



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 178 OF 2015

BETWEEN

1. COSMAS BARASA JACOB
2. BENSON MUNEENI MWENDWA
3. NICODEMUS MUTUA KIRUNYA
4. JOSHUA ODHIAMBO ONGINJO CLAIMANTS

VERSUS

LEISURE LODGES LIMITED RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oyugi Kitoo & Company Advocates for the Claimants

Wanja & Kibe Advocates for the Respondent

JUDGMENT

1. The Claimants filed their Statement of Claim on 27th March 2015. They state they were employed by the Respondent Hotel in various capacities and on diverse dates. The 1st Claimant's contract was terminated by the Respondent on 30th September 2013; 2nd and 3rd Claimants' on 1st October 2013; while the 4th Claimant resigned on 30th October 2014.

2. The 1st Claimant was a Cook; 2nd and 3rd Claimants, Kitchen Stewards; and 4th Claimant a Painter. 1st, 2nd and 3rd Claimants state they were not issued notice of termination. They aver termination was unfair and unlawful. All Claimants aver their terminal benefits were miscalculated. Alternatively they ask the Court to find that the Respondent, did not disclose how terminal dues were tabulated. They pray for Judgment against the Respondent in the following terms:-

a. **1st Claimant:** 3 months' salary in lieu of notice at Kshs. 61,074; severance pay at 16 days' salary for every year completed in service at Kshs. 101,790; gratuity at Kshs. 61,074; shoe allowance at Kshs. 12,000; 2 years' travelling leave allowance at Kshs. 8,600; 9 years' leave allowance; and 12 months' gross salary in compensation for unfair termination at Kshs. 244,296- total Kshs. 647,626.

b. **2nd Claimant:** 4 months' salary in lieu of notice at Kshs. 72,760; severance pay at Kshs. 144,834; service gratuity at Kshs. 127,330; shoe allowance at Kshs. 12,000; 9 years' leave allowance at Kshs.141,804; 2 years' leave traveling allowance at Kshs. 8,600; and 12 months' salary in compensation for unfair termination at Kshs. 218,280 – total Kshs. 725,608.

c. **3rd Claimant:** 4 months' salary in lieu of notice at Kshs. 84,080; severance pay at Kshs. 123,305; service gratuity at Kshs. 115,610; show allowance at Kshs.12,000; 8 years' leave allowance; 2 years' leave traveling allowance at Kshs. 8,600; and 12

months' gross salary in compensation for unfair termination at Kshs. 544,166- total Kshs. 796,406.

d. **4th Claimant:** 30 months' housing allowance at Kshs. 179,940; 30 months' service charge at Kshs. 289,500; service gratuity at Kshs. 64,966; shoe allowance at Kshs. 12,000; 2 years' leave allowance at Kshs. 24,923; and 2 years' leave traveling allowance at Kshs. 8,600 – total Kshs. 579,929.

3. The Claimants pray also for orders that the Respondent is ordered: to pay to them all statutory dues; issues certificates of service; pays damages for wrongful and unfair termination; and shoulders the costs of the Claim.

4. The Respondent filed its Statement of Response on 26th May 2015. Its position is that it employed the Claimants on seasonal contracts of 3 months at a time. These contracts expired and/or were not renewed, on various dates. Before they exited, each Claimant was paid properly tabulated terminal dues. Their cheques were written and were always ready for collection, but for reasons unknown to the Respondent, the Claimants did not collect their cheques. The Respondent based its calculation of terminal dues on the existing Collective Bargaining Agreement which regulated relationship between the Parties. The Respondent states the said CBA, concluded between Claimants' Union KUDHEIHA and the Respondent, has a dispute resolution clause which the Claimants have not exhausted. The Claim is premature. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

5. The 1st Claimant gave evidence on 14th February 2017 and 26th September 2017. There is on record Authority issued by Co-Claimants to the 1st Claimant to prosecute the Claim on their behalf. The 4th Claimant gave evidence on 26th September 2017, bringing Claimant's case to a close. Respondent's Assistant Human Resources Manager Monica Wambui Kamau gave evidence for the Respondent on 16th February 2018, bringing the hearing to an end. The Parties confirmed filing of their Closing Submissions on 2nd March 2018.

Claimants' Case

6. The 1st Claimant testified his Colleagues worked with him for the Respondent Hotel. He was employed initially as a Cleaner, in July 2004. He became an Assistant Cook in 2008. He confirmed the dates of employment, and designations given by the Co-Claimants in their Pleadings.

7. The Respondent operated a clocking system. Employees were issued clocking cards. The system became computerized when written contracts were introduced. The 1st Claimant was first issued with a contract of 6 months, in 2008. Once particular term-contract lapsed, Employees would go on working.

8. There was a CBA concluded between the Claimants' Union KUDHEIHA and the Respondent. Trade Union Dues were deducted from the Claimants' monthly salaries and remitted to the Trade Union. The Parties were bound by the existing CBA.

