



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 533 OF 2014

**BETWEEN**

**KENYA HOTELS AND ALLIED WORKERS UNION....CLAIMANT**

**VERSUS**

**PINEWOOD RESORT AND SPA.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*John Simiyu, Deputy Secretary -General, for the Claimant*

*Beatrice Opolo Advocate, instructed by the Federation of Kenya Employers [FKE], for the Respondent*

## **JUDGMENT**

1. The Claimant filed its Statement of Claim on 29<sup>th</sup> October 2014. The Claim is made on behalf of 2 former Employees of the Respondent Hotel, Messrs. Nassir Athuman and Abdalla Mwabuda [Grievants], who were Members of the Claimant Union. The Grievants were employed as Public Area Cleaner and Room Steward, respectively. The Grievants were asked to proceed on annual leave. Athuman reported back on 28<sup>th</sup> March 2013, and Mwabuda on 9<sup>th</sup> April 2013. Both were denied the chance to resume duty upon reporting back. They considered their contracts of employment to have been terminated. They sought the assistance of the Claimant Union, which formally reported the existence of the dispute to the Ministry of Labour. A Conciliator was appointed, who upon considering Submissions made by the Parties, recommended that: the Respondent did not summarily dismiss the Grievants for failure to obey lawful instructions; the Respondent pays to the Grievants notice pay, any pending annual leave, any unpaid wages, service charge; and issues Certificates of Service to the Grievants. The Respondent refused to honour these recommendations, necessitating the filing of this Claim in Court, in which the Claimant prays for Judgment against the Respondent in the following terms:-

- a) Notice pay.
- b) Severance pay.
- c) Pending off-duty days.
- d) Public Holidays.
- e) Annual leave pay.
- f) Service charge.
- g) 12 months' salary in compensation for unfair termination.

The Claimant seeks a sum of Kshs. 557,194 on behalf of the 1<sup>st</sup> Grievant, and Kshs. 558,141 on behalf of the 2<sup>nd</sup> Grievant. The Court is also prayed to award damages to the Grievants.

2. The Respondent filed its Statement of Response on 26<sup>th</sup> November 2016. It is conceded that the Respondent employed the Grievants in the roles indicated in the Claim. Both worked as Casual Employees, as and when work was available. On or around 13<sup>th</sup> October 2012, the

Grievants were allowed upon request, to proceed on accumulated annual leave as well as pending Off-duty and Annual Leave days. They were to decide while on this break period, whether to sign fresh contracts of service that about all the 62 Casual Employees of the Respondent, were expected to sign. All such Employees except the 2 Grievants signed the new contracts. The Grievants refused to sign the new contracts upon resuming work at the end of their break. They opted to walk out of employment, only to turn around and claim they had been locked out. They were not locked out. The Respondent did not terminate their contracts. The Conciliator rightly concluded that the Respondent did not terminate Grievants' contracts. They are not entitled to any of the prayers. They left employment of their own volition. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant called the 1<sup>st</sup> Grievant, who gave evidence common to both Grievants, and closed Claimant's case, on 7<sup>th</sup> March 2016. The Respondent gave evidence through its Operations Manager Mlewa Chengo on 7<sup>th</sup> March 2016 and 27<sup>th</sup> February 2018 when hearing closed. The matter was last mentioned in Court on 31<sup>st</sup> May 2018 when Parties confirmed the filing of their Closing Submissions.

4. Mwabuda testified he was employed as a Room Steward. He was previously a Member of Kenya Union of Domestic, Hotels, Education Institutions and Allied Workers Union [KUDHEIHA]. He joined the Claimant Union in 2011. He had a cordial relationship with the Respondent.

5. He did not refuse to sign a new contract. He was not given any reason justifying termination. He was in continuous employment. He did not leave employment voluntarily. He was locked out and denied an opportunity to defend himself. The Grievants did not agree with the Report of the Conciliator, which the Witness testified, favoured the Respondent.

6. Cross-examined, the Grievant told the Court he resigned from KUDHEIHA, and joined the Claimant. He first worked as a Casual Employee when recruited. He was offered Off-duty days and Public Holidays. He utilized annual leave days. He was locked out. His position was not declared redundant. He testified that his Representative in Court, Mr. Simiyu would know why the Grievants are seeking service charge. He confirmed that he disagreed with the Conciliator's Report.

