



**Mwakalato & 5 others v Lesure Lodge Limited (Cause 272 of 2018)
[2024] KEELRC 13647 (KLR) (6 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13647 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 272 OF 2018**

**AK NZEI, J
MAY 6, 2024**

BETWEEN

**SAID HAMISI MWAKALATO 1ST CLAIMANT
BENJAMIN SOO TUTHUI 2ND CLAIMANT
JUMA HUSSEIN GAO 3RD CLAIMANT
ALI MOHAMMED DZOSI 4TH CLAIMANT
NASSORO JUMA KIBARUA 5TH CLAIMANT
KAZUNGU MONGO MADZAYO 6TH CLAIMANT**

AND

LESURE LODGE LIMITED RESPONDENT

JUDGMENT

1. The six Claimants herein sued the Respondent vide a memorandum of claim dated 23/4/2018 and filed in this Court on 25/4/2018, and pleaded that they, being employees of the Respondent, were unlawfully terminated by the Respondent on 16/10/2017. They further pleaded as follows:-
 - a. 1st Claimant -said Hamisi Mwakalato
 - i. That he was employed by the Respondent as an electrician in the year 2011, earning a gross pay of kshs. 33,123 per month until, his services were terminated on 16/10/2017.
 - ii. That during the period of employment, the 1st Claimant worked from 8pm to 7.30am from Monday to Sunday, with an alternate one(1) off day per week.
 - b. 2nd Claimant – Benjamin Soo Muthui



- i. The 2nd Claimant pleaded that he was employed by the Respondent as a steward supervisor from the year 2005, earning a monthly gross salary of kshs. 29,100, until his services were terminated on 16/10/2016.
 - ii. That he worked from 3pm to 2am from Monday to Sunday, with an alternate one (1) off day per week.
 - c. 3rd Claimant: Juma Hussein Gao
 - i. The 3rd Claimant pleaded that he was employed by the Respondent as a Pool Attendant in the year 2008, earning a monthly gross salary of kshs. 27,500, until his services were terminated on 16/10/2017.
 - d. 4th Claimant: Ali Mohammed Dzosi
 - i. That he was employed by the Respondent as a Kitchen Steward from the year 2011, earning a monthly salary gross pay of ksh, 34,240, until his services were terminated on 16/10/2017.
 - e. 5TH Claimant: Nasoro Juma Kibarua
 - ii. That he was employed by the Respondent from the year 2012, earning a gross monthly pay of kshs. 22,275, until his termination on 16/10/2017.
 - iii. That he worked from 3pm to 2p from Monday to Sunday with an alternate one(1) off day per week.
 - f. 6th Claimant: Kazungu Ongo Madzayo
 - i. That he was employed by the Respondent as a Waiter from the year 2006, earning a monthly gross pay of kshs. 26,862, until his services were terminated on 16/10/2017.
 - ii. That he worked from 10pm to 8am from Monday to Sunday, with an alternate one (1) off day per week.
2. It was the Claimants' pleading that their services were terminated verbally, without being given notice or reasons for the termination; that they were not accorded any hearing before termination and that the termination was unfair.
3. The Claimants further pleaded that they reported the matter of their termination to KUDHEIHA (their Trade Union), and that the Respondent attended a conciliation and agreed to compensate the Claimant for the unlawful termination.
4. The Claimants set out their respective claims against the Respondent as follows:-
 - a. 1st Claimant: Said Hamisi Mwakalato
 - i. Service pay from 2011-2017x15 days for each years workedksh. 99,369
 - ii. Overtime worked at 12 hours every 6 days per week (15,264x6 years)ksh. 91,584
 - iii. 12 months compensation for unfair termination.....ksh. 397,476