9. The Claimants were informed by the Respondent, in the year 2013, that there was no more work for them. They consulted their Union. They were advised termination was not carried out in accordance with the CBA. The Respondent consulted Claimants' Union. The Respondent and the Union tabulated Claimants' terminal dues. The Claimants did not agree to what was tabulated. They were willing to have further consultation. The Union Officer who participated in tabulation of dues was sacked by the Union. The Union pursued the matter further. There was fresh computation. The Claimants did not agree with the new figures. The Claimants abandoned their Union and sought assistance from KITUO CHA SHERIA [Legal Aid Centre], who redid computation of dues, resulting in the figures presented before the Court in this Claim. The prayers are based on the governing CBA at the time of termination. The 1st Claimant adopted his Witness Statement and Documents filed in Court as his evidence.

10. Cross-examined, the 1st Claimant testified termination took effect on 1st October 2013. There were no letters of termination. They appealed against the decision through their Shop Steward Francis Omondi. A copy of the Appeal was not availed to the Court. The Respondent and Claimant's Union, determined what the Claimants would be paid. The Claimants did not collect their cheques. There were 3 different agreements, giving different figures. The Hotel would shut down routinely for about 2 years. Redirected, the 1st Claimant testified there were no termination letters availed to the Claimants by the Respondent. They were told by Human Resources Office there was no more work. Negotiations with the Union took place after termination. The Claimants were not involved in the original meetings. The Respondent and the Union, were not honest in dealing with the Claimants. The Claimants remained Employees of the Hotel, even when the Hotel was closed.

11. The 4th Claimant testified he resigned through a notice issued upon the Respondent. He was not able to recall how long the notice period was. Terminal dues tabulated by the Respondent and Claimants' Union, comprised monthly salaries only. The 4th Claimant wrote to the Respondent and the Union, tabulating what he felt was the correct terminal dues owing to him. He was an Official of the Union. He bases his Claim on the CBA. His contract was not unfairly terminated. He only seeks his rightful terminal dues.

12. The 4th Claimant confirmed on cross-examination that his contract was not unfairly terminated; he only seeks terminal dues based on the existing CBA. He was offered Kshs. 147,000 by the Respondent. He accepted this, but was later told by the Union that the offer was rescinded. He claims for house allowance based on the time he worked as a Casual Employee. He served on casual and seasonal contracts. He claims service charge based on the CBA. He did not provide the mode adopted in computation of service charge. He prays for gratuity under the CBA. He did not make a formal demand on being offered the sum of Kshs. 147,000, because KUDHEIHA engaged the Respondent on behalf of the Claimants. The salaries and allowances remained the same, regardless whether an Employee was under casual or seasonal contract. Service charge is claimed based on the average paid annually.

Respondent's Case

13. Monica Wambui Kamau, Assistant Human Resources Manager adopted her Witness Statement on record as her evidence. She confirmed the Claimants were employed by the Respondent. Their contracts were not terminated by the Respondent. The 4th Claimant resigned, while the rest left because business had gone down.

14. There is a Works Committee at the workplace, which deals with grievances. It is composed of a Chairman, Secretary, Shop Steward and Departmental Representatives. It deals with disputes within 7 days of their being reported. If unresolved, the dispute goes before the Branch, and lastly, to the Coast Dispute Committee.

15. In the present dispute, various levels of dispute resolution were engaged. The Works Committee and the Branch were involved. The main dispute revolved around the number of years served. Some aspects of the dispute were resolved at Branch level. 28 Employees were paid their dues pursuant to the engagement of these dispute resolution mechanisms. Only 4 Employees, the Claimants herein, escalated the dispute to Court. The Branch was supposed to resort to the Coast Dispute Committee. Instead, the Claimants approached KITUO CHA SHERIA, which brought the outstanding dispute to Court. The offers made by the Respondent to the Claimants, and the cheques drawn in settlement are exhibited by the Respondent. The Respondent proposes to pay what was agreed.

16. Cross-examined, Monica told the Court she was still in employment as of October 2013 when the Claimants left employment. The dispute resolution procedure outlined in Monica's evidence above is contained in the CBA. She did not have details of the procedure in Court. Employees did not sign the agreement reached between the Respondent and their Union. The Witness did not have minutes of the meetings which resulted in the agreement. She did not have letters inviting Employees to collect their cheques. There were no conditions imposed on the Employees before they could pick their cheques. The Respondent received demand letters from Claimants' Advocates before institution of the Claim.

The Court Finds:-

17. The Claimants were employed by the Respondent Hotel on various dates, between 1999 and 2013. The 1st Claimant was a Cook; 2nd and 3rd Claimants were Kitchen Stewards; while the 4th Claimant was a Painter. The 1st Claimant left employment on 30th September 2013, while the 2nd and 3rd Claimants left on 1st October 2013. Although the 4th Claimant pleads that he resigned on 30th October 2014, his evidence, and documents on record show he resigned effective 30th October 2013. His letter of resignation is clear on this. The first 3 Claimants state their contracts were terminated on the ground that there was no more work for them. The evidence by Respondent's sole Witness Monica, is that the first 3 Claimants left employment because the business had gone done.

