Otenga & 24 others v Freewind Holding Limited t/a Creekside Hotel (Cause 66 of 2018) [2022] KEELRC 1746 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1746 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 66 OF 2018

B ONGAYA, J

JUNE 24, 2022

BETWEEN

THADDEUS MWEBI OTENGA .... 1ST CLAIMANT

LILLIAN D MZEREDA .... 2ND CLAIMANT

GLADYS MBULA MUTWIWA .... 3RD CLAIMANT

MARTIN ODHIAMBO AMOLO .... 4TH CLAIMANT

ELDEN KATUNGWA MWETEELI .... 5TH CLAIMANT

PATRICK THOYA TSOFWA .... 6TH CLAIMANT

MERCY KASYOKA MUNYOKI .... 7TH CLAIMANT

MOSES KALUA MATUMBO .... 8TH CLAIMANT

SYLVIA ACHIENG OWINO .... 9TH CLAIMANT

ALPHONCE KYALO .... 10TH CLAIMANT

CHARLES ODERO OKELO .... 11TH CLAIMANT

ONESMUS MUTISO KIMAILI .... 12TH CLAIMANT

PETRONILLA NAZI SHUME .... 13TH CLAIMANT

MAURICE SEVU MULU .... 14TH CLAIMANT

EDITH MWANAMBONJE KOMBO .... 15TH CLAIMANT

DANIEL MWENDWA MUTUKU .... 16TH CLAIMANT

WILBERFORCE KIGWA MBUKA .... 17TH CLAIMANT

CE CILIA VATA MUNGUTI .... 18TH CLAIMANT

STEPHEN KITEME MUNYOKI .... 19TH CLAIMANT

DOMINIC PETER MULAUDI MUSANGO .... 20TH CLAIMANT

TIMOTHY NZIOKA MUOKA .... 21ST CLAIMANT

ALBERT ORORA OBONYO .... 22ND CLAIMANT

HARUN SIMEON DECHE .... 23RD CLAIMANT

PAUL MWENDWA MUSESA .... 24TH CLAIMANT

JOSEPH ODERO OTEKO .... 25TH CLAIMANT

AND

FREEWIND HOLDING LIMITED T/A CREEKSIDE HOTEL ...... RESPONDENT

JUDGMENT

1. The claimants filed the memorandum of claim on February 7, 2018 through Hezron Onwonga, Industrial Relations Officer for Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (hereinafter referred to as "the union"). The claimants filed the amended memorandum of claim on February 14, 2019 and stated the issue in dispute as the wrongful and unfair termination on account of redundancy contrary to section 40 of the *Employment Act*, *2007*, the parties' CBA clause 11 and section 15 of the Regulation of Wages and Conditions of Employment (Hotel and Catering Trade) Order.

2. The claimants pleaded that they are members of the union and the respondent is in the hospitality industry providing accommodation and food services to its customers. The further case is as follows. The claimant and respondent operate on duly signed recognition agreement and a registered collective bargaining agreement (CBA) as signed with the Union of Kenya Hotelkeepers and Caterers Association (UKHCA- hereinafter "the association"). Further the respondent terminated the claimants' employment suddenly on November 1, 2017, and, on account of redundancy without a notification letter contrary to sections 5, 40, 43, 78, 77, and 76 of the *Employment Act*, *2007* and clause 11 of the CBA. Further the termination violated Article 41 of the *Constitution of Kenya, 2010* that provides that all employees have a right to fair labour practices and because the termination could not be justified. Further, throughout employment the respondent failed to effect statutory deductions such as union dues and NSSF and should not be allowed to escape the liability.

3. The claimants particularised their individual claims upon the headings of underpayment; pending leave days and offs; 2 months' pay in lieu of notice; severance payment for years worked; shoe compensation; one-month salary notification; leave and leave travelling allowance; and 12 months' salaries compensation. Each pleaded the effective date of employment, designation, current salary, house allowance, date of termination and duration served. They prayed for:

    1. A declaration the redundancy was unlawful and unfair.

    2. The affected employees be paid salary for 12 months as compensation for wrongful termination as per section 49 of *Employment Act*, *2007* and section 12 of the Industrial Court Act together with accrued salary for December 2017, underpayment, pending leave days, off-days, service gratuity for the years served, severance pay at 16 days for the years served, notice as provided for under the CBA, unpaid leave travelling allowance for years served, unpaid salary

for notification and service charge for December, 2017 as tabulated in the memorandum of claim making a sum of Kshs 21, 415, 132.14.