- iv. Unpaid leave for 2 months for 6 years (66,246x6 years).....ksh.397,476
 - v. One month salary in lieu of noticekshs. 33,123
 - vi. Certificate of service.
- b. 2nd Claimant: Benjamin Soo Muthui
- i. Service pay from 2005-2017x15 days for each year workedksh. 174,600
 - ii. Overtime worked at 12 hours for 12 years (13,392x12 years)ksh. 160,704
 - iii. 12 months compensation for unfair and unlawful terminationksh. 349,200
 - iv. Unpaid leave for 2 months for 12 years (58,200x12 years).....ksh. 698,400
 - v. One month salary in lieu of notice....ksh. 29,100
 - vi. Certificate of service.
- c. 3rd Claimant: Juma Hussein Gao
- i. Service pay from 2008-2017x15 days for each year workedksh. 124,110
 - ii. Overtime worked at 13 hours for 9 years....ksh. 154,408
 - iii. 12 months compensation for unfair and unlawful termination.....ksh. 330,000
 - iv. Unpaid leave for 2 months for 9 years....ksh. 698,400
 - v. One month salary in lieu of noticeksh. 27,500
 - vi. Certificate of service.
- d. 4th Claimant: Ali Mohamed Dzosi
- i. Service pay from 2006-2017X15 days for each year worked.....ksh. 102,720
 - ii. Overtime worked for 14 hours every 6 days per week for6 years.....ksh. 162,432
 - iii. Compensation for unfair and unlawful termination.....ksh. 410,880
 - iv. Unpaid leave for 2 months for 9 years (68,480x6)....ksh.410,880
 - v. One month salary in lieu of notice.....ksh. 34,240
 - vi. Certificate of service
- e. 5th Claimant: Nassoro Juma Kibarua
- i. Service pay from 2012-2017x15 days for each year workedksh. 55,682.



- ii. Overtime worked at 12 hours every 6 days per week for 5 yearsksh. 51,120
 - iii. 12 months compensation for unfair and unlawful termination.....ksh. 267,300
 - iv. Unpaid leave for 2 months for 5 years (44,550x5 years).....ksh. 222,750
 - v. One month salary in lieu of notice.....ksh. 22,275
 - vi. Certificate of service
- f. 6th Claimant: Kazungu Ongo Madzayo
- i. Service pay from 2006-2017x15 days for each year workedksh. 147,741
 - ii. Overtime worked for 11 years (6,768x11 years)....kshs. 74,448.
 - iii. 12 months'(salary) compensation for unfair and unlawful terminationkshs. 322,344.
 - iv. Unpaid leave for 2 months for 11 years (53,724x11 years).....kshs. 590,964.
 - v. One month salary in lieu of noticeksh. 26,862
 - vi. Certificate of service.
5. Documents filed by the Claimants alongside the memorandum of claim included each of the Claimant's written witness statements which replicated their respective claims, and each of the Claimant's list of documents. Documents listed by the Claimants included their individual employment contracts, payslips, NSSF statements, demand letters, minutes dated 3/10/2017, identity cards and the Respondent's letter to KUDHEIHA (Kwale Branch) dated 12/2/2018. The Claimants subsequently filed further documents and witness statements with the Court's leave.
6. The Respondent entered appearance on 10/5/2018 and filed response to the claim on 4/6/2018, denying the Claimants' claim. The Respondent pleaded:-
- a. that the Claimants did not have a common cause of action as they were employed on different dates and on different terms, either as casuals or on separate short term contracts which were distinct and for specific work.
 - b. that each of the Claimants was employed from time to time on casual basis depending on availability of work and for some short periods of time. The respondent denied having unlawfully terminated the Claimants' employment.
 - c. that due to the intermittent nature of the Claimants' engagement with the Respondent, they were not entitled to be given warning or termination letters.
 - d. that the Claimants were always paid their full dues whenever their seasonal contracts ended, except for the last casual engagement in October 2017 which the Respondent was always willing to pay, but which the Claimants refused to collect, and which has been calculated in terms of the CBA.



