leave days.
- (c) Service charge for November 2012
- (d) Less statutory deductions and monies owing to the company in the form of loans, advances or shortages etc, if any.

9. The Claimant did not agree with the Respondent's position, and filed his Statement of Claim on 4th February 2013 in which he seeks Award against the Respondent for:-

- (a) A declaration that the Respondent engaged in unfair labour practice, in violation of Article 41(1) of the Constitution of Kenya 2010.
- (b) Respondent to pay the Claimant Service Pay of 13 years 10 months, at Kshs.60,450.
- (c) Respondent to pay the Claimant his annual leave days and pro-rata unpaid leave at Kshs.120,900.
- (d) Salary and house allowance up to and including 16th December 2012 at Kshs.9,300.
- (e) Certificate of Service
- (f) Costs to the Claimant
- (g) Interest on (b) (c) and (d) above
- (h) Any other suitable relief

10. The Claimant gave evidence, and closed his case before the first Trial Judge Radido Stephen on 9th October, 2013.

11. The Respondent filed its Statement of Response on 10th May 2013. It concedes the Claimant was its Employee, initially employed on casual terms. He was allowed to go on leave in accordance with the CBA in place. It was agreed before the Labour Officer on the number of pending annual leave days, and agreed the Claimant utilizes part of his accrued annual leave days and be compensated for the remaining days. He took leave and opted to resign. His terminal dues were computed, and forwarded to the Labour Office for his collection.

12. Mr. Amos Furaha Thoya, Human Resources Manager testified on 31st October 2014 for the Respondent. 8 Employees declined to collect their terminal benefits. Among them was the Claimant.

The Respondent forwarded a Bankers' Cheque of Kshs.224,571 to the Labour Office, for onward transmission to the 8 Employees. The Witness was not able to say if the cheque was paid out to the Employees. He agreed salary for days worked up to 16th December 2012 had not been paid to the Claimant and his Colleagues, and Certificates of Service – though ready, had not been released.

*The Court Finds and Awards:-*

13. The Claimant was employed by the Respondent as Food and Beverage Cashier on 1st February 1995. He resigned voluntarily through a letter he wrote to the Respondent dated 16th November 2012. The notice of resignation was for 30 days, beginning 16th November 2012 to 16th December 2012.
14. The Respondent issued the Claimant with a letter of employment on 1st November 2012. The date of employment was shown to be 1st February 1999.
15. It is conclusively shown by documents from both Parties that on the same date of 1st November 2012, the Respondent issued a separate letter to the Claimant, advising the Claimant it had been decided to reward (perhaps award) the Claimant his 312 days of accrued annual leave.
16. The documents also show the Claimant was to proceed on annual leave with effect from 12th November 2012 to 13th December 2012.
17. The letter of 1st November 2012 by the Respondent is categorical, as is the attached Schedule of Annual Leave, that the Claimant was owed 312 days as of 1st November 2012.
18. He took 32 days of these 312, leaving him with a balance of 280 days.
19. The letter dated 22nd November 2012 from the Respondent to the Claimant, advising him that his accrued annual leave days had been revised down to 54 days was without foundation. The Respondent merely reacted like a jilted lover by hitting back at the Claimant, upon learning of the Claimant's decision to end the 13 year old relationship, through his abrupt resignation while on leave.
20. The 312 days of annual leave were accrued, acknowledged, agreed upon, and completely vested in the Claimant. They were his not by the benevolence of the Employer, but by a succession of Employment Statutes, and by Clause 3 of the contract of employment which gave the Claimant 24 days of annual leave with full pay, upon completion of 12 months continuous service.
21. Mr. Amos Furaha Thoya, the Human Resources Manager was not able to explain his Employer's baffling change of position, with respect to the Claimant's outstanding annual leave days. He could not explain why the days were revised down, and why only a sum of Kshs.26,849.20 was paid on account of the Claimant's pending annual leave days to the Labour Office. He did not show that any terminal benefits have reached the Claimant and his Colleagues.
22. Under the repealed Employment Act Cap 226 the Laws of Kenya, Section 7, the Claimant was entitled to at least 21 days of annual leave after 12 months of consecutive service. This position was preserved in the repealing Employment Act No. 11 of 2007, under Section 28. The Claimant's contract allowed him 24 days of annual leave.
23. The Claimant gives different figures of Kshs.120,900 (Statement of Claim) and Kshs.115,868 (Closing Submissions), in annual leave pay. He similarly was not clear on his salary as of the date of termination. In his Claim, it is indicated as Kshs.9,300 per month; Kshs.12,283 in the Closing Submissions; Kshs.12,423 in his evidence on 9th October 2013; while a pay slip for March 2010 attached to the Respondent's bundle of documents, shows gross pay of Kshs.9239.15. His prayer (d) seeks salary and house allowance up to and including 16th December 2012 at Kshs.9,300.
24. The Court adopts the figure of Kshs.12,283 shown in the employment contract of 1st November 2012, as the base rate in compensating the Claimant.

