



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO 809 OF 2017**

**NAHASHON MAINA.....1<sup>ST</sup> CLAIMANT**

**PHILIP MAINA.....2<sup>ND</sup> CLAIMANT**

**PENNIDICTORS MBUVI.....3<sup>RD</sup> CLAIMANT**

**LUCY ATIENO.....4<sup>TH</sup> CLAIMANT**

**JOSHUA KIBISU.....5<sup>TH</sup> CLAIMANT**

**HARACE ONGILI.....6<sup>TH</sup> CLAIMANT**

**VERSUS**

**CENTRAL PARK HOTEL.....RESPONDENT**

**JUDGMENT**

1. The Claimants were all employees of the Respondent engaged on diverse dates and in various capacities. Although the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Claimants filed sworn statements stating that their employment contracts were concluded orally, they had earlier on in the Statement of Claim indicated that they were issued with letters of appointment. Indeed, Claimants 1, 2 and 3 furnished the court with copies of their letters of appointment in the list of documents that they filed.
2. Notwithstanding these discrepancies, the Respondent admits that the Claimants were all employed by it. Further, all the Claimants filed copies of their pay slips and dismissal letters issued by the Respondent. It is therefore clear that the Claimants and Respondent had an employer-employee relationship.
3. The Claimants allege that they were all terminated on 14<sup>th</sup> February 2017. This fact is conceded by the Respondent. It is therefore not in doubt that the parties' employer-employee relationship came to a close on 14<sup>th</sup> February 2017.
4. When the matter came up for trial, the parties entered a consent that the cause be determined on the basis of the documents filed in court. Being the desire of the parties and in recognition of rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 the court permitted this mode of disposal of the matter.
5. The cause was filed by the 1<sup>st</sup> Claimant on his own behalf and on behalf of the other 5 Claimants. However, the other Claimants subsequently filed their respective sworn statements.
6. In the Statement of Claim, the Claimants assert that they were wrongfully terminated. They were not subjected to the required procedure preceding a lawful termination under the Employment Act.
7. They allege that they neither received termination notices nor were they subjected to any disciplinary process as required by section 41 of the Employment Act. Finally, they assert that they were not paid their terminal dues.
8. They therefore pray for the court to find their termination as unlawful. They also pray that the court orders that they be compensated to the tune of Ksh 2,067,322.47 as more particularly set out in the Statement of Claim.
9. The Respondent filed a Statement of Reply to the claim. Vide it, the Respondent asserts that the Claimants were validly relieved of their duties and paid all their dues. That the Claimants had all engaged in various work malpractices that warranted their summary dismissal. That

the Claimants admitted these maladies.

10. That in lieu of taking the harsher route of pressing criminal charges against them, the Respondent took the path of terminating the Claimants. That prior to their termination, the Claimants were all heard and they wrote to the Respondent acknowledging their mistakes.

11. The dispute in this matter therefore relates to: whether the termination by the Respondent of the various contracts of service of the Claimants was fair within the meaning of the Employment Act; and whether the Claimants are entitled to the reliefs that they seek in the cause.

12. From the record, there is no suggestion that the Respondent complied with the requirements of section 41 of the Employment Act before terminating the Claimants. The law requires that an employer who seeks to terminate the services of an employee on grounds of gross misconduct, poor performance or physical incapacity notifies such employee of the proposed grounds for termination. This should be done in a language that the employee understands. The employer must then grant the affected employee an opportunity to present evidence and call witnesses in his/her defense. The employee also has to be notified of the right to be accompanied by a co-employee or a union representative in the deliberations. And finally, the law implies that the employer must give the employee a reasoned decision after taking into account the representations made by the employee.

13. Although the Respondent asserts that it followed the procedure above, it does appear to the court that it did not. In a bid to fortify its assertion that it complied with the aforesaid requirements, the Respondent relies on two documents marked as "CP-1". These are alleged letters by the 1<sup>st</sup> and 5<sup>th</sup> Respondents purportedly owning up to the maladies they allegedly were guilty of and seeking to be pardoned.

