REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 1120 OF 2004

1. **JOHN MWANGI KIRIMA**
2. **CHARLES WANDUMO**
3. **VITALIS ALIVJOO K'ODHIAMBO**
4. **DAVID OYULA**
5. **JOHN MAKAU**
6. **ANNA NYAMBURA**
7. **JOHN ONYANGO BULEMI**
8. **ANTHONY MUNYAO NGUI**
9. **FREDRICK OTHIAMBO MOLA**
10. **GEOFFREY LUMUMBA MWANGEKA**
11. **SAMUEL MAINA NDERITU**
12. **SAMUEL MWENDWA**
13. **JACKSON KAMAU KUBWA**
14. **GEORGE N. NDIRANGU MWANGI**
15. **ALICE NYAGUTHII NJOGU**
16. **NDUNGU GICHUMBU**
17. **ELIZABETH OGOCHE WASEKA**
18. **MARY MUMBI NJENGA**

19. JOHN MWANGI WALLECE

20. JOSEPH OSORE MUSUMBA

21. MUTHINI MUTHAMA

22. ALEX OMONDI K'OTHIAMBO

23. REUBEN MBILUNZU

24. MARTIN MUGWANJA GATHIRWA

25. PHILIP KYALO MASAI

26. JULIUS KAMAU WANGENYE

27. ADAN YAKUB ADAN

28. JACKSON MACHARIA MWANGI

29. ROBERT MBUGUA WAMBUI

30. BERNARD OMONDI MIKA

31. STEPHEN KIRAGU MWANGI

32. STEPHEN ONYANGO ABUGA

33. ANTHONY MWANGI NDEGWA

34. GEORGE MUTHAKA MWIHIA

35. MATINGO NTHAUTHA

36. YAKUB ADAN BONAYA

37. REUBEN NJUGUNA MWANGI

38. NICHOLAS ONYANGO

39. BENJAMIN MUTHENYA

40. SIMON MWANGI41. KENYA HOTELS & ALLIED WORKERS UNION.....PLAINTIFFS

V E R S U S

1. CHEZER INVESTMENTS LIMITED

2. KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS AND ALLIED WORKERS (KUDHEIHA) .....DEFENDANTS

J U D G M E N T

There has been considerable delay in the preparation of this judgment. The same was occasioned by an oversight caused by pressure of work. The delay is regretted.

The first 40 Plaintiffs were former employees of the 1st Defendant at its then business called Hotel Boulevard, Nairobi. They were declared redundant by notices dated 16th October, 2004. Their case against the 1st Defendant as pleaded in the further amended plaint dated 14th November, 2006 is that the said redundancies were illegal for want of due notice to their trade union, the 41st Plaintiff, or to a labour officer, as required by law. Each of the first 40 Plaintiffs has therefore claimed special damages comprising all or some of the following:-

- gratuity
- salary in lieu of notice
- severance pay
- leave accrued
- leave travelling allowance
- public holidays.

The actual sums claimed by each of them are set out in paragraph 16 of the further amended plaint. Their total claims amount to KShs. 6,589,499/00. They also seek the following other reliefs against the 1st Defendant:-

- general damages for unlawful redundancy or unlawful termination of employment
- issuance of certificate of service to each of them
- costs of the suit
- interest on the costs and monetary claims at court rates.

Both the 41st Plaintiff and the 2nd Defendant were at all material times trade unions registered under the Trade Unions Act, Cap. 233. At one time the first 40 Plaintiffs were members of the 2nd Defendant. The 2nd Defendant had been duly recognised by the 1st Defendant, and there was a collective bargaining agreement duly executed between them. But at some point before the redundancies the first 40 Plaintiffs withdrew their membership from the 2nd Defendant and joined the 41st Plaintiff. They authorised the 1st Defendant to deduct their monthly union dues from their salaries and pay them to the 41st Plaintiff. The 1st Defendant did so. However, there was no formal recognition agreement executed between the 41st Plaintiff and the 1st Defendant, and there was no collective bargaining agreement entered between the two.

