



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2341 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

DANIEL OTIENO OGONJO.....1<sup>ST</sup> CLAIMANT

TITUS CARLSHAMEL MALUKI.....2<sup>ND</sup> CLAIMANT

PAUL NYOYOTHA MUKOYA.....3<sup>RD</sup> CLAIMANT

**VERSUS**

**PENDULUM ENTERTAINMENT LIMITED T/A TREEHOUSE CLUB.....RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim dated the 22<sup>nd</sup> day of November 2017 and filed in Court on the 23<sup>rd</sup> November 2017, the Claimants claim the following from the Respondent, Pendulum Entertainment Ltd;

*a. For the 1<sup>st</sup> Claimant Daniel Otieno Ogonjo*

*i. Underpayment Kshs.110,000/=*

*ii. Overtime Payment Kshs.110,250/=*

*iii. Annual leave (1 month) Kshs.35,000/=*

*iv. Notice Pay (1 month) Kshs.35,000/=*

*v. Damages for unfair termination Kshs.420,000/=*

*vi. House Allowance Kshs.36,750/=*

TOTAL Kshs.784,350

*b. For the 2<sup>nd</sup> Claimant Titus Carlmashel Maluki*

*i. Payment for 2 weeks suspension Kshs.20,000/=*

*ii. Notice Pay Kshs.40,000/=*

*iii. Damages for the wrongful termination Kshs.480,000/=*

*iv. Overtime payment Kshs.126,000/=*

TOTAL Kshs.686,000/=

c. For the 3<sup>rd</sup> Claimant

i. Payment for 2 weeks suspension Kshs.17,500/=

ii. Notice Pay Kshs.35,000/=

iii. Damages for wrongful termination Kshs.420,000/=

iv. Overtime Payment Kshs.110,250/=

TOTAL Kshs.582,750

v. Costs of the claim

2. The claim proceeded as an undefended cause. The Court directed the Claimants to proceed by way of witness affidavits and written submissions.

3. The 1<sup>st</sup> Claimant, **Daniel Otieno Ogonjo** deposed that he was offered employment as a bartender by the Respondent through an oral contract. That he was neither given a written contract of employment nor an appointment letter. That they agreed on a monthly salary of Kshs.35,000/= per month. That two weeks after he had started working, the Respondent unilaterally altered his terms of service. That by the new terms he was to be paid Kshs.1,200/= for every working day.

4. That he worked for four days in a week- Wednesday, Thursday, Friday and Saturday at Treehouse Club as a Bartender. That on average he worked between 1500 hrs-0100hrs on Wednesdays and Thursdays and 1500hrs-0700hrs on Fridays and Saturdays, thus working overtime. That he was never paid for working overtime. That on the 28<sup>th</sup> of January, 2017, the Respondent informed him of a meeting which was to take place on the 30<sup>th</sup> of January 2017 which he had to attend.

5. That at the meeting with the Respondent's officials he was handed a termination letter in which the Respondent terminated his employment on account of redundancy. That he was never informed in advance of any redundancy. In addition, he was never consulted on any negotiations in order to avoid or mitigate job loss on account of redundancy.

6. That he was never informed of the criterion that was used to terminate his employment on account of redundancy. That the procedure set out in the Employment Act was never adhered to thus making the purported redundancy an illegal/wrongful termination.

7. That the Respondent's claim that the Company could not afford his salary is false as the Respondent had recently hired a cashier, a manager and two bartenders. That as a result of the termination, he has suffered undue economic hardship. That consequently he has sought legal redress through the firm of Nchogu, Omwanza and Nyasimi Advocates who then sent a demand letter to the Respondent seeking for damages for wrongful termination, underpayment, overtime pay, annual leave and house allowance. He adopted the claim, witness statements, the list and bundle of documents as part of his evidence in chief.

8. The 2<sup>nd</sup> Claimant, **Titus Carlshamel Maluki** deposed that he was offered a job on the 16<sup>th</sup> of July 2016 through an oral contract. That he was neither given a written contract of employment nor an appointment letter. That by their oral agreement, the Respondent agreed to pay him a daily wage of Kshs.1,200/=. That he worked on the same terms for the remainder of July 2016 and on 1<sup>st</sup> August 2016, the Respondent informed him that he was now officially on payroll and would be earning a monthly salary of Kshs.40,000/=. That he was issued with itemised pay slips.

9. That he worked for four days in a week – Wednesday, Thursday, Friday and Saturday at Tree house club as a Bartender. That on average he worked between 1500hrs- 0100 hrs on Wednesdays and Thursdays and 1500 hrs-0700 hrs on Fridays and Saturdays; thus working on overtime. That he was never paid overtime. That on the 26<sup>th</sup> of January 2017, he was issued with a suspension letter informing him of his suspension pending disciplinary investigation.

