



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 86 OF 2013

SYMON NYAMU MUTHIGANI..... CLAIMANT

VERSUS

SUN AFRICA HOTELS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th May, 2015)

JUDGMENT

The claimant filed the statement of claim on 08.08.2013 through Gori, Ombongi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the said contract is still in force as the right procedure in clause 3 has not been followed.
- b. That on the strength of 1 above, the claimant is still an employee of Sun Africa Hotels and the General Manager of Keekorok Lodge. As such, the claimant be allowed back to his employment or the contract be terminated procedurally as envisaged in the contract or on terms the court will set out and or in alternative without prejudice to the foregoing, the claimant to be compensated for the remainder period of the contract up to the age of retirement at an average of Kshs.234,845.00 per month being Kshs.1,878,760.00 (up to August 2013).
- c. The claimant be compensated for the trauma that has ravaged him in the intervening period caused by the strange occurrence, by the quantum the court will decide.
- d. A declaration that the conduct of the Managing Director or Group CEO in this matter was in total breach of the contract, in contravention of the industrial charter, and in breach of the Employment Act and an appropriate censure should be meted upon him.
- e. A declaration that the company is in breach of the NSSF Act for failing to remit the claimant's contribution to the statutory body, and be compelled to remit the amount fully in the tenancy of the employment contract in the sum of Kshs.5,600.00 to date.
- f. 28 days off days and 17.5 days in lieu of leave.
- g. Interest on (b) above at court rates from the date of the claimant's dismissal until payment in full.
- h. Costs of the claim plus interest.
- i. Such further or other relief as this honourable court may deem fit to grant.

The respondent filed the memorandum of response on 04.09.2013 through Odhiambo M.T. Adala Advocate. The respondent prayed that the suit be dismissed with costs.

It is not disputed that the claimant was employed by the respondent by the letter dated 26.06.2012. The letter stated that the claimant was offered permanent employment upon the terms and conditions stated in the letter with effect from 26.06.2012. The claimant was employed to the position of General Manager–Keekorok Lodge reporting to the respondent's Group Managing Director, “...with effect from the date

of this appointment up to such time as the contract shall determine in accordance with the provisions laid out herein.” Clause 3 of that letter on probationary service stated as follows:

“3. The new employee’s tenure of service shall be subject to the successful completion of an initial six month probation period where the Employer shall subject the employee’s work to scrutiny and appraisal. This period of probation may be extended for a further three months for unsatisfactory performance or misconduct. The subsequent failure upon the extension of the said probation shall cause this employment appointment to automatically terminate.

Following satisfactory completion of your probationary period, the management shall confirm your employment in writing.

You shall not be entitled to any leave or other benefits during your probation period. You can terminate this employment during your probationary period by giving one week written notice of your intention.”

The letter further provided that the claimant’s monthly gross salary was Kshs. 134,845.00. Housing and meals were to be provided.

The claimant testified to support his case. He testified that he worked up to 26.01.2013. On 26.01.2013 he testified that he reported at work and found another manager in his office. That new manager advised the claimant that he had instructions to give the claimant a clearance notice. Further, the probationary period was not extended as per clause 3 of the letter of employment. The claimant denied that he was given a termination notice and the contract never ended as stipulated in the said clause 3. The claimant specifically denied receiving the respondent’s letter exhibit RS2 dated 10.12.2012 which the respondent alleged to have delivered to the claimant. That alleged letter of termination of employment addressed to the claimant by the respondent’s Group Managing Director stated as follows:

“RE: TERMINATION OF YOUR EMPLOYMENT

In reference to the probation clause 3 stipulated in your letter that ‘The new employee’s tenure of service shall be subject to the successful completion of an initial six month period where the Employer shall subject to the employee’s work to scrutiny and appraisal, this is to inform you that the Management has decided to terminate your employment with effect from 31st December 2012.

You are therefore requested to hand over all the company property and report to Nairobi Corporate Office on Monday 31st December for full and final settlement.

Thank you.

Yours Sincerely

Signed

Rahul Sood

Group Managing Director”

The claimant testified and it was not disputed by the respondent that at termination he earned Kshs.134,845.00 plus consolidated allowances of Kshs.100,000.00 making Kshs.234,845.00 per month.

The claimant testified that under the probationary provision only the claimant had the option to terminate but not the respondent. He further stated that in event of unsatisfactory service he was entitled to 3 months extension of that probation service as agreed. The claimant further testified that the human resource office or the respondent’s Group Managing Director never appraised him. The claimant further stated that he was never given reasons for the termination.