The Plaintiffs' case against the 2nd Defendant is that it wrongly and unlawfully held itself out as representing the first 40 Plaintiffs. It is their further case that the 1st Defendant served the redundancy notices upon the 2nd Defendant while knowing that the first 40 Plaintiffs were represented, not by the 2nd Defendant, but by the 41st Plaintiff. The 1st Defendant thus did not comply with the law. The relief sought against the 2nd Defendant is rendered as follows in the further amended plaint:-

"A permanent injunction restraining the 2nd Defendant from in any way dealing in matters touching on

employees at the Boulevard Hotel."

The 1st Defendant duly entered appearance and filed defence. It denied the Plaintiffs' claims. More specifically, it denied that the redundancies were unlawful or that due notices of them were not given, or that such notices were supposed to be given to the 41st Plaintiff. The 1st Defendant pleaded that it duly served notices of redundancies upon the 2nd Defendant with whom it had a collective bargaining agreement and upon the Provincial Labour Officer, Nairobi.

The 1st Defendant also pleaded that the 41st Plaintiff misrepresented to the 1st Defendant that it had executed a recognition agreement with an employers' association representing the 1st Defendant, and by that misrepresentation the 1st Defendant honoured the first 40 Plaintiffs' instructions to forward to the 41st Plaintiff the employees' monthly union dues. The 41st Plaintiff thus unlawfully enriched itself.

In the alternative and without prejudice, the 1st Defendant pleaded that any dues to the first 40 Plaintiffs would have to be calculated, not under the collective bargaining agreement between the 1st and 2nd Defendants as apparently sought by them, but under the relevant Regulation of Wages (Hotels and Catering Trades) Order made under the Regulation of Wages and Conditions of Employment Act, Cap. 229 (now repealed). The 1st Defendant calculated those dues and pleaded them under paragraph 16(A) of its amended defence. The dues as calculated by the 1st Defendant amount to a total of KShs. 3,403,654/23. The 1st Defendant otherwise prays for dismissal of the Plaintiffs' suit with costs.

It would appear that the 2nd Defendant never filed defence. At any rate, on 17th May, 2007 when hearing of the suit commenced, the Plaintiffs withdrew their case against the 2nd Defendant with no order as to costs.

The following consent order was recorded in regard to admission into evidence of documents:-

"ORDER: By consent:-

1. All the documents in the Plaintiffs' list and bundle of documents dated 22nd February, 2006 be and are hereby admitted in evidence and marked as Exhibit P1.

2. All the documents in the 1st Defendant's list and bundle of documents dated 4th May, 2007 be and are hereby admitted in evidence and marked as Exhibit D1."

It was also ordered by consent that the following facts are not in dispute:-

1. That the first 40 Plaintiffs were at all material times the employees of the 1st Defendant.

2. That their services were terminated on the ground of redundancy.

3. That the first 40 Plaintiffs were entitled to certain terminal benefits, the only issues in regard thereto being the types of benefits and the quantums thereof.

4. That union dues were collected from the first 40 Plaintiffs by the 1st Defendant and forwarded to the 41st Plaintiff, the only issue in regard thereto being whether they were so collected and forwarded upon misrepresentation by the 41st Plaintiff.

5. That there was no recognition agreement signed between the 1st Defendant and the 41st Plaintiff.

Learned counsels for the Plaintiffs and the 1st Defendant framed the issues for determination in this suit as follows:-

1. Whether the first 40 Plaintiffs were declared redundant in accordance with the law?

2. What were the terminal benefits due to them, and the quantum thereof?

3. Whether the first 40 Plaintiffs were members of the 41st Plaintiff or of the 2nd Defendant?

4. Whether the 41st Plaintiff should have been notified of the redundancy?

5. Whether there was any misrepresentation made by the 41st Plaintiff to the 1st Defendant with regard to collection of union dues from the first 40 Plaintiffs?