- e. that the claims for unfair termination and for pay in lieu of notice are not payable as the Claimants were engaged for short periods. That the Claimants did not have pending leave days.
 - f. that the Respondent had a Collective Bargaining Agreement (CBA) with Kenya Union of Domestic Institutions, Hospitals and Allied Workers Union (KUDHEIHA), of which the Claimants are members, which lays down a detailed and exhaustive dispute resolution mechanism which the parties ought to follow in the event of a dispute, and that the CBA is binding. That it was unfair for the Claimants to bypass the CBA and to file the present claim.
 - g. that the Claimants' claim is premature and incompetent and ought to be struck off.
7. Documents filed by the Respondent alongside its response to the claim included an affidavit by one Monica Wambui Kamau sworn on 30/5/2019 in verification of the Respondent's response, a witness statement by the said person dated 16/11/2018, a witness statement by one Jackson Nzioki Mutiso dated 16/11/2021 and lists of documents regarding the Claimants, dated 8/6/2022. The said documents included tabulations of each of the Claimant's terminal dues, calculated in accordance with a CBA signed between the Respondent and KUDHEIHA, to which the Claimants were members.
8. Trial opened before me on 8/12/2021. The 2nd Claimant testified as the Claimants' 1st witness (CW-1). He adopted his filed witness statement dated 25/4/2018 as his testimony and produced in evidence the documents listed on the list of documents 23/4/2018. The 2nd Claimant (CW-1) further testified:-
- a. that he was employed by the Respondent as a Kitchen Supervisor in 2005 and that at the time of his termination on 16/10/2017, he was earning a monthly salary of kshs. 29,100
 - b. that on 16/10/2017, he and the other Claimants reported on duty as usual and that at around 10.00am on the said date, each of them was called by the HR (Human Resources Officer) and were told to go home as their employment had been terminated. That the termination was done orally.
 - c. that the Claimants reported the matter to their Union (KUDHEIHA), and a meeting was called for 31/10/2018, which both the Claimants and a representative of the Respondent attended. (Minutes of the meeting were produced in evidence by the 2nd Claimant, as exhibit no. 7).
 - d. that vide an email dated 5/12/2017, the respondent requested for time to look into their records and to do their calculations, but never got back to the Claimants with any calculations. That by a letter dated 12/2/2018, the Respondent cancelled a subsequent meeting scheduled for 15/2/2018 and stated that the Claimants should go to Court, hence the claim herein. (The said letter was produced in evidence).
9. Cross-examined, the 2nd Claimant (CW-1) testified further that he worked for the respondent on contracts of six months, one year or even more, with the terms of each contract being stated therein, and that he and the others worked continuously. That sometimes, the contracts were given and at other times, the contracts were not given, but that the Claimants continued working. That he was terminated on 16/10/2017, and by then a contract had long lapsed.
10. The 1st Claimant testified as the Claimants' 2nd witness (CW-2). He testified that he was employed by the Respondent in 2011 and was terminated on 16/10/2017, earning a monthly salary of kshs. 33,123. He produced in evidence the documents listed on his list of documents dated 2/6/2022, filed pursuant to the Court's orders in that regard.
11. Cross-examined and re-examined, the 1st Claimant testified:-



- a. that he worked continuously, and was being given written contracts while at times he was not. That when given, the contracts had commencement dates and termination dates. That he worked continuously without leave, and that the only days that he did not work were when on off. That in 2015, he was given a one month contract but continued working.
 - b. that there was a CBA between the Respondent and KUDHEIHA, and that after termination, the Claimants reported the matter to the said Union and the respondent did tabulations which were not proper, and that there was no agreement reached even after a meeting held on 31/10/2017.
12. The 3rd Claimant (CW-3) testified that he was employed by the respondent in 2008, earning kshs.27,580 per month, and that his employment was terminated on 16/10/2017. He adopted his witness statement dated 31/5/2022 as his testimony and produced in evidence the documents listed on his list of documents dated 2/6/2022, save for the document listed thereon as item no. 1. He denied having received the sum of kshs. 135,975 tabulated by the Respondent as his dues.
 13. Cross-examined, the 3rd Claimant testified that at times, the Claimants were given contracts which stated both commencement and termination dates, and that at other times they were not given, and that when they asked, they were told that the most important thing was that they were receiving their salaries. That they worked continuously, with or without contracts. That he was a regular employee as opposed to a seasonal employee.
 14. The 4th Claimant (CW-4) testified that he was employed by the Respondent in 2011, earning ksh. 34,240 per month, and that his employment was terminated on 16/10/2017. He adopted his witness statement dated 31/5/2022 as his testimony and produced in evidence the documents listed on his list of documents dated 2/6/2022.
 15. The 5th Claimant (CW-5) testified that he was employed in 2012, earning kshs. 22,275 per month, and was a permanent employee. He adopted his witness statement dated 31/5/2022 as his testimony and produced in evidence the documents listed on his list of documents dated 2/6/2022. The 5th Claimant further testified that he was a permanent employee, and that a letter signed on 1/2/2017 spelt the date of commencement and the date of termination (28/2/2017), and that he was not given any other contract, that he was terminated on 16/10/2017. That his NSSF statement confirms contribution, and that he was working continually.
 16. The 6th Claimant (CW-6) testified that he was employed in 2006, earning ksh.24,862 per month, and that he was terminated on 16/10/2017. He adopted his witness statement dated 31/5/2022 as his testimony and produced in evidence the documents listed on his list of documents dated 2/6/2022. The 6th Claimant further testified that it was agreed at the meeting held on 31/10/2017 that the respondent would avail tabulation of the Claimants' dues depending on their years of service, which the respondent never did. Cross-examined, the 6th Claimant testified that he was employed permanently and worked continuously until the date of termination. That although he was being given some contracts, he continued working even when no contracts had been given. That during the year 2015, for example, no contract was given, though he worked through out. That his NSSF statement attests to the fact that he worked through out as NSSF remittances were made by the employer. That documents filed by the Respondent show that the 6th Claimant was at work even during the year 2015. That he worked through out from 2006 upto 2017.
 17. The respondent called one witness, Jackson Nzioka Mutiso (RW-1). He adopted his six witness statements regarding each of the Claimants, as his testimony. The witness also produced in evidence the documents listed on the Respondent's six lists of documents dated 6/6/2022. The witness further