25. ***He is granted 280 days of annual leave pay at Kshs.12,283÷26 working days= Kshs.472.40 x 280 =Kshs.132,278.***
26. His pay slip shows he was subscribed to the National Social Security Fund. His Claim for Service Pay could only stand for the period prior to 2nd June 2008, when the Employment Act 2007, came into effect. Section 35(6) of this Act makes the Claimant ineligible for service pay.
27. He merits service pay for the period between 1st February 1999 to 1st February 2008 – a period of 9 years. ***Service pay is granted at Kshs.12,283 ÷ 26 working days= Kshs.472.40 x 15 days = Kshs.7,086 x 9 years = Kshs.63,777.***
28. The Claimant did not explain his prayer for pro-rata annual leave days, in his pleadings, evidence and submissions. There shall be no award under this item.
29. He is entitled to his salary and house allowance for 16 days worked in December 2012. ***The Claimant shall be paid 16 days salary and house allowance for December 2012 at Kshs.472.40 x 16 = Kshs.7,558.***
30. ***The Respondent shall release to the Claimant his Certificate of Service forthwith, as required under Section 51 of the Employment Act 2007.***
31. ***It is declared the Respondent's treatment of the Claimant amounted to unfair labour practice, and violated Article 41 of the Constitution of Kenya.***
32. The Claimant prays for costs, submitting that his Advocate has been flying from Nairobi to Mombasa for hearing, and the Claimant cannot, given his salary meet the Advocates' costs.
33. The Respondent's position is that it had settled this Claim earlier on at the Labour Office, It was the Claimant who declined to collect his terminal dues. The Court has made numerous declarations, *“that costs are not awarded in industrial actions.”*
34. These two positions find no favour with this Court. The Claimant engaged his Advocate from Nairobi, while fully aware of the Claimant's financial wherewithal. At no time has the Industrial Court declared that costs are not awarded in disputes before it.
35. Section 12(4) of the Industrial Court Act 2011 allows the Court, subject to the Court's Rules, to make such orders as to costs as the Court considers just.
36. Rule 28(1) of the Industrial Court (Procedure) Rules 2010 states that the Court shall be guided by section 12(8) of the Act in awarding costs to a party.
37. Section 12(8) of the Act, refers to the Labour Institutions Act 2007, a law which has since been repealed. It guided the Industrial Court to consider the requirements of law and fairness and, take into account if a Party acted frivolously, vexatiously or with deliberate delay during conciliation proceedings and in bringing or defending proceedings.
38. Read together, these Laws leave the Court with the discretion in granting of costs. The Court must always weigh the interest of the Employee and the Employer carefully, noting that as stated under Rule 28(2), an order for costs should not be punitive.
39. The Respondent made an effort to settle the Claim at the Labour Office, and perhaps, failed to achieve full compliance with the law, based on the incomplete advice given to the Respondent by the Labour Office. Parties have conducted their respective cases without undue delay. The Respondent complains in its letter of 22nd November 2012 to the Claimant about financial constraints experienced by the Hotel due to insecurity at the Coast. This is an ongoing and commonly known situation, and it would not be in the interest of good industrial relations to burden the Respondent with an order to pay costs.

40. Parties shall meet their own costs, and there shall be no order on interest.

In sum, IT IS ORDERED:

***a) It is declared the Respondent's treatment of the Claimant amounted to unfair labour practice, and was in violation of Article 41 of the Constitution of Kenya.***

***(b) The Respondent shall pay to the Claimant annual leave pay at Kshs.132,278; service pay at Kshs.63,777; 16 days' salary and house allowance at Kshs.7,558 – total Kshs.203,613.***

***c) The Respondent shall release to the Claimant his Certificate of Service forthwith.***

***d) The monetary award be satisfied within 21 days of the delivery of this Award, in default execution to issue.***

***e) Parties to meet their costs, and no order on interest.***

Dated and delivered at Mombasa this 6th day of March 2015.

James Rika

Judge