



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**

**(BIMA TOWERS)**

**CAUSE NO. 25 OF 2014**

**RIMBA MASHA KARISA..... CLAIMANT**

**v**

**OCEAN SPORTS RESORT.....RESPONDENT**

**JUDGMENT**

1. Rimba Masha Karisa (Claimant) was employed by Ocean Sports Resort (Respondent - name in appointment letter is Ocean Sports 2006 Ltd) on 1 January 2009 as a painter at a basic wage of Kshs 6,792/- and house allowance of Kshs 3,727/- per month.
2. Through a letter dated 31 January 2013 the Respondent notified the Claimant of its intention to terminate his services because of a *dramatic downturn in the economy which has resulted in the hotel industry not attracting the normal volume of business*.
3. The letter gave the Claimant two months notice and also informed him that he had 31 days leave due. The notice letter was copied to the Respondent's Chief Accountant, Works Committee and Branch Secretary of Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA).
4. The Claimant was dissatisfied with the termination and on 7 February 2014 he lodged a Memorandum of Claim in Court stating the issue in dispute as *unfair termination of Rimba Masha Karisa*.
5. The Respondent was served and on 9 April 2014 it filed a Reply. Because the Reply admitted that the Claimant was terminated on account of its operational requirements and that the same was in compliance with the Employment Act and the Collective Bargaining Agreement between the Respondent and KUDHEIHA, the Court will treat this cause as one of redundancy and will therefore restrict itself to the evaluation and discussion as to whether the provisions of the law and Collective Bargaining Agreement on redundancy were adhered with.

**Claimant's case**

6. The Claimant pleaded and testified that he was given a notice of termination of service dated 31 January 2013 and that the same was unfair and contravened section 41 of the Employment Act and clauses 9 and 11 of the Collective Bargaining Agreement.
7. At the time of termination, the Claimant stated he was earning Kshs 11,756/- basic wage and Kshs 4,504/- house allowance.
8. On why the termination was unfair, the Claimant pleaded and testified that he was a permanent employee and the Respondent omitted to terminate the services of casuals and contract employees and therefore there was malice in his termination.
9. The Claimant also contended that the Respondent did not follow the Last In First Out principle

- and that the local labour officer was not informed.
10. The Claimant further asserted that he was not accorded a hearing prior to termination and conciliation did not resolve the dispute.
  11. The Claimant sought the prayers outlined in paragraph 4.2 of the Memorandum of Claim.

### **Respondent's case**

12. The Respondent on its part pleaded that the termination of the Claimant was lawful and was carried out in compliance with the law and the Collective Bargaining Agreement between it and KUDHEIHA and was based on its operational requirements due to low business volumes and thus for a valid reason.
13. Further, documents were produced (letter to Claimant dated 27 December 2012), letter to Union dated 31 January 2013 (informing Union of decision to terminate services of the Claimant), letter from Union dated 18 March 2013 (in response to the letter dated 31 January 2013) and further letter from Respondent to the Union dated 25 March 2013.
14. Other letters from Chairman, Coast Disputes Committee and Saccho to which the Claimant took a loan were also produced.
15. The Respondent called its Human Resources Manager Rehema Abdillahi to testify. She stated that the Claimant was terminated because the Respondent's business was not doing well and that the Claimant was called to a meeting through a Memo dated 27 December 2012 and explained to the intended redundancy.
16. Further, that the Union and the local labour officer were notified and after conciliation between the Union and Respondent, the Claimant's final dues of Kshs 40,600/- were agreed at and the same were paid to the Saccho to offset Claimant's loan balances.
17. The witness also testified that the Claimant had 20 hours overtime and 16 days leave which were included in the final dues.
18. The witness denied that the Respondent had casual employees.

### **Issues for determination**

19. Arising from the pleadings, evidence and written submissions filed by the parties, there are two main issues for determination and these are, whether the termination (through redundancy) was unfair and if unfair, appropriate remedies.

### **Whether the redundancy was unfair**

#### ***Procedural fairness***

20. The Claimant's cause of action was grounded on failure to comply with both the provisions of the Employment Act and the Collective Bargaining Agreement between the Respondent and KUDHEIHA.
21. The Collective Bargaining Agreement was not produced in court and therefore the following discussion will rely on the statutory provisions on redundancy.
22. The provision of law relied on by the Claimant was section 41 of the Employment Act. However, section 41 of the Act is only applicable in terminations on the grounds of misconduct, poor performance or physical incapacity. The provisions regulating redundancy are sections 40, 43 and 45 of the Employment Act.
23. It is implicit in the pleadings, testimony and documents produced that the Claimant was a member of KUDHEIHA.
24. Pursuant to section 40(1)(a) of the Employment Act, the Respondent was under an obligation to inform the Union and local labour officer in writing at least one month in advance of the reason(s) and extent of intended redundancy.
25. The Respondent's case is that the Union and the local labour officer were informed through its letter dated 31 January 2013. There are two letters on record dated 31 January 2013. The first letter was addressed to the Claimant and was copied to the Respondent's Chief Accountant, Works Committee and Branch Secretary, KUDHEIHA (Claimant's exh 2).

