



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI.

**(Before: Charles P. Chemmutut, J.,
A.K. Kerich & H.B.N. Gicheru, Members.)**

CAUSE NO.66 OF 2000.

KENYA GAME, HUNTING & SAFARIS WORKERS' UNION.....Claimants.

- v -

PRIVATE SAFARIS (E.A.) LTD.....Respondents.

Issues in Dispute:-

1. Termination of Abud Mohammed Mittwan,

(hereinafter called the grievant).

2. Reduction of his wage from Kshs.34,775/= to Kshs.27,000/=.

J.M. Ndolo, General Secretary, for the Claimants (hereinafter called the Union).

M. Onyango (Mrs.), Executive Officer, F.K.E., for the Respondents (hereinafter called the Company).

A W A R D.

Under powers vested upon him by Section 8 of the Trade Disputes Act, Cap.234, Laws of Kenya (which is hereinafter referred to as the Act), the Minister for Labour referred this dispute to the Court on 14th June, 2000 for consideration and determination; and his reference, together with the statutory certificates from the Labour Commissioner and the Minister himself under Section 14, subsection 9(e) and (f) of the Act, were received by the Court on 16th June, 2000. Consequently, the Union submitted their written memorandum on 28th July, 2000, to which the Company filed their reply statement on 30th October 2000, and the case was heard on 3rd April, 2001.

The Company are tour operators incorporated in Kenya and have had a valid recognition agreement with the Union since 27th February 1997. However, the parties have yet to conclude their first collective agreement which is still pending in this Court

under Cause No.88 of 1999.

According to Mr. Ndolo, the grievant was employed by the Company on 1st December, 1987 as a porter at a salary of Kshs.750/= per month. He rose through the ranks to a position of a Cashier in 1993, when his salary stood at Kshs.8,750/= per month, plus house and laundry allowances of Kshs.2,000/= and Kshs.1,000/= respectively. In 1994, his salary was hiked to Kshs.10,000/= but the said allowances remained the same. The grievant, however, received a fixed overtime allowance of Kshs.2,850/= due to extra duty hours per day. By June 1996, his salary had risen to Kshs.20,000/= per month, plus monthly house, laundry, fixed overtime and transport allowances of Kshs.5,000/=, Kshs.1,000/= Kshs.4,615/= and Kshs.4,160/= respectively, making a total salary of Kshs.34,775/=. It is stated further that during the same year, i.e. 1996, the grievant became a member of the Union and was also elected a shopsteward, but he was ordered by the management of the Company to resign from the Union, which he did, without informing the Union. In April 1997, the grievant received an undated confidential letter from the Executive Chairman, Mr. P.F. Kitololo, (App.I), to the effect that his salary would be Kshs.27,000/=. and that all allowances, commissions, e?.t?.c?., except safari allowance, would be taxable. Henceforth, his performance was also to be rated on points. On 28th July 1997, the grievant enquired from the Executive Chairman why his aforementioned allowances, amounting to Kshs.14,775/=. were missing from his July payslip (App.2), but he did not receive any response. On 15th September 1997, the Administrative Manager, Mr. D.L. Odero, advised the General Manager, Mr. M. Ahamed, to suspend the grievant for threatening to take legal action against the Company (App.3); and on 19th September 1997, the grievant was duly suspended by the General Manager (App.4). The letter of suspension reads in *extenso* as follows:-

“I am under instructions from the head office to suspend your services with Private Safaris (E.A.) Ltd. with immediate effect on reasons well known to yourself.

You will be paid half salary until such time when the legal action you are taking against the company is sorted out.

You are also required to report to the undersigned every Friday

and update the company on the matter.

(Sigd.)

M. Ahamed, General Manager Mombasa”.

On 15th October, 1997, the Union interceded on behalf of the grievant (App.5), but he was terminated the following day, i.e. on 16th October 1997 (App.6). The letter of termination reads in full as follows:-

“RE: TERMINATION.

Further to your suspension, this is to inform you that your services with this Company are terminated with immediate effect.

By copy of this letter, the Accountant is requested to pay you one month’s salary in lieu of notice of termination of your services and any leave outstanding.