14. The court has considered the two documents. First, they are said to relate to the 1<sup>st</sup> and 5<sup>th</sup> Claimants. They cannot therefore be relied upon as evidence against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Claimants. The court cannot rely on the documents to find that these four Claimants were notified of their misconduct in terms of section 41 of the Employment Act. Second, the documents do not mention the name of the 5<sup>th</sup> Claimant at all. How can the court then attribute them to the 5<sup>th</sup> Claimant? Third, although the first of the two documents, mentions Nahashon it is undated and does not indicate the specific charges to which he was responding. It is therefore not possible to rely on it to hold that the 1<sup>st</sup> Claimant was notified of the charges facing him.

15. It is also not clear from the record whether the Claimants were notified of the right to be accompanied by a co-employee of their choice or their trade union representative if any. Similarly, there is no record of the disciplinary session proceedings. In the premises, it is not possible for the court to find that the Claimants were accorded a hearing as contemplated under section 41 of the Employment Act.

16. The grounds for termination are also not proved. Although the Respondent asserts that the Claimants were guilty of various malpractices, no evidence is tendered in this respect. The only evidence relied on in this respect is "CP-1" which mentions the name of the 1<sup>st</sup> Claimant only. Even then, it does not tell us which specific malpractice the 1<sup>st</sup> Claimant was guilty of apart from the statement that he had been unfaithful. Importantly, the document is undated and it is impossible to link it to the events relating to the dismissal in question.

17. The Respondent has relied heavily on the provisions of section 44 of the Employment Act to justify the termination. On the basis of this section the Respondent suggests that the terminations were on account of gross misconduct. But as shown above, there was no cogent evidence of gross misconduct on the part of the Claimants.

18. In its statement, the Respondent asserts that it heard the Claimants. But no evidence of such hearings is provided. It also claims in its submissions that it held several meetings with the Claimants. However, no evidence of such meetings is provided.

19. The court therefore finds that the Claimants have proved that they were terminated unfairly. From the record, the grounds to warrant the termination are not brought out. The procedure leading to the termination was flawed. Conversely, the Respondent has failed to justify the terminations. Consequently, the termination of the Claimants by the Respondent is declared as unfair and unlawful.

20. Having so found, the next question is to determine whether the Claimants are entitled to any remedies. I will start by examining the effect of the discharges some of the Claimants are said to have executed releasing the Respondent from liability.

21. From the evidence tendered, Claimants 2, 3, 4 and 6 entered some form of negotiations with the Respondent to settle the dispute after the Claimants' advocates issued the Respondent with a demand to admit liability and pay the Claimants their dues. The record shows that these four Claimants agreed to withdraw their respective claims against some agreed payments. They executed two documents that are common to all of them: the withdrawal of claim form; and the staff clearance form. As the content of the documents are the same, I will use only one set to illustrate the points I want to address. I will use the forms signed by Horace Ongili.

22. In the claim withdrawal form, the employee acknowledges that he had agreed with the Respondent that his terminal dues would be Ksh. 19,871. He then says that he will have no claim against the Respondent "*after the cheque of Ksh. 19,871 is paid.*" This is a common denominator in all the claim withdrawal forms produced by the Respondent as exhibits.

23. In the staff clearance form, the employee confirms that the sum of Ksh. 19,871 comprises his final dues and he has no claim against the Respondent outside this amount. However, the clearance form does not say that the amount had been paid. Rather it was agreed to be paid.

24. In all the other clearance forms, the settlements are expressed in similar manner. They are couched in futuristic language such as "your final dues of Ksh 10,420/= will be deposited in your February 2017 payroll account; amount to be paid through cheque; amount of Ksh. 10,254/= to be paid as final dues; and approved amount to be paid- Ksh. 1987 will be paid through cheque."

25. The two forms were signed by the four Claimants on diverse dates between 2<sup>nd</sup> March 2017 and 30<sup>th</sup> March 2017. What is important to note is that the forms suggest that the employees agreed to close the matter upon receiving their respective cheques. There is not a single one of them who signed as having received the payments. The court therefore finds that the release of the Respondent by the Claimants was conditional on payment of the agreed amounts.