The respondent's witness was Peterson Njuguna (RW) the respondent's Group Human Resource Manager since 2004. RW stated that he did not recall giving to the claimant the alleged termination letter dated 10.12.2012. RW was not sure if the claimant worked after 10.12.2012 but confirmed the claimant was paid after 31.12.2012. He admitted receiving the claimant's demand letter and he wished not to make commends on the claimant's claims. In cross-examination RW stated that he learned about the respondent's dismissal sometimes in January 2013. In his evidence, RW appeared to suggest that the claimant had a valid grievance about the termination as RW did not recall or make decisive recollection of the circumstances or reasons for the claimant's termination. RW confirmed that the claimant was a good worker.

The **1st issue** for determination is whether the alleged termination letter dated 10.12.2012 served any purpose in the dispute. The court finds that the letter was not delivered to the claimant as there was no evidence of such delivery. The probation period was ending on or about 26.12.2012. Under the probation clause quoted earlier in this judgment, the respondent had no power to terminate the probationary period by giving a termination notice. Thus, the court finds that the alleged termination letter served no purpose in this dispute because it was not served and it was not founded on any contractual provision. Even if the general implied term under section 35 (1) (c) of the Employment Act, 2007 were to apply so that it was a contract terminable by either party giving 28 days' notice as the claimant enjoyed a monthly pay, the court finds that the letter by its content did not refer to a termination notice as envisaged in the section.

The **2nd issue** for determination is whether the termination was in breach of the contract of employment. The court has considered the provisions of clause 3 on termination during the probationary period. The court finds that termination by the respondent was subject to employee's work scrutiny and appraisal. The respondent did not demonstrate before the court that the claimant's termination was based on such scrutiny and appraisal. RW for the respondent did not recall when the claimant left employment but he confirmed that the claimant was paid up to 31.12.2012. There is no reason to doubt the claimant's evidence that he worked up to 26.01.2013. The court finds that the claimant's employment was terminated on 26.01.2013 long after the lapsing of the probationary service on or about 26.12.2012. Thus, to answer the 2nd issue for determination the court finds that the termination was in breach of the contract of employment because it was outside the probation term of service as urged for the respondent.

The **3rd issue** for determination is whether the contract of service is still in force. The court finds that the claimant was entitled to consider himself terminated once the respondent's Managing Director refused to communicate to him on 26.01.2013. The court finds that the contract of employment was constructively terminated effective 26.01.2013.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. RW confirmed that the claimant was a good worker and had not been implicated in any disciplinary case or misconduct. The court has considered that the respondent did not advance any genuine reason for terminating the claimant's employment after the claimant had successfully served the probationary period. The court finds that the termination was unfair as it was without genuine reason, there was no due process and was in clear breach of the provisions of the contract of employment. The court finds that compensation of 6 months' salaries at Kshs.234, 845.00 per month and a further one month pay in lieu of the termination notice making **Kshs.1,643,915.00** will meet the ends of justice in this case. The awards are respectively made under sections 35 (1) (c) and 49 (1) (c) of the Employment Act, 2007. While making that finding the court has considered that the termination came shortly after the end of the probationary period. Further, reinstatement will be declined as it was made in alternative to compensation and the award for compensation is sufficient in the circumstances of this case.
- b. The claimant has submitted that he be awarded Kshs. 30, 000, 000.00 being Kshs.28,181,400.00 for lost future earnings up to attainment of 50 years of age and the rest being damages for trauma suffered . The court finds that the claimant has not showed his current engagement or status of his livelihood since the termination. The claimant did not move evidence on the circumstances that

aggravated or mitigated his livelihood situation following the termination. The claimant did not also show the nature and extent of the trauma suffered that would justify the claims. Thus, the court finds that the reliefs as prayed for will fail as they are not justified taking all the material on record into account.

- c. The court finds that for the findings earlier made in this judgment and for want of justification, the other prayers made for the claimant will fail.
- d. The claimant will be paid one month salary for the period 26.12.2012 to 26.01.2013 being **Kshs.234,845.00**.
- e. The claimant has substantially succeeded in the claims made and the respondent will pay costs of the suit.

In conclusion judgment is entered for the claimant against the respondent for:

- a. The respondent to pay the claimant a sum of **Kshs.1,878,760.00** by **1.08.2015** in default interest at court rates to be payable thereon from the date of this judgment till full payment.
- b. The declaration that the claimant's termination from employment by the respondent was unfair.
- c. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 29th May, 2015**.

BYRAM ONGAYA

JUDGE