3. The respondent to bear costs of the suit plus interest at Court rates.

4. The Court to issue any order it deems just and fit.

2. The respondent filed on July 25, 2018 the memorandum of response through Desai, Sarvia & Pallan Advocates and Ms Sebastian Advocate appeared in that behalf.

3. The respondent denied that it had been a member of the association and had never executed the alleged CBA between the union and the association. Further, it has never been a party to a recognition agreement between the association and the union as alleged for the claimants. The respondent further pleaded that the claimants' employment was not terminated but that they were all transferred to a new management after the new management purchased the respondent's hotel. Further the claimants were fully paid their dues and they acknowledged receipt save for some who failed to collect their dues or declined without reasonable cause. The claimants were clearly informed that their employment was being transferred to the new management which would issue them with new contracts of service and upon similar terms and conditions of service. The employment of the claimants was not terminated and in the circumstances it is pleaded that there was no breach of section 78 of the Act on notification of a termination of employment to the nearest employment service office. Further section 77 of the Act was not breached since the respondent did not abolish any office or fill any office. Further, Article 41 of the *Constitution* was not infringed because the respondent did not violate or infringe the claimants' fair labour practices. There was no discrimination and section 5 of the Act is pleaded as not breached at all. The respondent's case is that it transferred the claimants' employment to new management and there was therefore no redundancy situation. Further, section 46 of the Act was not breach because the claimants were never terminated on account of any of the unfair reasons for termination enumerated in that section. It is further pleaded and urged for the respondent as follows:

a. The claimants' suit against the respondent is frivolous, vexatious, an abuse of Court process and not brought in good faith since the respondent offered to fully pay the claimants' dues but some of them rejected the payment of the dues without any unjustifiable reason. The suit is an attempt to extort money from the respondent.

b. The claimants' employment was not terminated without due process as alleged but it was transferred to a new management of the same facility, a fact that is well known to the claimants and there was no breach to fair labour practices.

c. Sections 5, 40, 43, 45, and 26 of the *Employment Act*, *2007* was not violated as there was no discrimination against the claimants upon any identified ground.

d. The statutory deductions were deducted and remitted up to the time the new management took over the operations of the respondent.

e. The redundancy was necessary, procedurally done, and should be upheld.

f. The claimants are not entitled to claims and prayers sought as the respondent fully paid their terminal dues which fifty-seven claimants (may be meaning employees) expressly acknowledged receipt thereby relinquishing any such claims against the respondent and effectively discharging the respondent from liability. In particular claims for underpayment of salary and house allowance were denied and the CBA was not binding; leave due and not taken was computed and included in final dues but some claimants rejected the payment as pleaded for the respondent; one month in lieu of notice was offered per *Employment Act* but

some rejected and there is no basis to claim two-months' pay in lieu of notice and which is based on inapplicable CBA; severance pay was included in the final payment which the claimants declined; shoe compensation was not based on known contractual provision; one-month notification not due as the employment was not terminated at all; and, there was no unfair termination and the respondent ensured new management employed the claimants as respondent's operations were taken over by the new management and compensation for 12 months' salaries is not justified at all.

4. The respondent denied the grant total of Kshs. 18, 156, 410.90 as set out in the memorandum of claim (later amended as set out earlier in this judgment but the memorandum of response not amended, accordingly).

5. The claimant's witness (CW) was Dominic Peter Mulaudi Musango, the 21st claimant. The respondent's witness (RW) was the Director one Amjad Abdul Rahim. The final submissions were filed for the parties. The Court has considered all the material on record and makes pertinent findings as follows.

6. To answer the 1st issue for determination, the Court returns that the respondent employed the claimants at its hotel enterprise known variously as Creekside Hotel or Best Western Plus Creekside Hotel. The employment was effective diverse dates as per the respective letters of appointment exhibited for the claimants.

