



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT MOMBASA (BIMA TOWERS)**

**CAUSE NO. 422 OF 2013**

**ANTHONY MWOLOLO MUTIO.....CLAIMANT**

**v**

**BLUE MARLIN BEACH RESORT LTD.....RESPONDENT**

**JUDGMENT**

1. Anthony Mwololo (Claimant) was employed by Blue Marlin Beach Resort Ltd (Respondent) as a Waiter with effect from 1 December 2012 (appointment letter produced).
2. On or around 9 November 2013, the Respondent wrote to the Claimant to inform him that he was being summarily dismissed due to gross misconduct. The particulars of the gross misconduct were that he failed to report on duty in breach of clause 10(a) of the contract of service, bringing the Respondent into disrepute contrary to section 10(e) of the contract of service and failing to follow instructions to report on duty.
3. The Claimant was aggrieved with the dismissal and on 2 December 2013 he lodged a statement of Claim in Court stating the nature of dispute as *wrongful summary dismissal of employment*.
4. The Respondent was served and on 28 February 2014 it filed a Response through the firm of Macharia Gakaria & Associates, Advocates. On 3 June 2014 the Claimant acting in person and Mr. Gekonde holding brief for Mr. Macharia took a hearing date of 8 July 2014.
5. On the day fixed for hearing, the Respondent was not represented and because the date had been taken in the presence of both parties, I allowed the hearing to proceed.

**Claimant's case**

6. The Claimant in his testimony stated that he was appointed as a Restaurant Waiter with effect from 1 December 2012. He had served as a casual before. He stated that in March 2013 he sought a confirmation letter but the Respondent's Director told him there was no need for a confirmation letter.
7. He further stated that he was earning Kshs 7,000/- as basic pay per month (pay slip for August 2013 was annexed to Statement of Claim) and that because the salary was below the prescribed minimum wage he sought for an increase as a result of which the Respondent started paying him service charge.
8. The Claimant stated he was not paid wages for September to November 2013 when he was dismissed and that he used to work overtime and during public holidays because there were only 3 waiters. He also

stated that he never went on leave and that he was entitled to a uniform allowance which he never got.

9. On the circumstances leading to the dismissal, the Claimant stated that on 30 September 2013 the Respondent's Director told him that his wages for September 2013 would be paid together with the wages for October 2013 and he did not agree with the proposal as he needed money to pay rent and transport to work.

10. The Claimant further stated that on 7 November 2013 he sought to be paid the wages for September and October 2013 and the Director informed him he would be paid the next day. He was not paid and on 9 November 2013 he went to demand the arrears, but was told he would be paid on 22 December 2013. The Claimant said he then demanded for Kshs 6,000/- to pay rent but the Director got agitated and threw Kshs 500/- on the floor and asked him to take it and then ordered him to leave and gave him the dismissal letter.

11. The Claimant seeks the reliefs set out in the Statement of Claim.

### **Respondent's case**

12. The Respondent filed a Response but did not appear at the hearing. For what it is worth the Court will outline briefly what the Respondent laid out in the Response.

13. The Respondent denied the summary dismissal was wrongful and put the Claimant to strict proof. Further it was pleaded that on 8 November 2013 the Respondent informed all staff that salaries for October 2013 would be delayed and that on 9 November 2013 the Claimant and other employees stated they would not work until paid their wages.

14. The Employees refused to return to work, despite Respondent seeking intervention of a union called KUDHEIHA.

15. The Respondent contended in the Response that the Claimant was paid September 2013 wages and that the Claimant's October and part November 2013 wages were paid through KUDHEIHA.

16. According to the Respondent, the Claimant deserted duty and is not entitled to any of the Claims and that Claimant's leave pay was computed together with final dues, overtime and public holidays and were paid and that the Claimant was not entitled to a uniform allowance.

### **Evaluation**

17. The case at hand relates to a complaint of unfair termination. Consequently, sections 41, 43, 45 and 47 of the Employment Act, 2007 become directly implicated.

### ***Procedural fairness***

18. The Claimant was a lay person acting for himself. He cannot be held to the same high standards expected of trained advocates as far as pleadings and presentation in Court is concerned.

19. The letter of dismissal does not suggest that any process was followed by the Respondent before taking the decision to terminate. Section 41 of the Employment Act, 2007 has placed a statutory obligation upon employers to inform an employee of the charges he is facing and give him an opportunity to state his case before termination.

20. On the material placed before Court, the Court is satisfied that the Claimant has demonstrated that his dismissal was unfair.

21. Further, the Court is satisfied that the Respondent did not comply with the procedural fairness safeguards of section 41 of the Employment Act, 2007 and therefore the dismissal was procedurally

unfair.

