



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 30 of 2013**

**YUNUS KASSIM HASSAN DEKLA**

**CLAIMANT**

**V**

**NYALI INTERNATIONAL BEACH HOTEL**

**RESPONDENT**

**JUDGMENT**

1. On a date which is not clear from the record, Yunus Kassim Hassan Dekla (the Claimant) filed a Statement of Claim against Nyali International Beach Hotel (the Respondent) seeking one month salary in lieu of Notice, salary for November 2012, severance pay, pending leave days and salary arrears for October 2012.
2. The Respondent was served with summons and on 10 February 2013 it filed a Memorandum of Appearance through the firm of Omondi Waweru & Co. Advocates.
3. On 26 February 2013 the Cause was mentioned before me for directions and Mr. Odundo appeared for the Claimant while Mr. Otieno appeared for the Respondent. Mr. Otieno informed me that he had filed an appearance and needed to take instructions from the Respondent and I therefore set a mention date of 13 March 2013 to enable him take instructions and for further directions.
4. On 13 March 2013 the Cause was placed before Justice Makau O.N. and Mr. Odundo appeared for the Claimant while Mr. Nyaboye held brief for Mr. Otieno for the Respondent. Mr. Nyaboye informed the Court that the Respondent had not filed a Response because the parties were seeking a settlement. No mention was made as to whether Mr. Otieno had received instructions to file a Response. Justice Makau directed the parties to explore the settlement before 29 April 2013, which date he fixed as a hearing date.
5. On 29 April 2013, there was no representation for the Respondent while Mr. Odundo was present for the Claimant. He informed me that he was ready for hearing.
6. Bearing in mind that Justice Makau had directed the parties to explore settlement before the hearing date which he fixed for 29 April 2013 and that the hearing date was taken in the presence of both parties I ordered that the Cause proceed to hearing.
7. Before discussing the case of the Claimant I need to remind the parties and practitioners in general that the filing of a Memorandum of Appearance is an alien practice in the Industrial Court. What the rules provide for is the filing of the Response/defence within 14 days of service of the Memorandum of Claim and Summons. Indeed the summons issued by the Court and served upon the Respondents is clear that the Respondent should file a Response within 14 days. This practice is in accord with the objective of the Industrial Court Act that disputes should be settled expeditiously and of the need to keep the proceedings

in the Court simple.

### **The case for the Claimant**

8. The Claimant gave sworn testimony and he stated that he was employed by the Respondent on 15 January 2010 as an Administration Manager at a net salary of Kshs 150,000/- per month. A letter of Appointment was produced as exhibit 1.

9. On or about 20 November 2012, the Claimant stated that he was served with a letter terminating his services with immediate effect which he produced as exhibit 2. He stated that he never received a warning letter before getting the termination letter.

10. The Claimant added further that as instructed in the termination letter, he handed over to the Chief Accountant and he was cleared. He produced a Clearance Certificate as exhibit 3. But he was never paid any terminal dues despite demanding for the same personally and through his lawyers.

11. The Claimant in his evidence reiterated that he was not given the reasons for his termination. He pleaded and testified that his termination was unlawful and that he was not given an opportunity to rebut any allegations against him if any.

### **Issues for determination**

12. In my mind there are only two crucial issues arising for my determination, and these are; one, whether the termination of the Claimant was unlawful and two, if the answer to the first issue is positive, what would be the appropriate remedies.

### ***Whether the termination was unlawful***

13. Termination of employment can be unlawful, one because an employer has not complied with the procedural requirements of section 41 of the Employment Act (what is termed in employment parlance as procedural unfairness) or second, that the employer had failed to prove the reasons for the termination and third, that the termination was for a valid and fair reason as required by sections 43 and 45 of the Employment Act.

14. Section 41 of the Employment Act, 2007 has now created a statutory obligation on an employer before terminating the services of an employee on the grounds of *misconduct, poor performance or physical incapacity* to explain to the employee the reasons for the termination and to listen to any explanations by the employee. The employee is also entitled to have a representative present.

1. In my considered view in order for an employer to meet the legal requirements of procedural fairness set out in section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following:

(i) Explained to the employee in a language the employee understands the reasons why it was considering the termination.

(ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.

(iii) Heard and considered any explanations by employee or his representative.

(iv) Where the employer has more than 50 employees as required by section 12 of the Employment Act that it has and complied with its own internal disciplinary rules.