6. Whether the first 40 Plaintiffs are entitled to the special damages claimed or at all?

7. Whether the first 40 Plaintiffs are entitled to general damages?

8. Who should bear the costs of the suit?

The 1st Plaintiff, JOHN MWANGI KIRIMA (PW1) and one PATRICK MUKONGOLO MAKALE (PW2) testified for the Plaintiffs. PW2 was an industrial relations officer working with the 41st Plaintiff. One JAGDISH AMBALAL PATEL (DW1) testified for the 1st Defendant. I have considered the testimonies of these three witnesses as well as the many documents produced in evidence. I have also considered the written submissions filed for the parties, and the authorities cited. I will consider the issues as framed in turn.

Issue No. 1: <u>Whether the first 40 Plaintiffs were declared redundant by the 1st Defendant in accordance with the law?</u>

The issue here is whether the redundancies satisfied the requirements of the law. The law concerned here was the relevant provision of the Employment Act, Cap. 226, since repealed. Section 16A thereof provided for redundancy as follows:-

"16A. (1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:-

(a) the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;

(b) the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(c) no employee shall be placed at a disadvantage for being or not being a member of the trade union;

(d) any leave due to any employee who is declared redundant shall be paid off in cash;

(e) an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;

(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service....

(2) For purposes of this section:-

"trade union" means a trade union registered under the Trade Union Act (Cap. 233); and "redundancy" has the meaning assigned to it in section 2 of the Trade Disputes Act (Cap. 234)."

Redundancy is defined as follows in section 2 of Cap. 234 aforesaid:-

"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant".

The 1st Defendant declared all its employees (including the first 40 Plaintiffs) redundant because its was selling off its hotel business, and apparently getting out of hotel business, and the new owners were not willing to assume liability for the employees' benefits. The services of the first 40 Plaintiffs were thus going to become superfluous to the 1st Defendant as it could no longer use those services. I am therefore satisfied that the redundancies declared by the 1st Defendant met the legal definition of "redundancy" set out above.

Let us now see if the redundancies met the requirements of section 16A of Cap. 226 aforesaid.

The notification of redundancy required was to the trade union representing the first 40 Plaintiffs and to the Labour Officer in charge of the area where they were employed, which was Nairobi. Which trade union was representing them?

The first 40 Plaintiffs had, by their own choice, ceased to be members of the 2nd Defendant and joined the 41st Plaintiff. They duly authorised the 1st Defendant to deduct their monthly union dues and remit them to the 41st Plaintiff. The 1st Defendant agreed and effectuated the authorization. This was before the redundancies were declared. The 2nd Defendant was therefore not the trade union representing the first 40 Plaintiffs when the 1st Defendant declared them redundant.

It is common ground that the 1st Defendant gave notice of the redundancies to the 2nd Defendant and not to the 41st Plaintiff. The defence raised by the 1st Defendant on this issue of notice is that there was no recognition agreement or collective bargaining agreement between the 41st Plaintiff and the 1st Defendant. This is not disputed by the Plaintiffs.

That being so, what are the legal ramifications, if any, of there being no recognition agreement or collective bargaining agreement between the two? It was submitted for the Plaintiffs, in effect, that there were no adverse legal ramifications because the 1st Defendant impliedly recognised the 41st Plaintiff by effectuating the first 40 Plaintiffs' authorization to remit their monthly union dues to the 41st Plaintiff. For the 1st Defendant it was submitted that without a recognition agreement and a collective bargaining agreement between the 41st Plaintiff and the 1st Defendant in place, the 41st Plaintiff cannot in law have represented the first 40 Plaintiffs. It was further submitted that a recognition agreement cannot be implied from the conduct of the parties.

I have considered these rival stands of the parties on this issue. "Recognition agreement" is defined in section 2 of the Trade Disputes Act, Cap. 234 as

"...an agreement in writing made between a trade union and an employer or organisation of employers which provides (subject to such terms and conditions as may be contained therein) for the recognition of the trade union as the body entitled to represent the interest of those of its members who are specified in the agreement and who are or have been employed by the employer or any of the employers comprising that organisation".