### ***Substantive fairness***

22. Sections 43, 45 and 47(5) of the Employment Act, 2007 have also placed a duty upon an employer to prove the reasons for termination and that the reasons are valid and fair. An employer should also justify the grounds.

23. The Respondent was aware of the hearing date. It opted not to attend the hearing. The case/facts as presented by the Claimant therefore remained unchallenged/uncontroverted. The legal consequence being that there were no real disputes of fact. Section 10 of the Employment Act, 2007 is applicable.

24. The Respondent having failed to discharge the burden placed upon it, the Court holds that the dismissal was substantively unfair.

### **Appropriate relief**

#### ***Three months' salary in lieu of Notice***

25. The Claimant sought Kshs 30,000/- on account of three months wages in lieu of notice. He did not lay any contractual or statutory basis for the claim. Clause 9 of the appointment letter provided for termination by giving notice of one month or one month pay in lieu of notice.

26. Pursuant to the clause and sections 35(1)(c) of the Employment Act, the Court finds the Claimant is entitled to one month pay in lieu of notice.

#### ***Unpaid salary for September/October /November 2013***

27. The Respondent pleaded that the Claimant was paid his September 2013 wages but has not collected his wages for October/November 2013. The Claimant's unchallenged testimony was that he was not paid.

28. On the basis of the evidence on record, the Court would find in favour of the Claimant in the sum of Kshs 22,997/- as pleaded.

#### ***Service charge for 3 months***

29. The Claimant sought Kshs 12,000/- as service charge for three months. This head of claim is unchallenged and is granted.

#### ***Transport allowance***

30. Clause 9 of the appointment letter provided for a transport allowance according to company policy. The Claimant in his testimony stated that he was promised transport allowance because he worked odd hours.

31. Because of the contractual provision and in light of the uncontroverted evidence from the Claimant, the Court would award him the sum sought of Kshs 18,720/-.

#### ***Uniform allowance***

32. The Claimant sought Kshs 12,000/- under this head of claim. Clause 8 of the letter of appointment provided for uniform as per company policy. The Claimant testified that he was entitled to be provided with uniform but was not. The Court was not informed of any policy. Pursuant to section 10(7) of the Employment Act, it was incumbent upon the Respondent to disprove this claim.

33. On the basis of the statutory provision, the Court would find in favour of the Claimant.

### ***Compensation for wrongful dismissal***

34. The Claimant sought three months wages as compensation. Compensation is one of the primary remedies for unfair termination. It is a discretionary remedy and the Court is enjoined to consider any, some or all of the factors listed in section 49(4) of the Employment Act, 2007.

35. The Claimant had served the Respondent for only about a year. The Court would award him the equivalent of three months gross wages as compensation assessed at Kshs 30,000/-.

### ***Leave allowance***

36. Clause 6 of the letter of appointment provided that the Claimant was entitled to 24 days annual leave with pay. There was no suggestion that the Claimant went on leave. By dint of the contractual provision and sections 10(3) and 28 of the Employment Act, 2007, the Court finds in favour of the Claimant and awards him the equivalent of one month's basic pay of Kshs 7,000/-.

### ***Rest days***

37. The Claimant seeks Kshs 31,968/- in respect of 48 rest days. Clause 4 of the letter of appointment provided that the Claimant may be required to work according to a duty roster.

38. It is the responsibility of an employer to keep records under the Employment Act, 2007 and produce such records in legal proceedings. Pursuant to sections 10(3), (7) and 74 of the Employment Act, 2007 the Court finds in favour of the Claimant under this head.

### ***Public holidays***

39. The Claimant sought Kshs 7,326/- under this head. For reasons similar to those discussed under rest days, the Court finds in favour of the Claimant.

### ***Overtime***

40. The Claimant sought Kshs 48,600/- on account of overtime. His evidence being uncontroverted and in the absence of records being produced by the Respondent, the Court would grant this relief.

### **Conclusions and Orders**

41. In light of the discussion above, the Court finds and holds that the dismissal of the Claimant was unfair and awards him and orders the Respondent to pay him

a. Wages from September to 9 November 2013	Kshs 22,997/-
b. One month salary in lieu of Notice	Kshs 7,000/-
c. Service charge	Kshs 12,000/-
d. Transport allowance	Kshs 18,720/-
e. Uniform allowance	Kshs 12,000/-
f. Pay in lieu of leave	Kshs 7,000/-
g. Rest days	Kshs 31,968/-
h. 11 Public holidays	Kshs 7,326/-
i. Overtime	Kshs 48,600/-
j. 3 months wages as compensation	Kshs 30,000/-

TOTAL

**Kshs 197,611/-**

42. Each party to bear its own costs.

**Delivered, dated and signed in open Court in Mombasa on this 12<sup>th</sup> day of September 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant acted in person

For Respondent Macharia Gakaria & Co. Advocates