15. But before an employer is called upon to demonstrate that it has complied with the procedural fairness requirements, in the first instance, an employee must discharge the legal burden of establishing that his

contract or services have been terminated. In the case under discussion, the Claimant has discharged the burden placed upon him by producing the letter through which his services were terminated and therefore shifted the evidentiary burden to the Respondent to demonstrate that it complied with section 41 of the Employment Act.

16. The Respondent did not file a Response or appear at the hearing to put its side of the case across and therefore all that I have is the unchallenged evidence of the Claimant. In these circumstances there is no other conclusion I can reach except that the termination of the Claimant was procedurally unfair.

17. Considering the decision I have reached, it is not necessary for me to venture into a discussion whether the Respondent has proved the reasons for the termination or that the termination was for a valid and fair reason(s) as required by sections 43 and 45 of the employment Act (what is referred to as substantive fairness). That would be merely an academic exercise save to state that the letter of termination did not give any reasons at all on why the services of the Claimant were being terminated. I would expect the Respondent to at least have set out the reasons in the letter.

18. The common law position that an employer need not give any reasons for terminating the services of an employee provided he gives notice and or pays damages equivalent to the notice period is no longer good law in this country. The Employment Act has radically transformed the employment relationship in Kenya and it is now mandatory for an employer to observe what is known in public/administrative law as natural justice. Procedural fairness is the equivalent of natural justice in employment law.

### **Appropriate remedies**

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

19. Clause 10 of the Claimant's letter of appointment provided for termination by either party giving written notice or paying one month salary in lieu of notice. The evidence before me is that the Claimant was earning Kshs 150,000/- net per month. I do not know what arrangements were agreed between the parties as to payment of income tax but more on this later. It is appropriate having found that the termination was unfair to award the Claimant one month salary in lieu of notice in the sum of Kshs 150,000/-

#### ***Salary for November 2012***

20. The Claimant was terminated with immediate effect from 20 November 2012 and in compliance with section 35 of the Employment Act. He is entitled for the wages worked for. He sought Kshs 134,847/- for the earned wages between 1 November, 2012 to 20 November, 2012 when he was terminated and I accordingly award him the same.

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

21. It is trite law that severance pay is paid only in circumstances where an employee has been declared redundant. There was no claim whatsoever or evidence to suggest that the Claimant was declared redundant and therefore there is no statutory or contractual basis for me to award him severance pay. I decline this prayer.

#### ***Pending leave days and salary arrears for October 2012***

22. Apart from the pleading regarding the pending leave days and salary arrears for October 2012 and the statement by the Claimant that he was seeking pending leave days, no evidence was placed before me to support these 2 claims and despite the non rebuttal of this pleading, the Claimant being represented by an advocate should have laid a proper basis for this head of claim. I decline to make any award under these 2 heads.

#### ***Compensation***

23. Section 49 of the Employment Act has provided a remedy of up to a maximum of 12 months gross salary where it makes a determination that a termination of employment is unfair. The Claimant, though represented by an advocate did not plead, pray for or lead any evidence towards a grant of this remedy.

24. But the fact that a Claimant has not sought the remedy should not be a bar to the Court to grant the remedy. I say so advisedly on the basis that the Employment Act has provided for statutory remedies unlike what is familiar under the jurisdiction of the High Court. The compensation is not a common law or equitable remedy.

25. Considering that the Respondent gave no reason at all for the termination of the services of the Claimant, it is my view that an award of one month compensation would be a just order to make.

### **Conclusion and Orders**

26. I do find and declare that the termination of the services of the Claimant was procedurally unfair and award him:

(a) One month salary in lieu of Notice	Kshs 150,000/-
(b) Salary for November 2012	Kshs 134,847/-
(c) One month compensation	Kshs 150,000/-
<b>TOTAL</b>	<b>Kshs 434,847/-</b>

27. Bearing in mind that the salary of the Claimant was net I do order that the Respondent do bear any taxes arising from this award.

**Delivered, dated and signed in open Court in Mombasa on this 17<sup>th</sup> day of May 2013.**

**Justice Radido Stephen**

**Judge**

### **Appearances**

Mr. Odundo instructed by

Nyandwat Odundo & Co. Advocates

for Claimant

Omondi Waweru & Co. advocates  
attend hearing

filed Appearance for Respondent but did not