26. There is another letter addressed to Mr. Michael Yaa, Branch Secretary, KUDHEIHA and copied to the Works Committee.
27. The parties did not place before Court any material to suggest that the first letter was delivered to the Union/Works Committee.
28. Similarly, no material was placed before Court on the role of the Works Committee and whether it was a competent entity to receive redundancy notices on behalf of the Union.
29. In any case, the Union's letter dated 18 March 2013 (Respondent's exh 5) leaves no doubt that the termination notice though copied to the Union was not delivered and this is confirmed by the Respondent's letter dated 25 March 2013 (Respondent's exh 6) which regretted that lack of delivery of the letter was an oversight due the absence of the Respondent's Human Resource Manager from office.
30. What comes out is that the decision to terminate through redundancy was not formally communicated to KUDHEIHA, and if it was served it is not clear when it was served.
31. The Court also notes that the letter to the Union (Respondent's exh 2) indicated that the termination would be effective 1 February 2013. This falls short of the statutory one month period.
32. In the view of the Court, the Respondent did not comply with the provisions of section 40(1)(a) of the Employment Act in declaring the Claimant redundant.
33. In view of the provisions of section 45(2)(c) of the Act, it is not necessary for the Court to discuss or consider whether the reason(s) given by the Respondent to terminate the Claimant through redundancy have been proved and that the reason(s) are valid and fair based on the operational requirements of the Respondent.

### **Appropriate relief**

#### ***Two month salary in lieu of Notice***

34. The Claimant prayed for 2 months wages of Kshs 36,320/- as salary in lieu of notice. No contractual basis (Collective Bargaining Agreement was not produced) for 2 months notice was laid.
35. Pursuant to section 40(1)(f) of the Employment Act, the Claimant would be entitled to one month's wages in lieu of Notice.

#### ***One month pay in lieu of notification Notice***

36. This relief is covered under the award in the preceding paragraph and in light of the finding in the previous paragraph is declined.

#### ***Severance pay***

37. Pursuant to section 40(1)(g) of the Employment Act, the Claimant is entitled to severance pay at the rate of not less than fifteen days for each completed year of service.
38. The Claimant was employed on 1 January 2009 and was terminated in or around 31 January 2013 after serving for 4 years. He would be entitled to the equivalent of 60 days pay. The Respondent did not dispute the sum of Kshs 39,223/- and the Court would award him the same.

#### ***Leave***

39. The Claimant sought Kshs 22,063/- under this head. He took leave while serving notice from 22 February 2013 to 30 March 2013.
40. The final dues payment advice indicated that he had 16 days leave outstanding for which the Respondent had offered Kshs 9,026/-. The Court would award him this sum and not the equivalent of 36 leave days sought.

#### ***Leave travelling allowance***

41. The Claimant sought Kshs 4,200/- on account of leave travelling allowance. The computations by

the Respondent had this head. The Court would award him this head of relief.

### ***Overtime***

42. From the documentation provided by the Respondent, the Claimant had 33 hours of overtime though he claims for 55 hours overtime. The annual leave form produced indicated the Claimant had 5 days worth of overtime but how this was taken/paid was not clarified.
43. The Respondent's witness' testimony was that the overtime was paid. No documentation or proof of payment was given. The Court would therefore give the benefit of doubt to the Claimant and award him this head of claim.

### ***Compensation for unfair termination***

44. This is one of the primary remedies for unfair termination. The remedy is discretionary and according to section 49(4) of the Employment Act there are some 13 factors which the Court is enjoined to consider (any, some or all).
45. The Claimant has incurred reasonable expenses as a result of the unfair termination. He had served the Respondent for only 4 years.
46. Taking these factors into consideration, the Court would award him the equivalent of three months gross wages as compensation. The same is assessed at Kshs 51,480/-.

### ***Damages for loss of employment***

47. No material, contractual or statutory was laid for this head of relief as separate from and distinct from compensation for unfair termination. This head of relief is dismissed.

### ***Certificate of service***

48. A Certificate of service is a statutory right of an employee. The same was prepared on 15 April 2013. The Claimant should collect the same.

### **Conclusion and Orders**

49. In conclusion, the Court finds and holds that the termination of the Claimant was through redundancy and which redundancy was not in compliance with the law and therefore unfair and awards and orders the Respondent to pay him

a. One month salary in lieu of Notice	Kshs 17,160/-
b. 60 days equivalent of severance pay	Kshs 39,223/-
c. Outstanding leave	Kshs 9,026/-
d. Overtime	Kshs 9,075/-
e. Leave travelling allowance	Kshs 4,200/-
f. Three months wages compensation	Kshs 51,480/-

TOTAL

**Kshs 134,164/-**

50. The Claimant had taken a loan from a microfinance organisation. Pursuant to section 19(1)(g) and (h) of the Employment Act, if there was authorization in writing the Respondent is obliged to deduct from his dues any such sum to cover the outstanding balances. Further, the Kshs 40,600/- paid to the Sacco should be deducted from the award herein.

51. The claims for one month pay in lieu of notification notice and damages for loss of employment are dismissed.

52. Each party to bear its own costs.

**Delivered, dated and signed in open Court in Mombasa on this 13<sup>th</sup> day of June 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant in person

for Respondent Mr. Gakuo instructed by Muturi Gakuo & Kibaara Advocates