10. That the Respondent's letter informed him that he would be on suspension for two weeks and would be paid wages for the two weeks. That the allegations against him were that a computer belonging to the Respondent had been stolen on Monday 23<sup>rd</sup> January, 2017 and that the theft was occasioned as a result of negligence on his part. He deposed that he did not work on Mondays and was not on duty on the day that the laptop was allegedly stolen.

11. That on February 2017, he received a letter from the Respondent informing him that he had been cleared of any wrongdoing in the theft investigations and that he did not attend the disciplinary hearing that was scheduled on the same day.

12. That on the same day the Respondent issued him with a notice of termination which stated that owing to declining revenue, the Respondent could no longer sustain operation costs and pay his salary. That he was never informed in advance of any impending redundancy. That in addition he was never consulted of any negotiations to avoid or mitigate job loss on account of redundancy.

13. That the procedure that is set out in the Employment Act was never adhered to thus making the purported redundancy an illegal/wrongful termination. That the Respondent's claim that the Company could not afford to pay his salary was false as the Respondent had recently hired a cashier, a manager and two bar tenders. That he was never given one month's notice pay. That he was terminated without due process.

14. The 3<sup>rd</sup> Claimant, **Paul Nyorothe Mukoya** deposed that on the 2<sup>nd</sup> of July 2016, he was offered employment as a Bartender by the Respondent through an oral contract. That he was neither given a written contract of employment nor an employment letter. That they agreed on a monthly salary of Kshs.35,000/= per month. That two weeks after he had started working the Respondent altered his terms of service stated and he would be paid Kshs.1,200 for every working day.

15. That he was then issued with a payroll number 006/P/012 and started receiving a monthly salary of Kshs.35,000/= in December 2016. That he worked for four days in a week- Wednesday, Thursday, Friday and Saturday at Treehouse Club, thus working overtime. That he was never paid for working overtime.

16. That on the 30<sup>th</sup> of January 2017, he was issued with a suspension letter informing him of his suspension pending disciplinary investigations. That the Respondent's letter informed him that he would be on suspension for two weeks and that he would be paid wages for the two weeks when he would be on suspension. That the allegations against him were that a computer belonging to the Respondent had been stolen on Monday 23<sup>rd</sup> January, 2017 and that the theft was occasioned as a result of negligence on his part.

17. That he did not work on Mondays and therefore was not on duty on the day that the computer was allegedly stolen. That on the 9<sup>th</sup> February 2017, he received a letter from the Respondent informing him that he had been cleared of any wrongdoing in the theft investigation and that he did not need to attend the disciplinary hearing that was scheduled on the same day.

18. That on the same day, the Respondent issued him with a notice of termination which stated that owing to declining revenue the Respondent could no longer sustain operation costs and pay his salary. That he was never informed in advance of any impending redundancy. In addition, he was never consulted on any negotiations to avoid or mitigate job loss on account of redundancy.

19. That the procedure set out in the Employment Act was never adhered to thus making the purported redundancy an illegal/wrongful termination. That the Respondent's claim that the company could not afford to pay salary is false as the Respondent had recently hired a cashier, a manager and two bartenders. That he was never given one month's pay notice. He stated that his employment was unfairly terminated.

#### **The Claimants' submissions**

20. The Claimants submitted that their employment was terminated on the basis that the Respondent's revenue was dwindling. There was no fault on their part. That this makes the termination a redundancy. That the Respondent failed to follow the appropriate procedure as provided under the law. The Claimants submitted that section 40 of the Employment Act 2007 on redundancy was not adhered to. The Claimants were not given notice of their termination on account of redundancy nor were they consulted on the alternative duties. The Claimants were never provided with any criteria that would be used to select them for the purported redundancy.

21. That the entire process was flawed and thus the Claimants were greatly disadvantaged by the termination of their employment. The Claimants relied on the decision in **Faiza Mayabi v First Community Bank Limited (2019) eKLR** to buttress the argument that section 40(f) envisages that notice should be issued before there is termination. They argue that the Claimants' testimony that they were not accorded due process was not challenged.

22. The Claimants further submitted that there was no redundancy situation. That the Respondent did not explain the validity of the termination. That there were no audited accounts to show that it was not making profits. The Claimant relied on the case of **Francis Kiplagat Kirui v Jade Petroleum Ltd (2014) eKLR**, where Radido J held that "*the Respondent did not even attempt to prove that it had financial challenges. It sought to rely on mere depositions without concrete evidence such as financial statements or audited accounts. The court therefore reaches the conclusion the Respondent has failed to prove redundancy as a valid and fair reason to terminate the services of the Claimant. The termination was substantively unfair.*" The Claimants argued that the Respondent did not prove to court that they were making losses. That there was therefore no valid reason for the termination.

