

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

(Before Hon. Lady Justice Monica Mbarũ)

CAUSE NO. E098 OF 2024

KUDHEIHACLAIMANT

VERSUS

COCOA COLLECTION HOTELS..... RESPONDENT

JUDGMENT

The Claimant is a registered trade union. The Respondent is a limited liability company.

In this claim, the Claimant represents 7 grievants:

- 1) Joshua Odhiambo.
- 2) Salim Kazungu.
- 3) Ibrahim Murithi Njoroge.
- 4) Wycliffe Juma Anyula.
- 5) Caleb Kwamboi Boiyo.
- 6) Eunice Wairimu Waweru.
- 7) Elvs Kitsao Baraka.
- 8) Bernard Risa Musuni.

The claim is that the Respondent employed the grievants at Sun Africa Hotels Limited on various dates and in various departments. In December 2022, there was a change of management from Sun Africa Hotels Limited to the Respondent, Cocoa Collections Hotels.

Through a notice dated 13th May 2023, the Respondent terminated the employment of the grievants effective 30th June 2023. The Respondent tabulated the travel dues and issued a Certificate of Service. Each grievant was issued with a postdated cheque in payment of terminal dues. The payments were to be made in instalments. The first cheques to each grievant was cashed. However, subsequent payments were declined at DTB Bank.

Despite the grievants and the Claimant reporting the nonpayment's, the Respondent has refused to make full payments. Since September 2023, the Respondent has refused to make full payments to the grievants.

The claim is that, under section 16 of the Penal Code, it is a criminal offence for a person to issue a cheque drawn on an account with insufficient funds or on a closed account. This is committing a misdemeanor. One is liable for a sanction, including a fine of up to Ksh. 50,000, or double the payment of the cheque's value.

The Claimant is thus seeking the following:

- a) *A declaration that the Respondent unfairly and with malice defrauded the grievants of their terminal dues, and they are entitled to damages.*
- b) *The directors of the Respondent be fined Ksh. 50,000 or 1 year jail term.*
- c) *The Respondent be ordered to pay the balances due to the grievants at Ksh. 851,176.*
- d) *The Respondent be compelled to make a double payment as required under section 316 of the Penal Code.*
- e) *Costs of the suit be at Ksh. 400,000 plus interest on the awards.*

In evidence, the Claimant called Zacchaeus Osore, the regional secretary, Mombasa branch, who testified that the Respondent declared a redundancy and the 7 grievants were affected. The Claimant was notified, and it was agreed that the grievants would be paid their terminal dues. The Respondent issued them with postdated cheques. The 1st was cashed, but the response bounced. There was no communication from the Respondent explaining why they failed to honour the cheques.

Osore testified that the grievants were employed by Sun African Hotels Limited, which transferred management to the Respondent, who then declared the redundancy. The principal dues owing to the grievants have not been paid, and, owing to the bounced cheques, which are a criminal offence, such dues should be paid with interest and costs.

The Claimant also called Joshua Odhiambo a grievant. He testified that he was one of the Respondent's employees whose employment was terminated following a redundancy declaration. He was called and issued with postdated cheques. He cashed the first, but the rest bounced; there was no communication from the Respondent. He seeks the payment of his terminal dues with costs.

There was no response filed.

The Respondent did not call any evidence.

Determination

The facts of the case are not contested in any manner. The Respondent only entered an appearance and filed no response.

The issues for determination are whether the grievants are entitled to the claimed terminal dues and whether the court should sanction the Respondent for issuing dishonored cheques.

The grievants were the employees of Cocoa Africa Cheques Hotels Limited who issued the cheques for the payment of terminal dues. The Respondent's counsel in cross-examination contested the employer's fact.

The Notice dated 13th May 2023 is issued by the Respondent, Cocoa Collection Hotels. The Certificates of Service are issued by the Respondent. The bounced cheques were issued by Sun Africa Hotels Limited.

Under the Employment Act (the Act), the employer is defined as the person in direct contact with the employee or the agent of the employer.

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

More fundamentally, where the employer is changed, or there is a change of name, the employee caught in the middle is protected under section 13(6) of the Act. Any changes to name, particulars, or the contract of employment must be notified to the employee, and his/her rights do not dissipate as a result.

(6) Where, after an employer has given to an employee a statement under section 10 either—

(a) the name of the employer is changed without any change in the of the employer; or

(b) the identity of the employer is changed in circumstances in which the continuity of the employee’s period of employment is not broken, and subsection (7) applies in relation to the change,

the person who is the employer immediately after the change is not required to give to the employee a statement under section 12 but the change shall be treated as a change within subsection (1).

In this case, the Respondent's change in administration or ownership does not affect the grievants' rights. The Respondent is accountable as the employer under sections 10 and 13 of the Act.

The sum of Ksh. 851,176 is payable to the Claimant.

The issuance of bounced cheques by the Respondent is indeed a criminal act under the Penal Code. Indeed, such conduct is sufficient ground to allow the Claimant to seek the lifting of the corporate veil against the Respondent company and have its directors prosecuted under section 316 of the Penal Code as held in **Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] KEHC 6121 (KLR)**. The Respondent, through directors, knowingly secured payment of terminal dues by drawing cheques they knew could not be honoured. To date, these cheques have not been honoured, which constitutes the offence of issuing bad cheques under section 316A(1)(3) of the Penal Code. See **Peter Macharia Ruchachu v Director of Public Prosecution & another [2014] KEHC 7508 (KLR)**.

However, in employment and labour relations, the refusal to pay employment dues and benefits is an employment offence. It must be prosecuted by the labour officer, whose mandate to undertake such a task has since been found to conflict with Article 157 of the Constitution. See **Republic v Chengo & 2 others [2017] KESC 15 (KLR)**.

Addressing the prosecution of employment offences, the Court of Appeal in **Tribe Hotel Limited v Muoki [2024] KECA 1673 (KLR)** held that:

... if the Respondent [employee] desired the appellant [employer] to be found guilty for the offence under Section 51 (2) of the Employment Act, she ought to have complained to the police and or authorized labour officer and instigate the commencement of criminal proceedings against her former employer. We note than condemning the appellant to pay a fine of Kshs.100,000.00 and converting the same to a payment to the Respondent was not in conformity with Section 51 (3) and as a result, we quash the said award and substitute it with an order that the appellant issues the Respondent with a certificate of service within 30 days from the date of this judgment.

In this regard, the Claimant should cause the grievants to report the dishonored cheques to the police. This should then be addressed appropriately by the government agency responsible for public prosecutions.

However, the court takes into account the Claimant's efforts to have the terminal dues owed by the Respondent paid, without success. In this regard, the cost claim is justified. This shall be assessed by the court under the provisions of section 12(4) of the Employment and Labour Relations Court Act and Rule 73 of the Employment and Labour Relations Court (Procedure) Rules. The matter went for a full trial, and the costs OF Ksh. 200,000 is hereby found appropriate.

Accordingly, judgment is hereby entered for the Claimant against the Respondent in the following terms:

- a) The Claimant is entitled to Ksh. 851,176.**
- b) Costs awarded at Ksh. 200,000.**
- c) The dues at (a) and (b) shall be paid within 30 days; failure to do so shall result in the accrual of interest at court rates.**

Delivered in open court at Nairobi, this 23rd day of April 2026

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Catherine and Omar

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