



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 19 OF 2013

JOSEPH KENGACLAIMANT

VERSUS

WHITESANDS HOTELRESPONDENT

J U D G M E N T

The claimant brought this suit on 29/8/2012 against the respondent claiming terminal benefits for services rendered between December 1998 to June 2005. In her defence filed on 19/3/2013, the respondent denied liability contenting that the claimant was only a seasonal employee who did not serve continuously.

After several adjournments at the instance of the respondent, the suit was heard on 3/6/2013 and 6/6/2013 when the claimant testified as CW1 and the respondent called Mr. David Kimanthi as RW1.

CW1 testified that he was verbally employed by the respondent in December 1998 as a waiter for 6 months and in July 1999 he was given a formal contract letter which he signed acceptance and returned to the respondent's personnel officer to have it signed by the General Manager Mr. Ashley Meryas. The contract was 3 months ending on 30/9/1999. That the said contract was extended for a further 3 months by a letter dated 19/10/1999 to January 2000.

That the contract was extended for 2 months upto February 2000 but never the less, he continued working upto April 2000 without any formal extension. That on 27/4/000 he was served with a letter telling him that his contract was expiring on 30/4/2000. He produced all the contract letters as exhibits A-L including the notice of expiry of his contract.

That he continued to work despite the notice to end of contract by 30/4/2000 until 19/5/2000 when he received a letter appointing him for temporary staff for one month. Thereafter he continued without any formal contract for 6 years. That during his entire period of service he was never given a payslip but only signed on a petty cash vouchers. The wage was Ksh.140/per day which was increased to a maximum of Ksh.250/ as at the time of termination. He always believed that he was a casual throughout his service until 2005 May when RW1 was appointed the new HR Manager and published a list of permanent staff on the Notice Board inviting them to collect new staff identify cards.

That the claimant saw his name in the list of permanent staff and went for his staff identity card and the same was issued ho him (exhibit H). Thereafter he reported to the Food and Beverage Manager (F& BM) to verify his staff status who referred claimant to the HR manager for a written confirmation. The HR Manager (RW1) gave him a letter dated 20/6/2005 (exhibit I).

That on 7/10/2005 he went to work as usual but he was stopped at the gate by the security guards who demanded his surrender of the original staff card and the recommendation letter dated 20/6/2005 before he could be allowed in the work. He declined and just went back home. That he never got any termination letter and he later went to the work place to check whether there was any further communication but found none prompting him to write a demand letter.

Among the claims in his demand and in the suit is for service charge which was paid to the unionisable staff. He confirmed that he was a member of the union and he used to see the notice of service charge published at the notice board which used to range between ksh.10,000 to Ksh.30,000/- per month.

He also prayed for house allowance for job group 3 which was about ksh.3000/- and the difference in salary between that of a casual and the seasonal or permanent staff.

That during his service he was paid less than what was supposed to be paid to him in view of the letter dated 9/5/2000. That under the CBA he ought to have earned Ksh.8381/- per month inclusive of house allowance yet upto 2005 he was earning Ksh.140 per day (ksh.3640 per month) and from 2005 he was receiving ksh.250/- per day (ksh.5500 per month). That the said pay excluded the 4 unpaid rest days per month. He also claimed for payment in respect of holidays worked whereof he was only paid as casual the normal pay per day instead of the double pay. He claims 9 holidays per year which ran for the 76 months served.

The claimant claimed that he never went for leave during his service and maintained that he worked continuously even after the lapse of each seasonal contract. He also confirmed that the respondent paid for his NSSF contribution for four months from 1999 upto for January 2000 yet he continued to be deducted the NSSF money which was never remitted. He also claimed ksh.1200 being salary arrears for the days worked upto 7/10/2005. he produced the CBA for year 2004 to 2005 as exhibit M.

On cross examination he agreed that the contract lapsing on 31/5/2000 did not require any termination notice. He also did not have any document to prove that he was employed until 2005 except the time table and work schedule which are in the custody of the respondent. He however relied on medical certificate and staff identity card to prove employment. He contended that he was a seasonal employee and ought to have enjoyed equal benefits with permanent staff.

RW1 was a former HR Manager for the respondent between 7/1/2005 and 30/12/2008. He confirmed that the respondent employed seasonal staff depending on workload. The workers were interviewed by Departmental Heads and confirmed by the HR Manager depending on whether the employee produced a medical certificate. That a contract was then given to the employee.

He admitted writing a recommendation letter showing that the claimant had worked for the respondent. According to him it was a certificate of service. He also agreed that he signed on the staff card for the claimant. He contended that there were no records to show that the claimant continued with service after 31/5/2000. That he saw the claimant for the first time when he came for the recommendation letter.

On the issue of service charge, he maintained that it was provided for under the CBA. That it was shared among the unionisable staff with the approval of the works committee and the notice of the amount payable to each employee was published through the notice board.

He confirmed that a new employee must bring a medical certificate but after expiry the employer renews it as his cost. On cross examination he confirmed that he did not know about the matters that happened before 2005 when he joined the respondent. He confirmed that workers need to sign for payment on a master roll and the money go to the bank.

