



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 385 OF 2014**

**BETWEEN**

**JOHNSON NZAKA MWAMBAJI..... CLAIMANT**

**VERSUS**

**REEF HOTELS LIMITED..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Munee Katu & Associates, Advocates for the Claimant*

*Cyrus Maina & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant filed his Statement of Claim on 15<sup>th</sup> August 2014. He states he was employed by the Respondent Hotel as Cleaner on 15<sup>th</sup> August 2005. The Respondent wrote to the Claimant alongside other Employees on 15<sup>th</sup> October 2013, notifying them the business would be handed over to new Management effective 1<sup>st</sup> December 2013. His position became redundant. He sought to be paid terminal dues under the CBA concluded between KUDHEIHA and the Hoteliers' Association. The Respondent did not pay him, necessitating the filing of this Claim in which the Claimant prays for Judgment against the Respondent for notice pay; accrued annual leave; off days; travelling allowances; public holidays; severance pay; and arrears of house allowance, all totaled at Kshs. 319,250. He also prays for Certificate of Service, Costs and Interest.

2. The Respondent filed its Statement of Reply on 16<sup>th</sup> October 2014. It concedes to have written to all its Employees, notifying them of intended change in Management. Employees and their Union KUDHEIHA were advised they would be paid terminal dues on changeover. However, the Respondent did not move forward with the intended change. Employees were informed there would be no change and they would continue to work normally. Some Employees, including the Claimant, insisted they wished to have their contracts terminated, and terminal benefits paid as earlier advised. The Respondent was compelled to consult KUDHEIHA. It was agreed Employees were still in employment, but those who wished to leave, were free to do so under the Clause 9 and 27b of the CBA. The Claimant deserted employment on 22<sup>nd</sup> March 2014. The Respondent states it has no objection to paying the Claimant what was agreed between the Respondent and his Union, which is:-

- a) 74 days of annual leave at Kshs. 34,854.
- b) Pending off days as claimed.
- c) Travelling allowance as claimed.
- d) 61 public holidays at Kshs. 28,731.
- e) 48 days of unpaid off days at Kshs. 22,608.
- f) Arrears of house allowance at Kshs. 14,759.
- g) Certificate of Service to issue.
- h) The Respondent counterclaims notice pay of 2 months at Kshs. 28,260 against the Claimant.

Parties registered a partial consent compromising some of the prayers, on 15<sup>th</sup> December 2014.

3. The Claimant testified, and rested his case, on 4<sup>th</sup> June 2015. The Respondent called Hotel Manager Michael Munga on the same date. Other Witnesses included Housekeeper Emmanuel Katana Chiko, Senior Personnel Clerk Lamech Ouma Juma and KUDHEIHA's Industrial Relations Officer Hezron Onuong'a, all who testified on 8<sup>th</sup> September 2016, when Respondent's case closed. The Claimant was recalled and gave further evidence on 28<sup>th</sup> November 2016 when hearing closed. The dispute was last mentioned on 21<sup>st</sup> February 2017, when Parties confirmed the filing of their Closing Submissions and Judgment scheduled for delivery.

4. The Claimant outlined his employment history, and terms and conditions of service with the Respondent, which are largely not disputed. He received redundancy notice dated 15<sup>th</sup> October 2013 from the Respondent. He consulted his Employer and his Union and it was confirmed there was no more work. He was told he could work in the future as a Casual Employee. By March 2014, he had not been paid his terminal dues. He became tired of his Trade Union and withdrew membership in May 2014. He engaged Advocates to pursue the Claim in Court.

5. He agreed on cross-examination that Respondent's computation of annual leave days was correct. CBA applied to him. Notice pay should be paid according to the CBA. Respondent's Advocates replied to Claimant's demand letter advising Claimant's position had not been declared redundant. Parties agreed on certain items. The Claimant still presented his Claim in Court. He did not know if change in Management was made effective.

6. Hotel Manager Michael Munga confirmed employment details given by the Claimant. Employees were issued redundancy notices. It was expected the Hotel was going to be placed under new Management. KUDHEIHA was involved from the inception. The proposed change in Management did not take place. Another notice reissued reversing redundancy. The Claimant was advised he was still in employment. He and other Employees defied the collective position of the Union and wrote directly to the Respondent, demanding the process goes on. The Claimant deserted employment. The Respondent was and is willing to pay terminal dues as agreed with the Union, less notice pay due to the Respondent. The Manager confirmed on cross-examination that the Claimant was notified about the reversal of the redundancy process.