26. The question that must then be answered is whether there was payment to the four Claimants of the agreed sums to enable crystallization of the settlement. The claim was filed on 2<sup>nd</sup> May 2017. In the statement instituting the claim, the Claimants assert that the Respondent had not paid them their dues as at 2<sup>nd</sup> May 2017, the date of filing the cause.

27. In its response, the Respondent asserts that a settlement was reached with the Claimants and they were all paid. However, the Respondent does not provide evidence of the alleged payments.

28. If payments had been made as asserted by the Respondent, information of such payment would be in its custody. This is because it is the Respondent which made the payments if at all.

29. In terms of section 112 of the Evidence Act, the burden of proof of these facts lies with the Respondent. This is because the details of the alleged payments will ordinarily be within the special knowledge and control of the Respondent. Therefore, to the extent that the Respondent has not provided these records to demonstrate the alleged payments, the court cannot hold that payment was made.

30. In **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR**, the Court of Appeal said the following of documents purporting to clear a party from liability in a suit:-

*‘We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.’*

31. My understanding of the position of the Court of Appeal on this issue is that the fact of existence of a document purporting to discharge a party from liability in a cause is not of itself foolproof evidence of the issue having been closed. The court has to interrogate if the document was executed voluntarily. And to this I add that the court has to interrogate whether the terms of the agreement were fulfilled where this is contested. It is from this position that I look at the current matter.

32. To the extent that the claim withdrawal and clearance forms only signified an agreement that the matter would be deemed as settled once the Claimants received cheques in settlement of the amounts mentioned in the instruments, they are not evidence of payment and discharge but evidence of a conditional settlement having been reached. The condition for crystallization of the settlement was payment of the agreed amounts. And there is no evidence provided by the Respondent that the amounts were in fact paid to the Claimants after they signed these conditional release documents. The court therefore holds that these amounts were not paid.

33. I will then look at what the Claimants must be paid if at all.

a) NAHASHON MAINA

i. The claimant was not issued with notice to terminate in terms of section 35 of the Employment Act. The letter informing the Claimant of his termination is dated 14.2.2012 and it was expressed to take effect the same day. The Claimant is therefore entitled to pay in lieu of notice in terms of section 36 of the Employment Act. The Claimant’s pay slip produced in evidence shows that his gross salary was Ksh. 14,261. This amount is allowed in so far as it represents the one month salary in lieu of notice.

ii. In relation to leave, the Respondent in its letter of termination acknowledged that the Claimant had outstanding 17 leave days. That works to Ksh. 8,081/=. This is also awarded.

iii. The Claimant also claims for days worked in February 2017. These were 13 as he was terminated on 14<sup>th</sup> February 2017. The amount computed pro-rata works to Ksh. 6,180/=. This is awarded.

iv. The Claimant has asked to be paid service pay under section 35 of the Employment Act. However, the Claimant’s pay slip shows that he was a beneficiary of NSSF contributions by the Respondent. Under section 35 of the Employment Act, this does disentitle the Claimant from seeking service pay. Accordingly, this claim is declined.

v. Although the Claimant asks for compensation for public holidays worked, no cogent evidence was availed to show which holidays were in contention. Absent evidence on this, the claim is declined.

vi. The Claimant has asked for compensation equivalent to his gross salary for 12 months as compensation for wrongful termination. Having regard to the fact that the Respondent had no justification for its decision to terminate the Claimant and taking into account the fact that the Claimant was under duty to mitigate his loss but provided no evidence that he had done this, I award damages equivalent to 6 months of the Claimant’s gross salary. This works to Ksh. 85,566/=.

vii. I will also order that the Claimant be issued with a Certificate of Service.

viii. The total due for this Claimant is therefore Ksh. 114,088/=.

b) PHILIP MAINA

i) The claimant was not issued with notice to terminate in terms of section 35 of the Employment Act. The letter informing the Claimant of his termination is dated 14.2.2012 and it was expressed to take effect the same day. The Claimant is therefore entitled to pay in lieu of notice in terms of section 36 of the Employment Act. The Claimant's pay slip produced in evidence shows that his gross salary was Ksh. 14,500. The court orders that the Claimant be paid Ksh. 14,500 being the amount in lieu of notice and which is equivalent to the Claimant's one month's salary.