18. Evidence from both Parties as outlined above is sufficient to enable the Court find, the first 3 Claimants left employment on account of redundancy, which is a no-fault form of termination, as defined in a myriad of Judgments of this Court, and in Section 2 of the Employment Act 2007. The 4th Claimant terminated his contract of employment through resignation, by issuing the Respondent a 7 day notice of resignation.

19. It is common ground that the Parties were governed by a CBA concluded by the Respondent's Industrial Association, and Claimants' Trade Union KUDHEIHA. In redressing the grievance raised by the first 3 Claimants, Parties were bound to rely on the redundancy clause in that CBA, and on Section 40 of the Employment Act 2007. With respect to the 4th Claimant, the guiding principles in dealing with his grievance would be the clause dealing with resignation/termination by notice.

20. There is evidence termination on account of redundancy, affected a larger group of 28 Employees of the Respondent Hotel. The Respondent and the Claimants' Union held negotiations within the regulating Industrial Relations Mechanisms, and settled the grievances of all the Employees, except for the 4 Claimants. The Claimants do not deny that they were part of a larger group of discontented Employees, and that their grievances were taken through the mechanisms of Works Committee and the Branch Office of KUDHEIHA.

21. These mechanisms are contained in the Recognition Agreement concluded between the Respondent and Claimants' Trade Union, and not in the CBA as stated by Respondent's Witness. Clause 12 [a] of the Recognition Agreement, which Recognition Agreement has since been declared invalid by the Court sitting in Nairobi, created a local grievance procedure. The Parties submitted themselves to this procedure. In event there was no settlement at Branch Level, the dispute would be referred to Coast Disputes Committee.

22. The Claimants were Members of KUDHEIHA and bound by the Industrial Relations Mechanism, created by their Employer and their Union. They expressed their will to be subject to this structure, by continuing to subscribe to the Union through monthly subscription. They acknowledge the validity of the CBA which is a product of the Recognition Agreement. They pursue their claims on the strength of the CBA concluded pursuant to the Recognition Agreement. Should they avoid the dispute resolution mechanisms contained in these labour contracts and seek direct adjudication of the Court?

23. Majority of the aggrieved Employees accepted the process and outcome of dispute resolution carried out by the Respondent and Claimants' Union. The Claimants were dissatisfied. They should have sought to have audience before the Coast Disputes Committee before approaching KITUO CHA SHERIA and filing the dispute in Court. There would be recourse to the Labour Office if the mechanisms at the workplace did not answer all Claimants' grievances satisfactorily. The Court does not understand why these mechanisms would serve 24 out of 28 Employees well, and find disfavor in the eyes of the 4 Claimants.

24. The Court agrees entirely with the evidence of the Respondent, that the Claim was filed prematurely. The Claimants did not have justification in disregarding the position taken by their Trade Union. They did not have reason to isolate themselves from the rest of the Employees, and come to Court before exhausting the local grievance procedure available at the workplace. Where Employees are Members of a Union, they must abide by the position taken by their Union, unless it can be shown that position, is a result of improper conduct or motive, on the part of their Union. The Union is recognized by the Employer as the sole collective bargaining and negotiating agent. Employees must have enough faith in their agent. If the agent acts in breach of agency, the Employees are not barred from pursuit of damages against their agent. The Claimants herein state simply, that they believe their Union was dishonest, without establishing the basis of

their belief. Once the Union reached settlement with the Employer, the presumption would be that the agreement became binding on the Employees on whose behalf the Union was acting. There was no requirement for individual Employees, to append their signatures to any agreement concluded between the Respondent and their Union. Article 159 of the Constitution of Kenya binds this Court to observe the principle that alternative forms of dispute resolution mechanisms shall be promoted. This is a judicial philosophy which has underpinned the work of Labour Courts, from time immemorial.

25. Against this background the Court gives the following orders:-

- a. *The dispute by the 4 Claimants is referred to the Coast Disputes Committee.*
- b. *The Coast Disputes Committee shall examine and determine whether the first 3 Claimants were offered terminal benefits commensurate with the redundancy clause in the CBA; and whether the 4th Claimant was offered terminal benefits in accordance with resignation/termination-by notice clause, in the CBA.*
- c. *The dispute may be escalated to the Labour Office if there is no settlement upon the engagement of Coast Disputes Committee.*
- d. *The Claimants have the liberty to revert to Court upon exhaustion of these voluntary and statutory dispute resolution mechanisms.*
- e. *They are also at liberty to accept, at any time, the outcome of the earlier processes, which would mark the dispute as finalized.*
- f. *No order on the costs.*

Dated and delivered at Mombasa this 6th day of July 2018.

James Rika

Judge