



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 72 OF 2012

MICHAEL OTIENO OUMACLAIMANT

VERSUS

CARSLAKE NOMINEES LTD t/a DIANI SEA RESORTRESPONDENT

J U D G M E N T

The claimant filed this suit on 16/10/12 claiming employment terminal dues against the respondent. The gravamen of his case is that the verbal summary termination of service by the respondent was unfair and wrongful. The respondent has denied liability to pay the dues claimed and has contended that the claimant was lawfully terminated for gross misconduct and laziness.

The case was heard on 17/7/2013 when the claimant testified as CW1 and Omar Salim Swedi testified for the respondent as RW1. CW1 produced a letter of appointment to show that he was employed by the respondent on 15/11/1991 as an Executive chef. He worked continuously until 6/11/2006 when he the Managing Director (MD) the respondent verbally retired him without any reason and referred him to the Chief Accountant for his dues. At the time of termination he was earning a monthly salary of Ksh.99000/-. He maintained that he served the respondent diligently and he was never served with any warning letter for any indiscipline.

He further contended that in 1995 overtime was introduced and in 1996 the Hotel was elevated from 3 star to 4 star and the respondent promised to pay gratuity and retirement benefits to him. He prayed for ksh.742,500 being gratuity for 15 years at 15 day per year of service, ksh.45596 being refund towards medical expenses before termination, and ksh.408,000 being overtime.

On cross examination he admitted that at the time of termination he was 57 years old. He however denied that he was retired but terminated. He admitted that his overtime was compensated by off days. He also admitted ownership of motor vehicle KAD 932E but contended that his son also used the same car. He also contended that the Director also used to send him out every now and then especially to the immigration office. He further admitted that he was in the management and he knew that the respondent had stopped paying gratuity to the management staff.

RW1 is the respondents Chief Accountant. She admitted that the claimant was their Executive Chef in the Management Position. She confirmed that the claimant was retired on account of age on 7/11/2006 after completing his leave. That as a chief Accountant then, she paid his salary for 3 months in lieu of notice, salary for October 2006 plus a token of one month salary. That the total sum paid after reducing statutory deductions was ksh.352,395. That the notice period was 2 months but the respondent gave him 3 months notice pay.

She denied that the claimant was entitled to any gratuity because he was in management position. That he was also not entitled overtime because as a management staff he was compensated by off days which would be accumulated and taken as leave. She produced leave form (exhibit D.2) to prove that he took longer leave than normal from October- November 2006. She also confirmed from the claimants payslip that he was always paid his house allowance. She further denied the claim for medical expenses and contended that the claimant was only entitled to ksh.20000 per year and as at the time of his termination there was pending claim. According to her retirement does not require any written notice but a verbal discussion between employer and employee. After the close of the hearing parties filed written submissions.

Upon careful reading of the pleadings and consideration of the evidence and the submissions, the following issues for determination arise.

- a. **Whether the court has jurisdiction to entertain the suit by virtue statutory limitation of actions.**
- b. **Whether the termination of the claimants employment was wrongful and unfair.**
- c. **Whether the claimant is entitled to the reliefs sought in his claim**

The answer to the first issue is derived from the law which was in force when the cause of action arose. I have noted from the pleadings and submissions that both parties leaned on the principles introduced by the 2007 labour laws and completely ignored the former sources of labour law.

In my view the Section 90 of the Employment Act 2007 did not render time barred causes of action which arose before the said law came into force. In my view a cause of action is a right to sue which cannot be taken away by a law which is passed after the right had accrued. That in view is reinforced by the principle that law does not operate retrospectively. The court therefore finds that under Section 4(1) of the Limitation of Actions Act, Cap 22 laws of Kenya, the claimant had a statutory period of six years within which to file suit in court. That period was to end on 5/11/2012. The suit was filed on 16/10/12 and which was within the statutory time.

On the other hand, by dint of Section 12 of the Industrial Court Act and Article 162 of the constitution this court has exclusive original and appellate jurisdiction to determine all disputes related to employment and labour relations as the present case. The court therefore finds that it has the necessary jurisdiction to entertain the present suit.