7. The Operations Manager, Chengo, confirmed that the Grievants were employed by the Respondent. They worked as Casual Employees. Chengo did not recall for how long they so worked. The Labour Office advised the Respondent during inspection, that the Respondent does away with casual employment. Casual Employees were to convert to Contract Employees. This was to take place around September 2012. There were about 60 Employees on casual employment. They were required to sign contracts. The Grievants had requested to take their accumulated leave. They were to return, and sign contracts. 1<sup>st</sup> Grievant returned after leave. His dues were computed. He disputed the number of years worked. The dispute was taken before the Conciliator. It was found that the Respondent did not summarily dismiss the Grievants. The Grievants refused to obey lawful instructions issued by the Respondent. The CBA in place states that the Respondent collects service charge on behalf of KUDHEIHA. KUDHEIHA would then distribute this among its Members. The Respondent was not ready to pay notice pay, as it did not terminate the Grievants' contracts.

8. Cross-examined, Chengo agreed that the Respondent was to consider accrued rights as well as terminal rights. He did not know what the difference between these concepts is. The Respondent was to clear with the Employees completely, pay dues, and enter into fresh contracts. The Respondent did not force Employees into signing indemnity. CBA states service charge would be distributed to all Unionisable Employees equally. Labour Office recommended Casual Employees are employed on determinate contracts. They did not have accumulated benefits. Chengo was not familiar with Hotels and Catering Trades Order. He did not know that an Employee, who works for 1, or more years continuously, is deemed permanent. It was discriminative to pay service charge to some Employees, while leaving out the Grievants. The 1<sup>st</sup> Grievant was offered by the Respondent 2 years' annual leave. 2 years were excluded from computation of annual leave. Redirected, Chengo stated that the 1<sup>st</sup> Grievant took 168 days of annual leave. 2<sup>nd</sup> Grievant took 179 days. Service charge is negotiated between KUDHEIHA and the Respondent. KUDHEIHA paid to their Members. Grievants were not Members. They did not pay agency fees to KUDHEIHA. Their positions were not declared redundant.

### **The Court Finds:-**

9. This dispute was considered by the Conciliator appointed by the Ministry of Labour. There is a report dated 24<sup>th</sup> July 2014, which contains Submissions given by the Parties; Observations of the Conciliator; and Recommendations.

10. At paragraph 2.5 of the Statement of Claim, the Claimant states that the Respondent refused to honour recommendations of the Conciliator, prompting the Claimant to file this Claim under Section 73 of the Labour Relations Act Number 14 of 2007.

11. The evidence given by Mwabuda however is different from what is stated by the Claimant Union above. This Grievant testified that they did not agree with the recommendations made by the Conciliator, and that the Conciliator was biased.

12. The Respondent seems not to entirely agree with the recommendations of the Conciliator, disputing items such as notice pay, annual leave and service charge. The Respondent agrees with the finding that the Grievants' contracts were not terminated by the Respondent.

13. The Court notes that the Grievants took extended breaks of 168 and 179 days respectively, before returning to work when they were required to execute fresh contracts of employment. It does not look persuasive to hold that after these long breaks, the Grievants were owed annual leave days. They utilized their breaks from work, before they left employment. Mwabuda told the Court he utilized annual leave days. He was offered Off-duty days and Public Holidays. The prayers for Pending Off-duty days, Public Holidays and Annual leave are rejected.

14. The Grievants did not leave employment on redundancy. They cannot be granted severance pay under Section 40 of the Employment Act 2007.

15. They were not able to establish the prayer for service charge. They base the item on 32 months. They did not show the Court which these

32 months are. They did not assist the Court in understanding how the amounts claimed have been computed. The service charge in question is given under a CBA concluded between KUDHEIHA and Hoteliers' Association. The Claimant Union is a Successor Union in the Hotel Industry. It was unable to show to the Court how service charge, negotiated in a CBA which the Claimant was not party to, is to be computed and availed to the Grievants. It is not sufficient to submit that service charge was payable to all Unionisable Employees. The Claimant ought to have given satisfactory evidence on service charge, and probably called a Witness from KUDHEIHA, to enlighten the Court on this. The figures contained in the Claim are unsupported in evidence. The prayer for service charge is declined.

16. The Respondent established that it did not terminate the Grievants' contracts of employment. They were required, on the advice of the Labour Office to the Respondent, to cease working as Casual Employees, and to begin working on determinate contracts. There were about 60 Employees affected. All the other Casual Employees accepted the new contracts and continued working. The 2 Grievants rejected the contracts and walked away. In the findings of the Conciliator, they disobeyed the lawful instructions of their Employer. They cannot blame the Respondent for discontinuance of employment. There is no justification in awarding compensation or other damages to the Grievants as prayed.

IN SUM, IT IS ORDERED:-

*a) The Claim is hereby dismissed in its totality.*

*b) No order on the costs.*

**Dated and delivered at Mombasa this 27<sup>th</sup> day of July 2018.**

**James Rika**

**Judge**