- testified that the Claimants used to work on contracts during the respondent hotel's peak seasons; and that during low seasons, the respondent took them as casuals on daily basis; with payments being made daily and extra hours paid. That the contracts given to them stated the starting date and the end date.
18. The witness further testified that according to the records held by the Respondents, the Claimants' last contracts ended in April 2017, and that from that date they were taken as daily casuals. That while they were still working, the Claimants wrote to the respondent demanding their dues.
 19. Cross-examined, RW-1 testified that the Claimants wrote to the respondent demanding their dues after they had left employment, and that after a meeting held on 31/10/2017 and attended by the Respondent and the Claimants' Union, the respondent wrote on 12/2/2018 and directed the Claimants to go to Court. That the Respondent calculated the Claimants' dues, but the same were not paid to the Claimants. Further, the witness admitted that the clock-in records held by the Respondent were at variance with NSSF remittances, as in some areas, the clock-in (duty) records showed attendance on the part of the Claimants while the NSSF statement showed no remittances.
 20. Based on the evidence on record, and which I have substantially reproduced in this judgment, I must state that this is a very interesting case. I say interesting because the employer (the Respondent) is shown to have adopted what one would call a hybrid type of employment/engagement between itself and the Claimants. The Respondent is shown to have retained each of the Claimants in continuous employment for many years and to have intermittently given them written fixed short term contracts, upon expiry of which the Claimants remained in continuous employment without contracts. For example, in the words of the Respondent's witness (RW-1), the Claimants' last contracts lapsed in April 2017 and the Claimants continued working "as daily casuals" until October 2017.
 21. In my view, taking into account the provisions of Section 37 of the *Employment Act*, the Claimants cannot be said to have been casuals to whom wages were payable/being paid daily, but are deemed to have been employees to whom wages were paid/payable monthly, and regarding whom Section 35(1) (c) of the said Act applied.
 22. The law does not recognize the kind of hybrid employment relationship/model which the respondent purported to engaged in regarding the Claimants. This was an unfair labour practice.
 23. Based on the pleadings filed and evidence presented by all the parties herein, issues that present for determination, in my view, are as follows:-
 - a. whether the Claimants' employment was terminated by the Respondent,
 - b. whether termination of the Claimants' employment was unfair.
 - c. whether the Claimants are entitled to the reliefs sought.
 24. Before delving into the aforestated issues for determination, it is worthy noting that the fact of the Claimants' employment by the Respondent was never in dispute, and so were the time of employment of each Claimant, monthly earnings of each Claimant and the date of termination of each Claimant's employment.
 25. On the first issue, the claimants testified that their employment was verbally terminated by the respondent, upon which the claimants reported the matter to their Union, KUDHEIHA. It was a common ground that a meeting attended by the Respondent, the Claimants' Union and the Claimants was held on 31/10/2017. That the Respondent sought to be given more time to calculate the Claimants' dues, but wrote on 12/2/2018 directing the Claimants to go to Court. Minutes taken during the said meeting and the Respondent's letter dated 12/2/2018 were produced in evidence. Also



produced in evidence was the Respondent's email send to KUDHEIHA on 5/12/2018 indicating that the Respondent was to look its records on the matter.