A recognition agreement, as seen above, had to be in writing. There was no such agreement, duly signed by the 41st Plaintiff and the 1st Defendant, produced in evidence. The legal requirement for the recognition agreement to be in writing means, that it cannot be implied from the conduct of the parties, or

other circumstances. Further, a recognition agreement, in law, provides for the recognition of the trade union by the employer as the body entitled to represent the interests of those of its members who are specified in the agreement and who are or have been employed by the employer.

Without a written recognition agreement duly signed by the 41st Plaintiff and the 1st Defendant, the 41st Plaintiff was not, in law, the trade union representing the first 40 Plaintiffs for purposes of section 16A of Cap. 226 at the time the redundancies were declared. The 1st Defendant could thus not, as a matter of law, have notified the 41st Plaintiff of the redundancies required under that section. I so hold. In effect therefore, the first 40 Plaintiffs were not represented by a trade union at the time of the redundancies.

Regarding lack of a collective bargaining agreement between the 41st Plaintiff and the 1st Defendant, I have seen the definition of "collective agreement" in section 2 of Cap 234. Want of the same does not have any legal ramifications as far as the requirements of section 16A of Cap 226 are concerned.

The 1st Defendant notified the 2nd Defendant of the redundancies. The 2nd Defendant was also in law not the trade union representing the first 40 Plaintiffs as they had withdrawn their membership from it. The 1st Defendant so notified the 2nd Defendant because it considered that the collective bargaining agreement between it and the 2nd Defendant would provide better terminal benefits for the first 40 Plaintiffs and its other employees than the relevant Regulation of Wages order made under the Regulation of Wages and Conditions of Employment Act, Cap. 229. As it happened, the first 40 Plaintiffs refused the 1st Defendant's offer to pay them thus.

Regarding notification to the Labour Officer of the area where the employees were employed, I am satisfied from the totality of the available evidence, that the Provincial Labour Officer, Nairobi was duly notified of the redundancies by the 1st Defendant.

The second legal condition for declaring redundancy is that the employer shall have due regard to the seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. This condition cannot apply to the circumstances of this case because the 1st Defendant declared all its employees redundant.

The third condition is that no employee shall be placed at a disadvantage for being or not being a member of the trade union representing the employees. As already seen, there was no trade union representing the first 40 Plaintiffs for purposes of section 16A of Cap. 226 at the time the 1st Defendant declared the redundancies. This condition therefore does not apply.

The fourth condition is that any leave due to any employee who is declared redundant shall be paid off in cash. The notices of termination of employment by redundancy dated 16th October, 2004 served upon the employees by the 1st Defendant show clearly that all leave due to each employee was included in the offer of terminal benefits. There is no evidence before the court that any of the first 40 Plaintiffs demanded their leave dues in cash and were not paid. The evidence before the court is that they all refused the terminal benefits offered and came to court.

The fifth condition under section 16A of Cap. 226, is that an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice. The letters of termination by redundancy dated 16th October, 2004 clearly did not give the first 40 Plaintiffs one month's notice. But the letters offered them more than one months' salary in lieu of notice. I am satisfied on the evidence that this condition was met.

The sixth and last condition under section 16A aforesaid is that an employee declared redundant shall be entitled to severance pay at not less than 15 days pay for each completed year of service. By the letters of termination on account of redundancy dated 16th October 2004, the 1st Defendant offered severance pay at the rate of 15 days wages for each completed year of service. I am therefore satisfied that this condition was met.

I am thus satisfied that all relevant conditions in section 16A of Cap. 226 were met by the 1st Defendant. The first 40 Plaintiffs were therefore declared redundant in accordance with the law. I so hold.

Issue No. 2: <u>What were the terminal benefits due to the first 40 Plaintiffs and what are the quantums thereof?</u>

That the first 40 Plaintiffs were entitled to certain terminal benefits is one of the facts that are not in dispute. The only issues in regard thereto are the types of benefits and the quantums thereof. The first 40 Plaintiffs rejected the terminal benefits that were offered in the letters of termination. Those benefits were as set out in the collective bargaining agreement between the 1st and 2nd Defendants. The benefits were apparently more generous than the statutory benefits under section 16A of Cap. 226 and under the relevant wages order under the Regulation of Wages and Conditions of Employment Act.