23. The Claimants argued that the termination was unfair. That the Respondent frustrated the Claimants by subjecting them to unfair labour practices in the terms of unjustified suspensions. That the termination was cruel. They prayed for 12 months maximum compensation.

24. The Claimants also prayed for notice pay and averred that the Respondent dismissed the Claimants without first issuing one month's notice or payment in lieu thereof before terminating their employment.

25. The 1<sup>st</sup> Claimant averred that he was underpaid as the Respondent withheld a cumulative sum of Kshs.110,000 which was not challenged. The 1<sup>st</sup> Claimant also submits that he was not paid house allowance which ought to have been paid at the rate of 15% of the basic salary of Kshs.40,000. That these were not challenged by the Respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimants also submitted that they were not paid for the 2 weeks they were on suspension yet payment was promised in the suspension letters. That there was no evidence that payment was made. They pray that the withheld salaries be granted as remuneration protected by the law.

26. The Claimants averred that they were subjected to work overtime and were never compensated for the same. The Claimants were also underpaid and not given leave days' pay. They urged the court to award the prayers as per the tabulations at paragraph 28 of the claim. They also prayed for costs of the claim.

#### **Determination**

27. Having considered the pleadings, evidence raised in the affidavits, submissions and authorities cited by the Claimants, the following issues arise for determination:

- i. Whether an employment relationship existed between the Claimants and the Respondent.
- ii. Whether the termination of the Claimants' employment by the Respondent was wrongful, unfair and unlawful.
- iii. Whether the Claimants are entitled to the reliefs sought.

#### **Whether an employee-employer relationship existed between the Claimants and the Respondent**

28. The Claimants in their pleadings and evidence averred that they were employed by the Respondent, Pendulum Entertainment Ltd. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants deposed that they were offered employment as bartender by the Respondent through oral contracts. That they were neither given written contracts of employment nor appointment letters. The 3<sup>rd</sup> Claimant deposed that on the 2<sup>nd</sup> of July 2016, he was offered employment as a Bartender by the Respondent through oral contract. That he was neither given a written contract of employment nor an employment letter.

29. The Claimants all attached their termination and suspension letters as proof of their employment with the Respondent.

30. The Claimants relied on the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre and Another (2018) eKLR** where the Court held that:

*“The Claimant must establish all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”*

31. The Claimants also relied on the case of **Herman Hangarwa Shidakwa v Armati Security Solutions Limited (2019) eKLR**, where the Court observed that where the Respondent had failed to enter an appearance or file a defence despite being served with summons, the Claimant had proved his employment with the Respondent through bank statements, which fact was not contested by the Respondent.

32. In the instant case, which is an undefended claim, the Claimants have established existence of employment relationship with the Respondent through copies of letters of termination, letters of suspension and payslip.

#### **Whether the termination of the Claimants' employment by the Respondent wrongful, unfair and unlawful**

33. The Claimants averred that the Respondent did not adhere to due process whilst dismissing them from work. They contend that the procedure for redundancy provided for under section 40 of the Employment Act 2007 was not complied with. The Claimants deposed that the Respondent was not facing any redundancy situation as it recruited a manager, a cashier and two bartenders immediately after terminating the contracts of the Claimants. And further that the Respondent had no audited accounts to show that it was not making profits and the notice contemplated under the Act was not given.

34. The Claimants also relied on Section 40(1) of the Employment Act which enacts that, an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions

**a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy:**

**b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**

**c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**

**d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable The Employment Act, 2007 47 upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**

**e. the employer has where leave is due to an employee who is declared redundant , paid off the leave in cash;**

**f. the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**

**g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.**

35. The Claimants have however not prayed for redundancy. They have prayed for unfair termination. I would agree with them that the manner in which their employment was terminated does not disclose a redundancy but an unfair termination without valid reason and without compliance with either the provisions of Section 40 of the Act in respect of redundancy or Section 41 and 43 in respect of procedure and proof of valid reasons for termination.

36. I thus find that the employment of all the Claimants were terminated unfairly.

## Reliefs Sought

### i. Compensation for unfair termination

37. Having found their termination is unfair, the Claimants are entitled to compensation under this head. Given that the Claimants had barely worked for one year prior to the termination and the fact they did not in any way contribute to the termination, 3 months' compensation would in the circumstances be a reasonable compensation. For the **1<sup>st</sup> Claimant, Daniel Otieno Ogonjo** there was no payslip that shows how much he was earning. There is, however, a deposition that he was earning Kshs.35,000/= which was later adjusted to Kshs.1,200 per day and that he worked for 4 days a week, though it is not explained how the money used to be paid and why specifically no itemised payslip was provided. In **Civil Appeal No 234 of 2013, Freight Time Limited and Rosabell Wambui Munene**, the Court of Appeal construed the compensation under Section 49(1)(c) of the Employment Act 2007 as a special damage which is specifically pleaded and proved to the satisfaction of the court. Having pleaded and attested in his affidavit to earning Kshs.1,200 per day for 4 days a week. I will use the sum of Kshs.19,200 as his monthly salary and award him **Kshs.57,600** as compensation equivalent to 3 months' salary.