ii) In relation to leave, the Respondent in its letter of termination acknowledged that the Claimant had outstanding leave for one year and 5 days. That works to Ksh. 16,916/=. This is also awarded.

iii) The Claimant also claims for days worked in February 2017. These were 13 as he was terminated on 14th February 2017. The amount computed pro-rata works to Ksh. 6,283/=. This is awarded.

iv) The Claimant has asked to be paid service pay under section 35 of the Employment Act. However, the Claimant's pay slip shows that he was a beneficiary of NSSF contributions by the Respondent. Under section 35 of the Employment Act, this payment disentitles the Claimant from asking for service pay. Accordingly, this claim is declined.

v) Although the Claimant asks for compensation for public holidays worked, no cogent evidence was availed to show which holidays were in contention. Absent evidence on this, the claim is declined.

vi) The Claimant has asked for compensation equivalent to his gross salary for 12 months as compensation for wrongful termination. Having regard to the fact that the Respondent had no justification for its decision to terminate the Claimant and taking into account that the Claimant was under duty to mitigate his loss but provided no evidence that he had done this, I award him damages equivalent to 6 months of his gross salary. This works to Ksh. 87000/=.

vii) I will also order that the Claimant be issued with a Certificate of Service.

viii) The total due for this Claimant is therefore Ksh. 124,699/=.

c) PENNIDICTORS MBUVI

i) The claimant was not issued with notice to terminate in terms of section 35 of the Employment Act. The letter informing the Claimant of her termination is dated 14.2.2012 and it was expressed to take effect the same day. The Claimant is therefore entitled to pay in lieu of notice in terms of section 36 of the Employment Act. The Claimant's pay slip produced in evidence shows that her gross salary was Ksh. 17,000/=. This amount is allowed.

ii) In relation to leave, the Respondent in its letter of termination acknowledged that the Claimant had outstanding leave of 8 days inclusive of off days not taken. That works to Ksh. 4,533/=. This is also awarded.

iii) The Claimant also claims for days worked in February 2017. These were 13 as she was terminated on 14th February 2017. The amount computed pro-rata works to Ksh. 7,366/=. This is awarded.

iv) The Claimant has asked to be paid service pay under section 35 of the Employment Act. However, the Claimant's pay slip shows that she was a beneficiary of NSSF contributions by the Respondent. Under section 35 of the Employment Act, this disentitles the Claimant from asking for service pay. Accordingly, this claim is declined.

v) The Claimant has asked for compensation equivalent to her gross salary for 12 months as compensation for wrongful termination. Having regard to the fact that the Respondent had no justification for its decision to terminate the Claimant and taking into account that the Claimant was under duty to mitigate her loss but provided no evidence that she had done this, I award damages equivalent to 6 months of the Claimant's gross salary. This works to Ksh. 102,000/=.

vi) I will also order that the Claimant be issued with a Certificate of Service.

vii) The total due for this Claimant is therefore Ksh. 130,899/=.

d) HORACE ONGILI

i) The claimant was not issued with notice to terminate in terms of section 35 of the Employment Act. The letter informing the Claimant of his termination is dated 14.2.2012 and it was expressed to take effect the same day. The Claimant is therefore entitled to pay in lieu of notice in terms of section 36 of the Employment Act. The Claimant's pay slip produced in evidence shows that his gross salary was Ksh. 14,177. This amount is allowed as a representation of salary in lieu of notice.

ii) In relation to leave, the Respondent in its letter of termination acknowledged that the Claimant had outstanding leave days of one year and 5 days. That works to Ksh. 16,539/=. This is also awarded.

iii) The Claimant also claims for days worked in February 2017. These were 13 as he was terminated on 14<sup>th</sup> February 2017. The amount computed pro-rata works to Ksh. 6,143/=. This is awarded.