26. Although the Respondent indicated that the Claimants initiated their own separation by demanding payment of their dues while in employment, both the Claimants and RW-1 testified that the demand was made after termination of the Claimant's employment. It is worthy noting that the Respondent did not tell the Court how and when, according to the Respondent, the Claimants left employment. I find and hold that the Respondent terminated the claimants' employment.
27. On the second issue, the Respondent was not shown to have complied with Section 35(1) (c) of the Employment Act before terminating the Claimant's employment as no termination notice was given to the Claimants. The Claimants testified that they went to work as usual on 16/10/2017 and that they were called and informed that their employment had been terminated. The Respondent did not act in accordance with justice and equity in this regard. Section 45(4) (b) of the Employment Act 2007 provides as follows:-

“(4) A termination of employment shall be unfair for the purpose of this part where

(a)

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.”

28. I find and hold that termination of the 1st, 2nd, 3rd,4th, 5th and 6th Claimants' employment by the Respondent was unfair.
29. On the third issue, and having made a finding that termination of the Claimants' employment by the Respondent was unfair, I award each of the six (6) Claimants the equivalent of five months' salary in compensation for unfair termination of employment.
30. Regarding the claims for terminal dues, I have noted that both the Claimants and the Respondent testified, and indeed demonstrated by evidence, that there was a valid Collective Bargaining Agreement (CBA) between the Respondent and the Claimant's Union (KUDHEIHA) at the material time. The Respondent presented in evidence its tabulation of each of the Claimants' terminal dues based on the CBA. The Claimants did not question the accuracy of those tabulations in their evidence. The tabulations, which I accept and adopt as per the stated net sums, are as follows:-

- a. 1st Claimant.....ksh. 110,001
- b. 2nd Claimantksh. 127,617
- c. 3rd ClaimantKsh. 135,975
- d. 4th Claimant.....Ksh. 72,728
- e. 5th ClaimantKsh. 54,635
- f. 6th Claimant.....ksh. 84,501

31. In sum, and having considered written submissions filed on behalf of the parties herein, judgment is hereby entered for the Claimants against the Respondent as follows:-

- a. 1st Claimant: Said Hamisi Mwakalato
- i. Terminal duesksh. 110,001



- ii. Compensation for unfair termination of employment (ksh.33,123x5).....ksh.165,615
Total ksh. 275,616
 - b. 2nd Claimant: Benjamin Suo Muthui
 - i. Terminal dues.....ksh. 127,617
 - ii. Compensation for unfair termination of employment (ksh.29,100x5).....ksh. 145,500
Total Ksh.273,117
 - c. 3rd Claimant: Juma Hussein Gao
 - i. Terminal dues.....ksh. 135,975
 - ii. Compensation for unfair termination of employment (27,580x5)ksh. 137,900
Total ksh.273,875
 - d. 4th Claimant: Ali Mohammed Dzosi
 - i. Terminal dues.....ksh.72,728
 - ii. Compensation for unfair termination of employment (ksh.34,240x5)ksh.171,200
Total ksh.243,928
 - e. 5th Claimant: Nasoro Juma Kibarua
 - i. Terminal duesksh. 54,675
 - ii. Compensation for unfair termination of employment (ksh. 22,275x5).....ksh.111,375
Total ksh. 166,050
 - f. 6th Claimant: Kazungu M. Ongo Madzayo
 - i. Terminal dues.....ksh.24,501
 - ii. Compensation for unfair termination of employment (ksh.26,862x5).....ksh.134,318
Total ksh. 218,811
- 32. The awards made in compensation for unfair termination of employment shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*.
- 33. The Respondent shall issue each of the Claimants with a certificate of service pursuant to Section 51(1) of the *Employment Act* 2007 within 30 days of this Judgment.



34. The Claimants are awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH MAY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimants

.....Respondent

