



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 343 OF 2014

PHILIP NGANGA KARARA

CLAIMANT

v

THOMSON FALLS LODGE

RESPONDENT

JUDGMENT

1. Philip Nganga Karara (Claimant) was employed by Thomson Falls Lodge (Respondent) on 2 August 2010 as a Public Area Attendant on a 3 month contract with an option to renew.
2. The Respondent renewed the contract through a letter dated 5 November 2010 for a further 3 months. It appears there were several other renewals whose documentation was not produced.
3. Further renewals were through letters dated 22 February 2012 for 1 year, and on 27 March 2013 for another year. This renewal was to last upto 2 March 2014.
4. On 28 July 2014, the Claimant commenced legal action against the Respondent alleging unfair termination. The Respondent filed a Response on 17 October 2014 prompting the Claimant to file a rejoinder on 19 November 2014.
5. The Cause was heard on 19 May 2015 and the parties were directed to file written submissions.
6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant's contract expired by effluxion of time or whether he was dismissed, and if dismissal, whether the dismissal was unfair and appropriate remedies.*

Whether contract expired or dismissal

7. The last written contract entered into by the parties was dated 27 March 2013. It provided that the contract had been renewed for one year to run from 2 March 2013 to 2 March 2014. It further provided that other terms and conditions of service would remain the same.
8. The terms and conditions of service were spelt out in the initial contract dated 2 August 2010. The material clause on renewal provided that

At the end of the term you will seek for a continuation in case the company will be in a position to offer you another chance.

9. The Claimant did not state during examination in chief whether he applied for renewal after the expiry on 2 March 2014. In cross examination, he stated that he did not apply for renewal but continued working until 3 May 2014 when he received a letter informing him that due to low business being experienced his contract would not be renewed from 5 May 2014.
10. From the material produced and testimony, it is clear to the Court that the Claimant served on contracts whose terms were reduced into writing up to 2 March 2014.
11. When the tenure of the contracts expired on 2 March 2014, he did not apply for renewal but the Respondent allowed him to continue serving.

12. The terms and conditions under which he served after 2 March 2014 were not reduced into writing but the Court can in such a case imply that the Claimant was serving on month to month contract, i.e. he became an employee at will, which employment could be determined by giving one month notice, considering that he was on a monthly wage.
13. The Court therefore finds that although the Claimant's written contract expired by effluxion of time on 2 March 2014, he continued serving at will on a month to month oral contract which was subject to the protections granted employees by the Employment Act, 2007.

Whether termination of employment was unfair

14. Because the Claimant was getting paid by the month, pursuant to section 35(1) (c) of the Employment Act, 2007 he was entitled to 1 month written notice.
15. No such notice was given and in this regard the termination of employment was unfair.
16. Section 41 of the Employment Act, 2007 requires an employer to comply with the requirements of procedural fairness before terminating the services of an employee if the termination is on the ground of *misconduct, poor performance or physical incapacity*.
17. The reason given for the termination of the employment of the Claimant was low business. This had nothing to do with *misconduct, poor performance or physical incapacity*.
18. What the Respondent was doing was a declaration of redundancy and therefore the provisions of section 40 and 45(2) (a), (b) (ii) and (c) of the Employment Act, 2007 become implicated.
19. There was no suggestion at all that the Respondent complied with any of the section 40 conditions before terminating the Claimant's employment on the ground of low business. Further, the Respondent did not prove that the redundancy was necessitated by its operational requirements.
20. The Court finds that the termination of employment on account of redundancy was both procedurally and substantively unfair.

Whether Claimant was underpaid

21. The Claimant alleged that he was underpaid for the 3 years he served the Respondent.
22. The Claimant produced his pay slips for July and September 2011. The basic wage according to the pay slips was Kshs 5,768/-.
23. The minimum wage from 1 May 2011 to 30 April 2012 was Kshs 6,999/- for general labourers (pursuant to Legal Notice No. 64 of 2011). He was underpaid during the 12 months by Kshs 14,772/-.
24. The Claimant also produced his pay slips for February and August 2012. According to the February 2012 pay slip, he was earning a basic wage of Kshs 5,768/- while in August 2012 the basic wage was Kshs 7,222/-.
25. The Claimant did not disclose when the wage was increased to Kshs 7,222/-.
26. But according to Legal Notice No. 71 of 2012, the minimum wage for a general labourer was Kshs 7,915/-. Clearly again the Claimant was underpaid. Assuming the wage during the 12 month period was Kshs 7,915/-, the Claimant was underpaid by Kshs 8,316/-.
27. Pay slips for June and September 2013 were also produced. The basic wage remained Kshs 7,222/-. The prescribed minimum wage for a general labourer during this period (pursuant to Legal Notice No. 197 of 2013) was Kshs 9,024/-. The Claimant was underpaid by Kshs 21,636/-.

Appropriate remedies

Underpayments

28. The Court has reached a conclusion that the Claimant was underpaid by a total of Kshs 44,724/-. He is entitled to the same.

Leave earned

29. The Claimant sought Kshs 18,950/-. This head of claim was not challenged or controverted through leave records and the Claimant is entitled to the same.

1 month pay in lieu of notice

30. Under this head, the Claimant sought Kshs 9,024/-. He is entitled to the same.

House allowance

31. The Respondent's witness statement that the Claimant was provided with housing was not controverted. This head of relief does not lie.

Gratuity/Severance pay

32. The Claimant was declared redundant. He is entitled to severance pay. He sought Kshs 13,536/-. The Respondent did not challenge the computation and the Court would award him the same.

Compensation

33. The equivalent of not more than 12 months gross wages is one of the primary remedies where the Court finds unfair termination of employment.

34. The Court has determined the termination of employment was unfair. The Claimant served the Respondent for about 4 years. Considering the length of service, the Court would award him the equivalent of 4 months gross wages assessed as Kshs 51,712/- (based on gross wage in June 2012 pay slip).

Conclusion and Orders

35. The Court finds and holds that though the written contract of the Claimant lapsed/expired through effluxion of time, he continued serving at will on a month to month basis and this employment was terminated unfairly and awards him and orders the Respondent to pay him

a. Underpayments	Kshs 44,724/-
b. Leave	Kshs 18,950/-
c. 1 month pay in lieu of Notice	Kshs 9,024/-
d. Severance pay	Kshs 13,536/-
e. 4 months wages as Compensation	Kshs 51,712/-

TOTAL

Kshs 139,946/-

36. Claimant did not file submissions as directed. He is denied costs.

Delivered, dated and signed in Nakuru on this 24th day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muthanwa instructed by Muthanwa & Co. Advocates

For Respondent Mr. Otieno instructed by Geoffrey Otieno & Co. Advocates

Court Assistant Nixon