



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 211 OF 2014

BETWEEN

DIXON AMDAMA.....CLAIMANT

VERSUS

AMANI TIWI BEACH RESORT.....RESPONDENT

Rika J,

Court Assistant : B. Kombe

Mr. Amdama the Claimant in Person

Mr. Oloo Advocate, instructed by Menezes, Oloo & Chatur Advocates for the Respondent.

ISSUE IN DISPUTE; UNFAIR AND UNLAWFUL TERMINATION

AWARD

[RULE 17(1) (a) of the Industrial Court (Procedure) Rules 2010

1. Mr. Dixon Amdama filed his Statement of Claim on 15th April 2014. He was employed by the Respondent Hotel as the Head Animator, commencing 1st April 2013. He was to work for 1 year ending 31st March 2014. His salary was Kshs.30,600 per month. He was placed on probation for the first 2 months. He did not serve to the end of his contract; the Respondent terminated the contract on 17th May 2013, in circumstances the Claimant feels were unfair and unlawful. Amdama filed this Claim, seeking the following orders against the Respondent.
 - (a) 2 month's salary in lieu of notice at.....Kshs.60,000.
 - (b) Unpaid salary of 7 months at.....Kshs.210,000.
 - (c) Salary for 14 days worked in March 2013 at..Kshs. 14,500.
 - (d) Service charge of 7 months at.....Kshs.40,882.
 - (e) N.H.I.F. at.....Kshs. 4,800.

(f) N.S.S.F. at.....Kshs.1,600

Total Kshs.331,782

(g) Damages for wrongful dismissal

(h) Costs and interest

2. The Respondent filed its Statement of Response on 9th May 2014. It is agreed the Claimant was employed by the Respondent as the Head Animator, commencing 1st April 2013. His contract was for 1 year. He was to work on probation for 2 months. The Respondent terminated the Claimant's contract on 17th May 2013, within the probation period. He was paid a total of Kshs.41,200. The Respondent states it was not obliged to pay this to the Claimant, but did so because the Claimant had become a nuisance at the Hotel after termination. Termination was fair and justified, and the Claim has no merit.
3. The Claimant gave evidence on 25th June 2014, and called 2 other Witnesses, Mr. Alfrasio Imbala and Ms.Lilian Nasimiya Wabwire, who gave evidence on the same date, bringing the Claimant's case to a close. Assistant Human Resource Manager Ms.Tima Salim Kombe and Entertainment Manager Mr. Martin Dume Jira, testified for the Respondent on 26th February 2015, when the hearing closed.
4. The Claimant adopted his Witness Statement filed on 14th April 2014, together with the Bundle of Documents and Submissions. He confirmed on cross-examination that his contract required him to work on probation for the first 2 months. The letter of termination stated the Respondent made the decision because the Claimant left guests unattended. The issue was not raised to him before termination. He saw this letter for the first time, in Court. He was paid a total of Kshs.41,200. After termination, he was paid 3 months' salary totaling about Kshs.78,000. It is not true that he persistently went to the Hotel after termination and caused havoc. He received the money, but did not sign the discharge voucher. He was offered the Certificate of Service, but rejected it, because it was not what was agreed with the Respondent. It is not true that termination was in accordance with the terms of the contract.
5. Alfrasio and Lilian testified they worked with the Claimant. They were Dancers, entertaining guests at the Hotel. The Claimant was not supposed to report in the morning of 4th May 2013. The Claimant reported after lunch. Rumours were circulating that the Claimant was fired for not reporting in the morning of 4th May 2013.
6. Tima confirmed the details contained in the Claimant's contract. Termination was within the probation period. The Claimant allocated trainees to the guest area. The Trainees gave the wrong information to the guests who in turn lodged a complaint with the Management. The Respondent paid to the Claimant terminal benefits in liaison with the Labour Office. The Claimant signed the discharge voucher. The Respondent paid to the Claimant this money after the Claimant persistently made demands at the Hotel.
7. The Witness conceded in cross-examination that the Respondent had issued the Claimant a letter of appreciation, preceding the contract commencing 1st April 2013. The Claimant however, was employed on 1st April 2013 as per the contract of employment. The Claimant was to coordinate activities on the material day. Once an Employee finished working under probation, he was to be appraised before confirmation. The Claimant was still on probation at the time of termination.
8. The Entertainment Manager Jira received a complaint from guests, that they had not been attended to. Jira saw some of the Attendants were Trainees. They were engaged in a game of pool. The Head of Department Mr. Amdama was not there. The General Manager summoned Amdama and

suspended him. Jira testified on cross-examination that the Trainee, specifically Alfrasio, gave the guests wrong information.