Your name will be withdrawn from all Company schemes with immediate effect.

Yours sincerely,

PRIVATE SAFARIS (E.A.) LIMITED

(Sigd.)

P.F. KITOLOLO

EXECUTIVE CHAIRMAN".

The parties attempted to resolve the matter at their own level but failed, and on 23rd October 1997, the Union reported a trade dispute to the Minister for Labour (App.7). The Minister accepted the dispute and, under Section 7 of the Act, appointed Mrs. A.W. Guchu of Nairobi Central Labour Office, to act as the Investigator, but the Court was not given the benefit of reading her findings because page 3 of the report was missing (App.8.). The Minister, however, recommended in the said report, which was released to the parties on 21st September 1998, that the dismissal of the grievant be reduced to normal termination of service and he be paid as follows:-

- (a) One month's salary in lieu of notice.
- (b) Days worked and any leave due.
- (c) His salary be deemed to be Kshs.27,000/= per month w.e.f.

1st January 1997.

(d) Full pension refund.

(e) Two month's compensation.

The Minister finally appealed to the parties to accept the recommendation as a basis of settlement of the dispute. The Company grudgingly accepted the recommendation, save for recommendation (c) hereinabove, but the Union rejected it. Hence this dispute for consideration and determination.

Mr. Ndolo argued vehemently that the suspension and eventual termination of the grievant, who had a clean employment record, on disciplinary grounds was wrongful, and the reduction of his salary was also unlawful, prejudicial and detrimental to him. He asserted that the action taken by the Company against the grievant amounted to victimization on account of his trade union activities and a violation of the principle of natural justice that no order to the prejudice of a person should be passed without giving him due hearing – this is known as the principle of *audi alteram partem* (no one should be condemned unheard),

Section 80 (I) of the Kenya Constitution and I.L.O. Convention No.97 on the right to freedom of association and assembly and to form or belong to a trade union of one's choice.

Accordingly, Mr. Ndolo prayed that the grievant be reinstated to his job, without loss of benefits; or, in the alternative, he be paid the following terminal benefits:-

(a) Underpayment of salary in May 1997:

Kshs.27,000/= - Kshs.20,000/= Kshs.7,000.00.

(b) Fixed allowances (June – September 1997)

Kshs.14,775/= x 4 months. “ 59,100.00.

(c) October, 1997 ½ salary (including fixed allowances).

“ 17,387.50.

(d) One month’s pay in lieu of notice

(including fixed allowances). “ 34,775.00.

(e) 25 days *pro rata* leave “ 33,475.50.

(f) Gratuity: Kshs.34,775/= x 10 years’ service

x 18 days for every completed year of service:- 30 days. Kshs.208,650.00.

Total Kshs.360,388.00.

In reply, Mrs. Onyango submitted that the grievant was employed by the Company on 1st January 1989 as a porter/car washer, based at Mombasa office; and his salary rose gradually over the years and by 1st January 1996 he was earning a consolidated salary including house allowance, of Kshs.18,000/= per month. In 1993, however, the grievant was deployed to do office duties, which included being a cashier and processing N.S.S.F. and N.H.I.F. payments; and as an office employee, he was no longer entitled to fixed overtime, traveling and laundry allowances. But the allowances were inadvertently not stopped until May 1997, when an increment of his salary to Kshs.27,000/= was being processed. She pointed out that the management of the Company felt that it was unfair to the other office staff for the grievant to receive allowances while they did not earn the same. Hence the withdrawal of the allowances. The management of the Company did not, however, effect any recovery of the allowances which was paid to the grievant from 1993 to May 1997 because they considered such an action too punitive. Mrs. Onyango submitted further that the decision by the management of the Company was explained to the grievant, but when he failed to receive a favourable response to his letter, dated 28th July 1997 (App.2), he threatened to take legal action against the Company. This led to strained relations between him and the management of the Company, resulting in his suspension on 15th September 1997, on half salary; and he was eventually terminated on 16th October 1997, on payment of salary for the days worked, leave due, one month’s salary in lieu of notice and full pension benefits, which he accepted.