As regards the second issue the court appreciates that there was a written contract of employment between the two parties herein. The court also appreciates the fact that the termination of the said contract was in 6/11/2006 and therefore the applicable law to this case as earlier observed is the labour law in force then, which is the Employment Act Cap 226 Laws of Kenya (now repealed). The said law did not provide for the doctrine of unfair termination as we know it today. As such the procedure of disciplinary hearing before dismissal was not provided for under Cap 226. The court will therefore not spend any effort in trying to find out whether there was unfairness before termination because there was no statutory or contractual obligation on the employer to act fairly.

I will however consider the question whether the termination was wrongful. Termination is deemed wrongful if offending party has breached a term or obligation under the employment contract. In this case the claimant alleges that he was verbally retired by the MD without any notice or prior notice. The respondent has contended that the claimant had exceeded his retirement age and she had no obligation to give any prior written notice. She has relied on Court of Appeal decision in **C.A.C.A 19 of 2012 KENETH KARISA KASEMO VS KENYA BEREAU OF STANDARDS (2013) e KLR** where the court seemed to say that one does not need to be given a retirement notice in order for it to be lawful.

Am however of the view that the present case involves a contract of employment in the private sector and not public sector as in the said Court of Appeal case. In the said case the employment contract was subject to a staff pension scheme which provided for mandatory retirement at the age of 55 years. In the present case, there was no provision for mandatory retirement at any age in the employment contract.

It follows therefore that the respondent's MD was wrong to retire the claimant summarily. There was no law and I believe there still none which provides for mandatory retirement of workers in the private sector. The matter of retirement therefore remains a mode of termination of employment which must be agreed upon by the employer and the employee.

Consequently if the same is not agreed between the parties, it is presumed that the employment is indefinite unless it is terminated by notice, breach, dismissal, impossibility or death. In the present case the court is satisfied that the employment contract was terminated through breach because the reason given of retirement on ground of age was not provided in the contract between the parties herein. The contract provided for only one way of terminating the contract that is by serving a 2 months prior notice except for summary dismissal on account of gross misconduct.

The court therefore finds and holds that the alleged summary verbal retirement of the claimant was indeed wrongful termination of his employment. The use of the word 'retirement' is what rendered the termination wrongful and I so declare as prayed in the claim. The position would have been okay had the MD merely terminated the services and paid 2 months salary in lieu of notice as per the employment contract.

The last issue for consideration is whether the claimant is entitled to the dues sought. This was only an alternative prayer and I need not answer it after having granted the primary prayer sought by the claimant. The answer again is in the employment contract and the labour law in force on 6/11/2006. The parties have agreed in evidence that any party could terminate the contract by giving 2 months notice or paying or forfeiting salary in lieu of notice. The contract did not provide for any dues payable to the claimant upon termination. No law has been cited by the claimant to show that he was entitled to any gratuity on termination. The court therefore can not award the prayer for gratuity.

The prayer for house allowance arrears was not proved and it is dismissed. I agree with the defence that the payslips produced by the claimant indicated that out of the gross salary of 99000 ksh.9000 was for house allowance. I also dismiss the prayer for refund of medical expenses for lack of evidence. The claimant did not prove the amount claimed of ksh.45596/ and when the expenses were incurred. The employment contract provided for only annual cover of ksh.20,000/ and not ksh.45,596. I agree with the defence that no claim papers had been lodged by the claimant before his termination.

As regards the prayer for overtime, the court is satisfied with the explanation given by the defence that all overtime hours worked by the claimant was compensated by off days which were accumulated and added to the normal leave days which were utilized between October and November 2006.

In summary therefore the court enters judgment for the claimant in the following terms;

- a. **the termination of the claimant's employment through retirement on account of age is hereby declared wrongful.**
- b. **The claimant will also have costs and interest form the date of filing the suit.**

Signed, dated and delivered this 4th October 2013

ONESMUS MAKAU

JUDGE