



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 164 OF 2013
(Originally Nairobi Cause No. 575 of 2012)

MIRUKA MITEMA RONALD

CLAIMANT

v

SWAHILI BEACH RESORT

RESPONDENT

JUDGMENT

1. Miruka Mitema Ronald (Claimant) was employed on a 3 month contract by Swahili Beach Resort (Respondent) with effect from 25 August 2008 as a security guard at a monthly wage of Kshs 8,500/- inclusive of house allowance (letter dated 14 October 2013 from Respondent to Claimant show wage had increased to Kshs 9,000/- per month). The contract was terminable by the giving of 28 days notice. The contract did not provide for renewal.
2. On 12 July 2011, the Claimant's services were terminated through letter of same date. According to the Claimant the termination was unfair because he had not been given notice. He had not been served with any warning letter previously.
3. In testimony, the Claimant stated that he was not paid wages for days worked in July 2011, did not go on offs and also worked during public holidays. He further stated that he worked for 12 hours every day. He also stated that he was not being paid a uniform and shoe allowance. The Claimant produced attendance records from November 2008 to February 2011.
4. The Claimant stated he was seeking the reliefs set out in the Statement of Claim.
5. The Respondent filed a Response on 26 September 2013 and called one witness, Walter Ouma Abonyo, its Human Resources Manager. According to the Respondent, the termination of the services of the Claimant was lawful and that the Claimant was offered one month pay in lieu of notice but declined.
6. The witness stated that he joined the Respondent after the Claimant's services had been terminated. He testified that the Claimant was offered one month pay in lieu of notice, 10 days worked in July 2011 and 16 pending leave days. He further stated that there are about 11 public holidays every year and that security guards should work 8 hours per day but he did not know whether the Claimant worked overtime.

Issues for determination

7. This being a complaint of unfair termination the issues arising for determination are whether the termination was unfair, and if so, appropriate remedies.

Whether the termination was unfair

8. It is apparent the Claimant's relationship with the Respondent was oral because there was no evidence placed before Court to show that the initial contract of 25 August 2008 was renewed in writing.
9. It is not disputed that the Claimant was being paid by the month. Pursuant to section 35(1)(c) of the Employment Act, he was entitled to written notice. Because the notice was not given, the Court is satisfied that the Claimant has discharged the burden placed upon him by section 47(5) of the Act to show the termination was unfair.
10. Having discharged the burden placed upon him, it was upto the Respondent to show that it followed a fair procedure as required by section 45(2)(c) of the Employment Act rather than section 41 of the Act.
11. This is because the Court cannot tell whether the termination was on grounds of misconduct, poor performance or physical incapacity as the termination letter of 12 July 2011 did not give any reasons. The letter is also silent on whether the Claimant was afforded an opportunity to be heard.
12. The Respondent did not show that the termination was carried out in accordance with a fair procedure. The termination was therefore procedurally unfair.
13. Sections 43, 45 and 47(5) of the Employment Act on the other hand deal with substantive fairness of a termination. The employer is under a statutory obligation to prove the reason(s) for the termination and that the reason(s) are valid and fair.
14. The Respondent did not in the pleadings or testimony give any reasons for the termination or attempt to prove the reason(s) and or show that the reason(s) were valid and fair reasons.
15. The Court therefore can only conclude that the termination was substantively unfair.

Appropriate relief

One month pay in lieu of Notice

16. The Respondent had indicated it was ready to pay one month salary in lieu of notice of Kshs 9,000/-. The Claimant is entitled to one month salary in lieu of notice by virtue of section 36 of the Employment Act.

Service pay

17. The Claimant annexed to the Statement of Claim a Provisional Member Statement of Account. The Claimant thus was a member of the National Social Security Fund and by dint of section 35(6) of the Employment Act is not entitled to service pay.

National Social Security Fund

18. The Claimant sought Kshs 13,600/- on account of what was pleaded as NSSF for 33 months. No evidentiary basis for this head of relief was placed before Court and it is declined.

Leave and travelling allowance

19. Similarly, no evidentiary basis for the claim of Kshs 3,300/- was given. The Claimant did not even give evidence on which period he did not take leave.

16 pending leave days

20. The Respondent admitted it was ready to pay for 8 days leave under this head of claim. The Claimant sought Kshs 3,300/- but the Respondent offered Kshs 2,400/-.
21. The Respondent did not dispute the Claimant's entitlement to 16 days accrued leave. It is the duty of employers to keep employment records but none were produced.
22. The Court in this regards gives the benefit of doubt to the Claimant and finds in his favour.

Salary for July 2011

23.The Claimant is entitled, as of law to wages for days worked.

Public holidays

24.Under this head, the Claimant sought Kshs 18,600/- on account of 62 public holidays. In testimony, the Claimant did not clarify which public holidays he worked and during which years.

25.The Respondent offered 8 days pay for the public holidays. The muster roll produced by the Claimant show he worked during public holidays. Examples include 1 January 2010, 12 December 2010, 25 December 2010, 26 December 2010 and 1 June 2010.

26.On a balance of probabilities, the Court finds in favour of the Claimant but for 27 public holidays (taking as correct there were 11 public holidays each year).

27.Using the formula of gross pay divided by twenty six to get the daily wage multiplied by twenty seven the Court would award Kshs 9,346/-

Compensation

28.Under section 49(1)(c) of the Employment Act, compensation of the equivalent of not more than 12 months gross wages is one of the primary remedies for unfair termination.

29.The award however, is discretionary and section 49(4) of the Act has set out the factors the Court ought to consider.

30.The Claimant was a lay person acting in person. He did not expressly plead that he was seeking compensation. But the Court has found that his termination was unfair.

31.The Claimant had served the Respondent for only about two and a half years. The terms and conditions of service were not reduced into writing.

32.It was the duty of the Respondent to cause a contract of service to be reduced into writing. The Claimant also stated that he has incurred expenses as a result of the termination.

33.Considering the length of service and expenses reasonably incurred, the Court would award the Claimant the equivalent of two months gross wages assessed at Kshs 18,000/- as compensation.

Conclusion and Orders

34.From the foregoing the Court finds and holds that the termination of the services of the Claimant was unfair and awards him and orders the Respondent to pay him

One month pay in lieu of Notice	Kshs 9,000/-
a. 16 pending leave days	Kshs 3,300/-
b. Salary for July 2011	Kshs 3,300/-
c. 27 days public holidays	Kshs 9,346/-
d. 2 months compensation	Kshs 18,000/-
TOTAL	Kshs 42,946/-

35.The Court had on 20 March 2014 ordered the Respondent to pay the Claimant travelling and subsistence costs of Kshs 3,500/-.

36.If the same were not paid, then the same shall be paid in addition to the sum awarded herein above.

37.The claims for National Social Security Fund, leave and leave travelling allowance are dismissed.

Delivered, dated and signed in open Court in Mombasa on this 27th day of June 2014.

Radido Stephen

Judge

Appearances

Claimant

in person

Respondent
Advocates

Mr. Maosa instructed by Maranga Maosa & Associates