7. The 2nd issue is whether the CBA applied to the claimants' contracts of service. The claimants' case is that the union of which they are members had concluded a CBA and recognition agreement with the association of which the respondent was a member. Was the respondent a member of the association? The claimants have exhibited a certificate of membership No KAHC 106/017 issued by the Kenya Association of Hotel Keepers and Caterers to Best Western Creekside Hotel valid from January 2017 to December 31, 2017. The respondent has exhibited a search at the Business Registration Services showing that as at August 13, 2020 Creekside Hotel had been registered as business name on August 22, 2013 and the proprietor was Freewind Holding Limited. On the other hand, the Court observes that the claimants have not exhibited a search on official owners of Best Western Creekside Hotel. The Court further observes that the letters dated December 19, 2012 by which the respondent translated employment of some of the respondents stated in part, "I am aware and have been explained that Freewind Holdings Limited is appointing Cityblue Hotels Kenya Limited (hereinafter called the "Manager" to handle the running and management of the hotel formerly known as Best Western Plus Creekside Hotel (hereinafter called the "hotel")." By reason of the word "Plus", it appears to the Court that the Hotel in the certificate of membership No KAHC 106/017 is not one and the same as the hotel mentioned in the letter of separation or translation of employment. Further the respondent's submission in that regard is upheld. The Court therefore finds that the claimants have failed to establish that the respondent's hotel was known as Best Western Creekside Hotel as referred to in the certificate of membership No. KAHC 106/017. The Court finds that in absence of a search at the Business Registration Services, there is nothing linking the respondent to Best Western Creekside Hotel as referred to in the certificate of membership No KAHC 106/017. With reference to that certificate of membership No KAHC 106/017, CW confirmed in his testimony thus, "…Is certificate issued to Best Western Creekside Hotel. The respondent is Freewind Holding Limited T/A Creekside Hotel." In the circumstances, there is no material on record establishing that the respondent was a member of the association union of employers in the hotel industry, the Union of Kenya Hotelkeepers and Caterers Association. Thus the Court returns that the recognition agreement and CBA said to be between the union and the association of employers have not been shown to apply to the respective contracts of service between the claimants and the respondent. Further, as submitted for the respondent the

certificate of membership No. KAHC 106/017 was issued by the Kenya Association of Hotel Keepers and Caterers which is apparently not the same as the association of the employers in issue (Union of Kenya Hotelkeepers and Caterers Association). Nothing prevented the claimants from requesting the association to confirm that the respondent was its member and in absence of such efforts and evidence, the Court finds that the respondent was not a member of the association.

8. In the circumstances, the CBA could not have been incorporated in the claimants' individual contracts of service as envisaged in section 59 (3) of the *Labour Relations Act* as it has not been shown that the CBA in issue covered the claimants' employment with the respondent. The Court finds no rebutting evidence against RW's testimony in re-examination thus, "Respondent had no recognition or collective agreement with the claimants. During takeover claimants never said they were union members. Claimants never notified respondent that they were union members."

9. The Court returns that while the claimants were members of the union on a balance of probabilities, they did not notify the respondent and they could be represented by the union like in the instant case on the basis of their individual contracts of service and not on the basis of the provisions of the CBA which has been found not to have applied at all. In any event the union has not alleged that it had a relationship with the respondent, no Form S under the *Labour Relations Act*, *2007* is said to have been served upon the respondent to deduct and remit union dues. In the emerging dispute, it is not shown that the procedure in the recognition agreement or CBA and statutory conciliation were invoked towards resolving the claimants' grievances as a group. All that, in the Court's view, show that the recognition agreement and CBA did not apply as was alleged for the claimants.

10. To answer the 3rd issue for determination, the Court returns that CW was entitled to testify on behalf of all the claimants. It was submitted for the respondent that the 22nd to 25th claimants did not sign authorising CW to testify on their behalf as per holding by Gakeri J in *Joseph Kioko Langi v Sour Security Services Limited* [2022]eKLR. However, in the instant case on October 23, 2019 the Court (Rika J) recorded that the claimant sought to be called to testify on behalf of the 25 claimants had requisite authority and ordered in part "(b) The lead claimant to file and serve his witness statement within 14 days." The 21st claimant filed the witness statement on October 20, 2019 and at paragraph 2 stated that he had been given authority to evidence on his own behalf and that of his colleagues. The witness statement appears to have been within the terms of the directions of the Court at the pre-trial directions and in absence of a review, CW was clearly understood as testifying on his own behalf and that of the other claimants.

11. To answer the 4th issue the Court returns that there was no termination of employment of the claimants on account of redundancy as alleged. The Court returns that the evidence per the letters of translation of the claimant's service with the respondent dated December 19, 2017 shows that the respondent appointed Cityblue Hotels Kenya Limited as a manager of the hotel and to run the affairs of the hotel; the claimants would not be terminated but they would be absorbed or taken over by the new manager who was to offer contracts of employment upon similar terms of service as the claimants were already serving. The *Employment Act* in section 2 defines redundancy as the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job, occupation and loss of employment. As submitted for the respondent, to the extent that there was no abolition of office, job, occupation or loss of employment, it cannot be said that the redundancy situation took place. The respondent paid or was willing to pay salaries up to the last day worked prior to the takeover being on December 19, 2017, leave days accrued, public holidays and off-days worked and not paid, leave travelling allowance, and severance pay but less the due statutory deductions. As urged for the respondent, sections 77 and 78 of

