



**Kudheiha Workers Union v Sucham Investments Limited t/a Amani Tiwi Beach Resort
(Cause E032 of 2023) [2024] KEELRC 436 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 436 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E032 OF 2023
M MBARÚ, J
FEBRUARY 29, 2024**

BETWEEN

KUDHEIHA WORKERS UNION CLAIMANT

AND

**SUCHAM INVESTMENTS LIMITED T/A AMANI TIWI BEACH
RESORT RESPONDENT**

JUDGMENT

1. The claim is filed by the claimant for and on behalf of 133 former employees of the respondent who were represented in court by Govi Ozila Govi and Francis Omondi Ochieng (the grievants).
2. The claimant filed the claim herein on 24 April 2023 against the respondent and served the summons. There was no appearance or response filed.
3. The claimant is a registered trade union recognized by the respondent. They have negotiated a Collective Agreement (CBA) on terms and conditions of employment. The respondent is a member of the Kenya Association of Hotelkeepers and Caterers (KAHC) with whom the claimant has a CBA for and on behalf of the employee under the members of KAHC, including the respondent.
4. The grievants worked for the respondent in various departments but in the year 2020, after the onset of Covid-19, the grievants were sent away from their employment without the due process of adherence to the CBA. The respondent issued an infinite notice to the grievants without further communication or payment of their terminal dues.
5. The claimant's Kwale branch secretary engaged the respondent, seeking an audience to address the concerns of the grievants and payment of terrain dues without success. One Tima tabulated the terrain dues but these have not been paid. The matter was reported to the Minister but the respondent refused to honour summons to attend.



6. The claim is for payment of terminal dues and a finding that there was a termination of employment on account of redundancy leading to unfair termination of employment and the grievants should be re-engaged and the claim allowed with costs.
7. In evidence, the claimant called Francis Omondi Oluoch a grievant and member of the claimant, Kwale branch. He testified that the claimant and respondent have a CBA with terms and conditions of employment. In April 2020, the respondent sent away its employees including the grievants due to Covid-19. Despite resuming operations, the respondent has failed to honour and pay wage arrears or terminal dues. The grievant attached the schedule of union dues, copies of pay slips, and a report by the conciliator. The matter was reported to the Minister, a notice issued to the respondent, and the conciliator appointed issued a report on the matter.
8. Govi Dzila Govi is an employee of the respondent as head gardener in the maintenance department. He testified that in April 2020, the respondent, through the general manager communicated that all staff should go home and would be recalled. This was because of the Covid-19 pandemic. The grievants were all sent on indefinite leave without any written letter. The respondent later resumed operations and when the grievants sought to be paid their wages and arrears, there was no response. Despite the claimant engaging the respondent and a report to the Minister, there was no attendance or payment of dues.

At the close of the hearing, the claimant filed written submissions.

9. The claimant submitted that the respondent engaged in unfair labour practices by sending the grievants on indefinite leave without any written communication or payment of their dues contrary to Section 43 of the *Employment Act*, 2007 (the Act) which resulted in the unfair termination of employment on account of redundancy. Due to prolonged unresponsiveness, the claimant reported the matter to the Minister but the respondent failed to attend or address leading to these proceedings.
10. The claimant submitted that under ILO Convention No.158 on Termination of Employment Convention, 1982 an employer is required to minimize and prevent termination of employment by putting in place measures to mitigate any advance effects. The respondent, by keeping its employees out of service for a prolonged period ended up in unfair redundancy contrary to Section 40 of the Act as held in *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & others* [2014] eKLR.
11. Through the Conciliator, it was established that 106 grievants lost employment through involuntary means due to no fault of their own and the respondent has failed to pay terminal dues. In the case of *Packard v Seras* [1837] 6 A & E the respondent was estopped from going against the legal promise and obligation to pay employees their terminal dues. In this case, the grievants should be paid their terminal dues.

Determination

12. As noted above, the respondent did not enter an appearance or file any response. This denied the court crucial evidence and records as required under Section 10(6) and (7) of the *Employment Act*, 2007.
13. The claimant has filed the claim herein for and on behalf of its members, the grievants. Two grievants testified in support of the claim. A letter of authority for the grievances was filed. The claims for each grievant were outlined as tabulated by the Minister, under the Conciliator's report dated 20 March 2023. The schedule of payment is per Rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016.



14. An employer who removes its employees from the shop floor without any due cause and fails to secure their rights in employment commits a serious employment breach contrary to Sections 35, 41, 43, and 44 of the Act. account taken that COVID-19 arose out of matters beyond the control of the respondent or any employer, the employer well secured under the law in terms of Section 40 of the Act, ought and should have issued necessary notices therefrom. Leaving the grievants at large and without communication resulted in unfair labour practices.
15. The Minister through the Conciliator did a fact-finding, applied the CBA between the parties, and made awards for the grievants comprising the following;
 - a. Notice pay;
 - b. Severance pay;
 - c. Unpaid service charge;
 - d. Compensation.
16. The grievants were sent off by the respondent due to no fault of their own. Indeed, as held in the case of Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR; Abednego Ngwabe Were v East African Safaris Air Express Ltd [2019] eKLR; and Angela Shikuru Kondonga v Airtel Kenya Ltd [2016] eKLR the court agree that a redundancy must be preceded by a statutory notice under section 40(b) of the Act and the employer must prove that all the parameters of redundancy under Section 40(a) & (c) have been taken into account and in an objective manner.
17. In the case of Africa Nazarene University v David Mutevu & 103 others [2017] eKLR where the court held that under section 40(1) a redundancy notice must be served in writing to the employee or his union and the area Labour Officer at least one month before the termination of employment on account of redundancy. In this case, without the attendance of the employer, the respondent, the court is left with the evidence by the claimant that there was an unfair redundancy.
18. In an unfair redundancy, Section 45(2) (b) of the Act requires the employer to apply due process where there is an operational matter resulting in a redundancy.
19. In this regard, there being an involuntary termination of employment, on the claims made by the grievants, an assessment of the following is due;
 - a. Notice pay based on the number of years worked and the CBA rate;
 - b. Severance pay for the full years of service;
 - c. Pay for untaken leave days;
 - d. Unpaid salaries for days worked;
 - e. Under the CBA, allowed pay for service charges;
 - f. Any other legal entitlement at the end of employment due to a redundancy.
20. The claimant shall attend before the Labour Officer, Kwale for tabulation of these dues. Attend in court for confirmation of the dues owed to the grievants in this regard. Judgment is hereby entered in these terms.

File a report in court on 14 March 2024.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF FEBRUARY 2024.



M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