Submissions

9. The Claimant submits that the existence of a probation clause, does not entitle the Respondent to unfairly and unlawfully terminate the Claimant's contract. There were no guests' complaints. Activities were conducted by the Trainees as scheduled. It was not legitimate for the Respondent to take an extreme disciplinary penalty against the Claimant. The termination procedure was not fair, in accordance with section 41 of the Employment Act 2007. The Respondent failed to justify termination as required under Sections 43, 45 and 47 of the Act. The Claimant submits he ought to be reinstated to his previous position, and paid the costs of the Claim, with interest at Court rates.
10. The Respondent relying on the ***Industrial Court at Nairobi Cause No. 168 of 2012 between Danish Jalang'o and Another v. Amicabre Travel Services Limited (2014) e-KLR*** submits that an Employee whose contract is terminated while on probation has no reason to demand to be shown by the Employer other reasons for termination, outside the terms of the probationary contract. Section 41, 43 and 45 of the Employment Act 2007 cannot be imported into probationary contracts.
11. The Claimant was on probation, had worked for 1 month, and is not entitled to service pay under Section 35(5) of the Employment Act. He had not worked for 1 year, and was a Member of the N.S.S.F. Section 42 (4) of the Employment Act allowed the Respondent to terminate the contract through 7 months' notice, or payment of 7 days' salary in lieu of such notice. The Claim for 2 months' salary in lieu of notice is unfounded.
12. The Claimant does not say which 7 months he worked, without a salary. He cannot be paid for the months left in his contract. If he worked for 14 days in March 2013, it must have been on casual basis, where a daily wage was paid. The contract subject matter of this dispute commenced 1st April 2013. The Respondent availed records from the N.H.I.F. and N.S.S.F, showing remittance of the Claimant's contributions. The Claim should be dismissed with costs to the Respondent.

The Court Finds

13. The issues raised by this dispute are not whether the Claimant's contract was terminated in accordance with section 41, 43, 45 and 47 of the Employment Act 2007, as submitted by the Claimant: the issues are whether those provisions of the law applied at all to the termination; and whether the Respondent followed Section 42 which regulates probationary contracts.
14. The Claimant was employed by the Respondent as Head Animator, effective from 1st April 2013. He states in his Witness Statement, he was initially employed on casual basis on 18th March 2013, about 2 weeks before the commencement of his contract on 1st April 2013.
15. His contract was for 1 year, ending 31st March 2014. It was however terminated at the instance of the Respondent on 17th May 2013. The Respondent stated this decision was made after the Claimant left guests of the Hotel unattended. Trainee Attendants were found to be playing pool by Mr. Jira, rather than attend to tourists. The Claimant as Head of Department failed to have the guests attended to.
16. The Claimant had worked for 1 month and 17 days. It is agreed his contract provided for probation of 2 months. Termination was within the 2 months. He was paid his salary of 3 months, amounting to Kshs.78,000 and terminal benefits at Kshs.41,200. These payments were conceded in the Claimant's evidence.

17. The Court upholds its decision in the case of ***Jalang'o & Another v. Amicabre Travel Services Limited***, cited at paragraph 10 of this Award. An Employee whose contract is terminated during probation is not regulated by Section 41,43,45 and 47 of the Employment Act. Probationary contracts are governed by their terms, and by Section 42 of the Employment Act.
18. The Claimant had worked for only a month and 17 days. He was on probation when his contract was terminated. Termination was in accordance with Section 42 of the Act. He was not entitled to being heard or given reasons for termination. It is enough that the Employer found the Claimant's performance not in line with the Employer's expectation. As the Claimant submits, probation constitutes a trial period, during which the Employee is tested, before full admission to the enterprise. The rights under Section 41, 43, 45 and 47 are reserved for Employees who have gone through the trial period, and confirmed in employment.
19. All the Respondent was required to do was issue the Claimant 7 days' notice of termination, or pay to the Claimant 7 days salary in lieu of such notice, in accordance with Section 42 of the Act.
20. The Claimant was paid 41,200 in terminal benefits, and also paid Kshs.78,000 salary for 3 months. Presumably this was with regard to the month of March 2013 when the Claimant was in a casual arrangement; April 2013 and May 2013. Notably, he did not work the entire period in March and May 2013. The Respondent explained terminal benefits to comprise salary for the period worked, 1 month salary in lieu of notice, service charge and travelling allowance.
21. Quite clearly, the Claimant received more than the law under Section 42, conferred on him. It is not reasonable to demand for anticipatory salaries and benefits to the end of the full contract. He did not render any work for the period left in his contract, and the Respondent was entitled to terminate the contract during probation, under section 42 of the Act. N.H.I.F. and N.S.S.F. records show the Respondent made remittances. These claims against the Respondent are unfounded.
22. It was wrong however for the Respondent to refer to the Claimant as a nuisance and a pest, in paragraph 10 of the Statement of Response. The Respondent's Advocates should have used civil and respectful language acceptable to the Court and the Court Users. Insults and vulgar communication are not acceptable. Parties must engage each other in an environment of mutual respect, and engage the Court similarly.
23. There was nothing wrong with the Certificate of Service offered to the Claimant by the Respondent. The Claimant may collect his Certificate of Service from the Respondent if he is minded to do so.

In Sum, IT IS ORDERED:-

- (a) ***Termination was lawful, in accordance with Section 42 of the Employment Act 2007, and the Claimant has received more than his rightful terminal benefits.***
- (b) ***Paragraph 10 of the Statement of Response referring to the Claimant as a pest, is expunged from the record of the Court.***
- (c) ***The Claimant is at liberty to collect his Certificate of Service from the Respondent.***
- (d) ***No order on the cost and interest.***

Dated and delivered this 16th day of June 2015.

James Rika

Judge