the Act cannot be found to have been breached as had been alleged for the claimant. The documents filed show that per RW's evidence, RW must have met each employee and no termination took place because management was changing hands and new management would retain all staff. The RW's testimony appears consistent with that by CW who in re-examination stated, "During transition some employees were paid. They doubted they'd be employed. They took final dues. I went for payment. The payment was very little per years served. I had worked from August 15, 2013 to December 19, 2017. We were given uniform pay. I see page R137 of respondent's documents. I was to be paid Kshs 35, 801.00. Breakdown was not given. I felt it was unfair. The breakdown was never given. So I rejected the pay."

12. By that evidence, CW confirms that the claimants understood that it was a transition to a new management but the real dispute was that in paying the claimants to facilitate a smooth transition, the respondent failed to provide a pay slip. Sections 20 and 21 of the *Act* entitled the claimants to an itemised pay statement and showing due statutory deductions. The claimants prayed for any other just relief. The Court returns that they are entitled to a declaration that each be provided by the respondent an itemised pay statement in terms of sections 20 and 21 of *Act* with respect to their respective transitional payments on the headings of salary up to December 19, 2017, pay for leave days accrued, pending public holidays worked and not paid, pending off-days worked and not paid, due leave travelling allowance, severance payment and less due statutory deductions, and, as offered by the respondent so that any outstanding payments due be paid.

13. For avoidance of doubt, there was no termination and the letters of the transition dated December 19, 2017 were expressly in terms that there was no termination and the employee was to retain terms and conditions of service prevailing prior to the transfer of enterprise and translation or absorption into the employment of the takeover management or new hotel owner. The Court returns that the arrangement amounted to a transfer of the enterprise or business so that all the rights and obligations arising from the employment moved to the new employer as the employees generally retained the employment conditions which they had prior to their transfer to the new management or owner of the hotel. It is noteworthy that in that transition the respondent undertook to pay all the claimants' accrued remuneration and other benefits for the period served with the respondent including severance payment.

14. The court holds that in transfer of enterprise or business, it is sufficient that the outgoing employer or management pays all the accrued benefits of the employees or contracts with the incoming employer or management to take over such accrued benefits of the employees and which includes accrued service payment. In the instant case, the respondent appears to have undertaken to pay the claimants all accrued remuneration, benefits and including their service as manifested in the severance pay. It cannot therefore be found that the claimants suffered unfairness except to the extent that the respondent failed to give them the itemised payment statement or as is commonly known as pay slip – for which the Court has already granted appropriate relief.

15. To answer the 5th issue, the Court has found that the claims and prayers by the claimants were based on existence of a termination on account of redundancy and application of the CBA both of which the Court has found not applicable. The claims and prayers will therefore fail. The Court has considered the failure by the respondent to provide the transitional or takeover pay slips showing the itemised amounts due to each claimant as well as parties' margins of success and each party will bear own costs of the suit.

16. While making that finding the Court has considered the claim for underpayment. It is submitted that the underpayment was per Wage Order of 2018 yet the transition was on December 19, 2017 so that the Wage Order relied upon was not applicable at all.

17. In conclusion the claimants' suit is hereby determined with orders:

    1. The declaration that each claimant be provided by the respondent an itemised pay statement (pay slip) in terms of sections 20 and 21 of the *Employment Act*, 2007 with respect to their respective transitional or takeover payments on the headings of salary up to December 19, 2017, pay for leave days accrued, pending public holidays worked and not paid, pending off-days worked and not paid, due leave travelling allowance, severance payment and less due statutory deductions, and, as offered by the respondent along the lines of respective letters dated December 19, 2017 so that any outstanding payments due be paid to concerned claimants by August 1, 2022 and failing, interest to run thereon at Court rates from the date of filing the suit till full payment.

    2. The amount in order (1) above be computed by the parties and be included as part of the final decree flowing from this judgment.

    3. The declaration that for avoidance of doubt there was no termination on account of redundancy but there was transfer of enterprise or business from the respondent to the new owner or manager of the hotel who took over the employees by way of translation or absorption so that all the rights and obligations arising from the employment moved to the new employer as the employees generally retained the employment conditions which they had prior to their translation or absorption by the new management or owner of the hotel.

    4. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 24TH JUNE, 2022.

BYRAM ONGAYA

JUDGE