The first 40 Plaintiffs rejected the 1st Defendant's offer, first, because they considered the redundancies unlawful and also, apparently, because the 2nd Defendant was not their union anyway. They are thus entitled only to such benefits as are set out in section 16A of Cap. 226 and in the relevant Regulation of Wages (Hotels and Catering Trades) Order. These benefits are:-

(i) Accrued salaries

(ii) House allowances

(iii) Service charge

(iv) Salary in lieu of notice

(v) Severance pay

(vi) Accrued annual leave

(vii) Leave travelling allowance

(viii) Public holidays worked.

It is common ground that the first 40 Plaintiffs were paid their (i) accrued salaries, (ii) house allowance and (iii) service charge by order of the court herein made on 8th November, 2004. The outstanding benefits are thus:-

(i) Salary in lieu of notice;

(ii) Severance annual leave

(iii) Accrued annual leave

(iv) Leave travelling allowance; and

(v) Public holidays worked.

I hereby direct that the Deputy Registrar of the court do calculate these benefits for each of the first 40 Plaintiffs as provided for under section 16A of Cap. 226, and also under the relevant Regulation of Wages (Hotels and Catering Trades) Order. There shall be judgment for these Plaintiffs for those sums as will be calculated by the Deputy Registrar. I decline to award interest on these sums as the 1st Defendant never refused to pay them. On the contrary, it had offered more generous benefits.

Issue No. 3: <u>Whether the first 40 Plaintiffs were members of the 41st Plaintiff or of the 2nd Defendant?</u>

This issue has already been amply answered while considering Issue No. 1.

Issue No. 4: Whether the 41st Plaintiff should have been notified of the redundancies?

This issue as well has been answered under Issue No. 1.

Issue No. 5: Whether there was any misrepresentation made by the 1st Defendant with regard to collection of union dues from the first 40 Plaintiffs?

I do not quite see the relevance of this issue as no claim has been made in respect to the union dues deducted from the salaries of the first 40 Plaintiffs and paid over to the 41st Plaintiff. The issue has in any event been answered under Issue No. 1. The first 40 Plaintiffs quit the 2nd Defendant and joined the 41st Plaintiff. They then authorized deduction of union dues and the forwarding of the same to the 41st Plaintiff. The fact that the 41st Plaintiff has been found not to have been the trade union representing them for the legal purposes of section 16A of the Employment Act, Cap. 226 does not detract from the fact that the 41st Plaintiff was their union, and not the 2nd Defendant. There was thus no misrepresentation.

Issue No. 6: Whether the first 40 Plaintiffs are entitled to the special damages claimed or at all?

This issue has been answered in issue No. 2.

Issue No. 7: Whether the first 40 Plaintiffs are entitled to general damages?

As the redundancies have been found to have been lawful, no general damages are available to the first 40 Plaintiffs.

Issue No. 8: Who should bear the costs of the suit?

Costs are at the discretion of the court, though they will normally follow the event. I have power to otherwise order for good reason. I consider that there is good reason here. The Plaintiffs, though they will have judgment for their statutory terminal benefits, have failed on the issue whether their redundancies were lawful. It will also be remembered that the 1st Defendant had not refused to pay their terminal benefits. In these circumstances I order that the parties do pay their own costs of the suit.

In summary, there will be judgment for each of the first 40 Plaintiffs for their statutory terminal benefits as will be calculated by the Deputy Registrar of the court. The claim for general damages is dismissed. The suit against the 2nd Defendant having been withdrawn, I cannot understand why the 41st Plaintiff chose to remain in the suit. Its suit against the 1st Defendant (whatever it was) is hereby dismissed. Parties shall bear their own costs of the suit. Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT

THIS 17TH DAY OF JULY, 2009

H. P. G. WAWERU

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