7. Chiko and Juma agreed with the evidence given by their Hotel Manager.

8. The last Witness Hezron Onuong'a was quite helpful to the Court. He told the Court his Union and the Respondent have a relationship spanning 25 years. There is in place a Works Committee, which represents Workers. If there is a problem at the workplace, it is channeled through this Committee to the Union Branch.

9. The Union was notified of intended change in Management and resultant redundancy. There was a change in the proposal. The Union held a consultative meeting with the Respondent on 27<sup>th</sup> October 2013. A fresh notice issued reversing the process. The notice was in compliance with the resolution made by the Union and the Respondent at the consultative forum. There was a further meeting held on 5<sup>th</sup> March 2014. Parties agreed those Employees who insisted on leaving should be allowed to do so. Terminal dues were agreed between the Union and the Respondent. Cross-examined, Onuong'a was firm that he would not tell the Court untruths, as this would not be in the interest of the Union. Works Committee would escalate grievances to the Union if there was no settlement at shop- floor level.

**The Court Finds:-**

10. The Court has emphasized in past Judgments the need to distinguish and issue redundancy related notices under Section 40 of the Employment Act 2007.

11. In the current suit, the notice issued on 15<sup>th</sup> October 2013, should have been characterized and understood as an initial notice under Section 40 of the Employment Act, announcing the intention to declare redundancy; give reasons for, and extent of redundancy; and open room for consultations.

12. Consultations such as those which followed the notice, could lead to reversal of the process, or affirm the process, leading to the application of the other provisions of Section 40. This would include issuing of the actual notices of termination or payment of notice pay, severance pay, leave etc.

13. The Respondent reversed the intended process of redundancy, and notified the Employees and their Trade Union, on 27<sup>th</sup> October 2013. Employees were told they would continue serving. That should have been the end of the matter, but for some Employees, the prospects of redundancy packages were all too alluring. This is the reason the Claimant is in Court.

14. A Group of Employees went outside the industrial relations machinery which bound them, and wrote demand letters for payment of terminal dues, even after they had been told by the Respondent and their Union, that there was no termination.

15. Employees, who are represented by a Trade Union, have no basis to engage their Employer directly on a collective dispute. Such a dispute is dealt with collectively by the Employer and the Trade Union, under the Recognition and Collective Bargaining Agreement in place.

16. The Respondent was not under obligation to pay terminal dues, as it did not terminate Employees' contracts. Due to pressure from the renegades, and perhaps in respect for good industrial relations, the Respondent engaged Claimant's Trade Union further. It was agreed those Employees who insisted on leaving be paid terminal dues. According to KUDHEIHA's Industrial Relations Officer, who as the Court observed above, was a helpful and truthful Witness, terminal dues were computed and agreed upon. One would expect that the dispute would rest there.

17. Not so. The Claimant walked away and engaged Advocates. The dispute was escalated to the Court. This was not necessary.

18. The Court is satisfied that the Claimant was a Member of KUDHEIHA. He states he became exasperated with KUDHEIHA and withdrew membership in May 2014. His withdrawal would not undo the authority he had given to KUDHEIHA through his membership, to represent him, state his position to the Employer, and reach compromise with the Employer. Even in withdrawing membership, he still seeks to benefit from the CBA negotiated by KUDHEIHA. His overall stand in this dispute is untenable. If he had a grievance against KUDHEIHA, he should have pursued KUDHEIHA for misrepresenting or under-representing his cause, rather than waste the Respondent's and the Court's time on an unnecessary dispute.

19. In the end, the Court upholds the proposed mode of settlement suggested by the Respondent under

paragraph 10 of the Statement of Response, as confirmed by the Union Representative in his evidence before the Court.

20. The counterclaim however is disallowed, the Respondent having agreed that Employees, who wished to leave, could do so and receive terminal benefits under the CBA. The Claimant's act of leaving cannot be deemed in the circumstances to amount to desertion.

IT IS ORDERED:-

***a) The Claim shall be fully settled in terms proposed by the Respondent under paragraph 10 of the Statement of Response, read together the partial consent Judgment registered in Court on 15<sup>th</sup> December 2014.***

***b) The counterclaim is rejected.***

***c) No order on the costs and interest.***

Dated and delivered at Mombasa this 20<sup>th</sup> day of June 2017

James Rika

Judge