Mrs. Onyango pointed out that the period complained of was from July to 15th September 1997, i.e. 2½ months, and the payment due to the grievant would be based on his salary, excluding any allowances, i.e. Kshs.18,000/=, upto April 1997 and Kshs.27,000/= from May 1997 to 16th October 1997, when his services were terminated. She, therefore, urged the Court to reject the Union’s demand and prayed that an award be made in terms of the Company’s offer.

It is clear from the submissions and the documentary evidence on the record that the grievant was suspended and eventually terminated on disciplinary grounds because he threatened to take legal action against the Company for withdrawing or discontinuing his allowances. The letters of suspension and purported termination did not give any particulars of the offence for which the grievant was terminated. It was not enough to say in the letter of suspension

“on reasons well known to yourself”. In my view, therefore, the action was wrongful, and the only question for consideration is what relief or reliefs, if any, to which the grievant is entitled. The Union demand that the grievant is entitled to his salary, including all the fixed allowances and gratuity, as stated hereinabove, while the Company maintain that he is entitled only to

his salary, excluding the allowances, gratuity or pension and two months' compensation in accordance with the Minister's recommendation.

The dictionary meaning of the word "salary" is a periodical payment for service. Salary is the payment made for work done in accordance with given directions. In other words, salary is more certain and does not carry the possibility of a loss; and it is fixed over a period of time and is generally paid at regular intervals. In Mitra's Legal & Commercial Dictionary, 4th Edition, by A.N. Saha, at page 691, "salary" means "a recompense or consideration made to a person for his pains, industry or work for another person, wages, allowances or other remuneration for work or service"; and at page 672, therein, "remuneration" ordinarily means "reward, recompense, pay, wages or salary for service rendered".

Therefore, "salary" or "wages" is the remuneration for a contract of service, and the definition of "salary" or "wages" includes allowances payable to an employee for services rendered because these allowances are part of the remuneration to which an employee is entitled under his contract of employment. "Salary" or "wages" or "pay" means remuneration for service paid or payable in cash or capable of being expressed in terms of money, including allowances. The word "remuneration" means "a reward or pay for service rendered"; and in view of the importance of this word, I have examined the law, and I would refer here to a passage from the judgement of a very eminent common law Judge in *J.B. Saunders v. The Postmaster General (1875) 1 K.B.658*. The question there was of the construction of an English statute under which an officer and clerk of a telegraph company was entitled to compensation on the basis of his salary and remuneration. Blackburn, J. observed with reference to the difference between salary and remuneration as follows:-

"But I think the word "remuneration" is a wider term and means a *quid pro quo*. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them".

Thus the word "remuneration" is a word of wide import and it includes allowances to which an employee is entitled under his contract of employment; and those allowances are a part of the contract of employment to which an employee is entitled as a reward for his services. In any case, it is an elementary principle of industrial law that once a certain amenity is given to the employees, it cannot be withdrawn from them except by mutual agreement of the parties. The labour laws are beneficial legislations, and hence they should be construed liberally so that their object, which is to provide maximum benefits to the employees, is achieved; and such object can only be achieved if a wide and liberal construction is given to the expressions "salary" or "wages" or "remuneration". I am, therefore, of the view that the grievant was entitled to the said fixed allowances during the entire period of his employment with the Company and the same must be restored to him.

The grievant was terminated on disciplinary grounds nearly five(5) years ago and the relationship of the Company and the grievant has been uncordial. In the circumstances, I am unable to reinstate the grievant to his former job, but would grant him normal termination of service, with full terminal benefits and compensation for loss of employment.

In the result, I *AWARD* and *ORDER* that the termination of the grievant on disciplinary grounds be reduced to normal termination of service and he be paid Kshs.360,388.00, being his terminal benefits as demanded at page 7 hereinabove; and in addition, the grievant be paid Kshs.208,650.00 being compensation equivalent to six(6) months' salary for loss of employment, (i.e. Kshs.34,775/= x 6), making a total of Kshs.569,038.00; in full and final settlement of his terminal dues. The said amount is, however, subject to the usual lawful statutory deductions.

Both members of the Court support this decision.

DATED and delivered at Nairobi this 11th day of October, 2002.

Charles P. Chemmutut,

JUDGE.