That seasonal staff did not have staff identity cards but a clock-in-card. He confirmed that Exhibit "h" was a staff identify card from the respondent. He confirmed also that service charge ranged between

ksh.6000 and ksh.15000/ per month depending on the season and it was paid through the employees' bank account.

After the close of the hearing, the parties filed closing submissions. I have carefully gone through the pleadings and considered the evidence and the closing submissions by the parties. I am satisfied that I have the jurisdiction to determine this suit by dint of Section 12 of the Industrial Court Act. The parties have also admitted jurisdiction. It is also not in dispute that the claimant was employed by the respondent under consecutive contracts since December 1998.

The issues for determination in my view are:

- a. **Whether the claimant served the respondent for a continuous period from December 1998 to October 2005 as seasonal staff.**
- b. **Whether the said continuous service entitled the claimant to equal benefits as permanent staff.**
- c. **Whether after the termination of the employment the claimant was entitled to the terminal dues sought in the suit.**

In answer to the first issue, the court has considered the contract letters and the oral evidence adduced by the parties. It is not disputed that from December 1998 to May 2000, the claimant served continuously as a seasonal staff. The dispute is for the period between May 2000 and October 2005. The claimant has maintained that he was in employment as a casual worker and in June 2005 he learned that he was supposed to be a permanent staff. He produced staff identify card and recommendation letter to support his claim.

The RW1 on the other hand denied the claimant allegation but agreed that he did not know what transpired before he joined the respondent in 2005. He confirmed that workers were signing master roll for their pay but payment was done through the employees bank accounts. He did not produce any record on that and he did not produce records of Duty roster or work time table. He admitted that he signed on the claimant's staff card and recommendation letter in 2005.

The question is how could the RW1 have given such documents from the blues and to a stranger? His explanation was convincing to the court. In any case he did not deny the allegation that he published a list of permanent employees on the Notice Board calling them to go for staff identity cards. The court therefore believes the evidence of the claimant that he worked continuously from December 1998 and did not stop even after the expiry term contract ending on 31/5/2000. It is during the continuous service that he knew RW1 as the new HR manager and saw his name among permanent staff on the notice board.

The answer to the second issue is in the affirmative. Firstly, the claimant's allegation that he was a member of the Kenya Union of Domestic, hotels, Educational Institutions, hospital and allied workers (KUDHEIHA) has not been contested. It follows therefore that the provisions of the CBA dated 1/1/2004 bound the respondent with respect to the claimant.

Clause 19 of the CBA barred an employer from employing a seasonal employee for more than six months. Such seasonal employees were to be subject to the same terms and conditions of service as the other employees as per Section 14 of the Employment Act Cap 226 (repealed). Under the said provision of repealed law a contract of service for six or more months was supposed to be in writing and subject to termination by a notice. From the foregoing and in view of the Clause 19 of the CBA, the claimant was entitled to similar terms and conditions of service as permanent staff.

The last question is whether the relief sought ought to issue. The claimant has prayed for accrued service charge, house allowance, the difference between permanent staff salary and casual workers, allowances for public holidays worked, accrued leave days, NSSF deductions not remitted, salary arrears for days worked, gratuity payments and any other relief the court deems fit.

Clause 21 of the CBA provided for service charge for all the unionsable employees at the exclusion

of the Management Staff. That the service charge was to be distributed equally to all the unionsable employees. The claimant was never paid his service charge due to the respondents unfair labour practices in the manner in which he dealt with the claimant. The claimant has prayed for Ksh.10000/ per month for the 76 months served but the RW1 contended that the monthly service charge ranged between ksh.6000 and ksh.15000/-. I will award the lowest amount of ksh.6000/- per month according to RW`1 which works to ksh.456000/ for the 76 months served.

I however dismiss the claim for house allowance because the claimant Exhibit “f” provided for a gross pay of Ksh.5232.00 per month which means all his pay was consolidated. I allow the claim for salary variance with respect to that paid to the permanent staff. The claim is for June to October 2005 during which period the claimant was earning ksh.250 per day which translated to ksh.6500 per month less 4 unpaid rest days. The uncontested evidence by the claimant is that during the said 4 months, the permanent staff were earning ksh.8381 per month gross. The variance was therefore ksh.1,881/ per month which translates to ksh.7524/- for the 4 months.

I will dismiss the claim for public holidays for want of particulars. It had not been pleaded or proved in evidence which holidays were worked for a normal pay. Even if the burden is upon the respondent to disprove allegations by the claimant, the latter ought to have pleaded the specific holidays worked in the calender year. I dismiss the claim for refund of the NSSF deductions and instead award service gratuities under Clause 27(b) of the CBA at the rate of one months salary per year of service. This works to ksh.41905/ for the 5 years served. I will also award ksh1200 prayed for the days worked in the month of October 2005.

in summary I enter judgment for the claimant and against the respondent for:

- a. **Accrued service charge456,000**
- b. **Salary variation 7,524**
- c. **gratuity pay41,905**
- d. **Salary earned in October 2005 1,200**

506,629

The respondent will pay costs and interest unless he settles the above judgment debt within 30 days of today.

Orders accordingly.

Signed dated and delivered this 26th July 2013

ONESMUS MAKAU

JUDGE