38. For the **2<sup>nd</sup> Claimant Titus Carlshamel Mukoya** there is a copy of payslip showing he earned a gross salary of Kshs.40,000. He is awarded  $40,000 \times 3 =$  **Kshs.120,000**.

39. The **3<sup>rd</sup> Claimant, Paul Nyorotha Mukoya** equally provided no payslips nor an explanation as to how used to be paid. Like the **1<sup>st</sup> Claimant**, the **3<sup>rd</sup> Claimant** pleaded and deposed in his witness affidavit that he was paid Kshs.1,200 a day for 4 days a week, I thus award him too **Kshs.57,600** as compensation like the **1<sup>st</sup> Claimant**.

### ii. Notice Pay

40. The **1<sup>st</sup> Claimant** is awarded **Kshs.19,200** as pay in lieu of notice. The **2<sup>nd</sup> Claimant – Kshs.40,000** and the **3<sup>rd</sup> Claimant – Kshs.19,200**. The notices are in accordance with Section 35 of the Employment Act as read with Section 49(1) of the Act.

### iii. Underpayment, overtime pay, leave days

41. In the submissions, it is stated that there is an assertion that **1<sup>st</sup> Claimant** was underpaid as the Respondent withheld a salary of Kshs.110,000 from his salary. What the **1<sup>st</sup> Claimant** however, deposed on is overtime. There is no mention of underpayment in the affidavit. The claim for underpayment therefore fails.

42. In relation to overtime, the **1<sup>st</sup> Claimant** at Paragraph 8 simply states the hours he used to work without stating what were the working hours as per his contract. It is therefore not possible to deduce how he arrives at the conclusion that he was working overtime. At any rate, there is no material document tabled demonstrating that the **1<sup>st</sup> Claimant** ever claimed the underpayment and overtime from the Respondent. The **1<sup>st</sup> Claimant** in the memorandum and the submissions prayed for house allowance but made no mention of the same in the deposition. The prayer therefore fails.

43. The **2<sup>nd</sup> and 3<sup>rd</sup> Claimant's** produced termination letters indicating that they were to be paid during suspension. The **2<sup>nd</sup> Claimant** is awarded **Kshs.20,000** whilst the **3<sup>rd</sup> Claimant** is awarded **Kshs.9,600**. There was no evidence led as to overtime dues accrued. The prayers therefore fail.

44. On the prayer for annual leave, both the **1<sup>st</sup> and 3<sup>rd</sup> Claimants** worked for 7 months. They are therefore entitled to leave for 7 months at 1.75 per month being 12.25 days at Kshs.1,200 per day. I award each of them **Kshs.14,700** on account of annual leave.

45. For the **2<sup>nd</sup> Claimant**, he worked for 6 months. At a salary of Kshs.40,000 per month, he is entitled to 10.5 days leave at **Kshs.16,154**.

## Conclusion

46. Having found as above, judgment be and is hereby entered for each of the Claimants against the Respondent as follows: –

### **1<sup>st</sup> Claimant – Daniel Otieno Ogonjo**

i. Annual leave..... Kshs.14,700.00

ii. Notice pay..... Kshs.19,200.00

iii. Compensation.....Kshs.57,600.00

**Total Award.....Kshs.91,500.00**

### **2<sup>nd</sup> Claimant – Titus Carlshamel Maluki**

- i. Payment for 2 weeks' suspension..... Kshs.20,000.00
- ii. Notice pay..... Kshs.40,000.00
- iii. Compensation..... Kshs.120,000.00
- iv. Annual leave..... Kshs.16,154.00

**Total Award..... Kshs.196,154.00**

**3<sup>rd</sup> Claimant – Paul Nyorotha Mukoya**

- i. Payment for 2 weeks' suspension..... Kshs.9,600.00
- ii. Notice pay..... Kshs.19,200.00
- iii. Compensation..... Kshs.57,600.00
- iv. Annual leave..... Kshs.14,700.00

**Total Award..... Kshs.101,100.00**

47. The Respondent shall pay the Claimants' costs for this suit.

48. Interest shall accrue from date of judgment till payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF AUGUST 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**