iv) The Claimant has asked to be paid service pay under section 35 of the Employment Act. However, the Claimant's pay slip shows that he was a beneficiary of NSSF contributions by the Respondent. Under section 35 of the Employment Act, this disentitles the Claimant from asking for service pay. Accordingly, this claim is declined.

v) Although the Claimant asks for compensation for public holidays worked, no cogent evidence was availed to show which holidays were in contention. Absent evidence on this, the claim is declined.

vi) The Claimant has asked for compensation equivalent to his gross salary for 12 months as compensation for wrongful termination. Having regard to the fact that the Respondent had no justification for its decision to terminate the Claimant and taking into account that the Claimant was under duty to mitigate his loss but provided no evidence that he had done this, I award damages equivalent to 6 months of the Claimant's gross salary. This works to Ksh. 85,062/=-.

vii) I will also order that the Claimant be issued with a Certificate of Service.

viii) The total due for this Claimant is therefore Ksh. 121,921 /=-.

e) LUCY ATIENO

i) The claimant was not issued with notice to terminate in terms of section 35 of the Employment Act. The letter informing the Claimant of her termination is dated 14.2.2012 and it was expressed to take effect the same day. The Claimant is therefore entitled to pay in lieu of notice in terms of section 36 of the Employment Act.

ii) The Claimant's pay slip was not produced. However, her evidence was that her gross salary was Ksh. 17,000/=-. The Claimant was a cook just like the 3<sup>rd</sup> Claimant who was earning Ksh. 17,000/=-. Being in the same job group, I believe the Claimant's evidence that she was earning Ksh. 17,000/=-. This amount is awarded as pay in lieu of notice.

iii) In relation to leave, the Respondent in its letter of termination acknowledged that the Claimant had outstanding leave of 7 days. That works to Ksh. 3,966/=-. This is also awarded.

iv) The Claimant also claims for days worked in February 2017. These were 13 as she was terminated on 14<sup>th</sup> February 2017. The amount computed pro-rata works to Ksh. 7,366/=-. This is awarded.

v) The Claimant has asked to be paid service pay under section 35 of the Employment Act. However, the evidence on record tends towards showing that the Respondent was paying NSSF for its employees. All the Claimants so far have this element included in their pay slips. I am inclined to believe that the Claimant was not treated differentially in this respect. Accordingly, this claim is declined.

vi) Although the Claimant asks for compensation for public holidays worked, no cogent evidence was availed to show which holidays were in contention. Absent evidence on this, the claim is declined.

vii) The Claimant has asked for compensation equivalent to her gross salary for 12 months as compensation for wrongful termination. Having regard to the fact that the Respondent had no justification for its decision to terminate the Claimant and taking into account that the Claimant was under duty to mitigate her loss but provided no evidence that she had done this, I award damages equivalent to 6 months of the Claimant's gross salary. This works to Ksh. 102,000/=-.

viii) I will also order that the Claimant be issued with a Certificate of Service.

ix) The total due for this Claimant is therefore Ksh. 130,332/=-.

f) JOSHUA KIBISU

i) The claimant was not issued with notice to terminate in terms of section 35 of the Employment Act. The letter informing the Claimant of his termination is dated 14.2.2012 and it was expressed to take effect the same day. The Claimant is therefore entitled to pay in lieu of notice in terms of section 36 of the Employment Act. The Claimant's pay slip produced in evidence shows that his gross salary was Ksh. 40,000. This amount is awarded to cover pay in lieu of notice.

ii) In relation to leave, the Respondent in its letter of termination acknowledged that the Claimant had outstanding leave of 11 days inclusive of off days not taken That works to Ksh. 14,667/=-. This is also awarded.

iii) The Claimant also claims for days worked in February 2017. These were 13 as he was terminated on 14<sup>th</sup> February 2017. The amount computed pro-rata works to Ksh. 17,333/=-. This is awarded.

iv) The Claimant has asked to be paid service pay under section 35 of the Employment Act. However, the Claimant's pay slip shows that he was a beneficiary of NSSF contributions by the Respondent. Under section 35 of the Employment Act,

this disentitles the Claimant from asking for service pay. Accordingly, this claim is declined.

v) Although the Claimant asks for compensation for public holidays worked, no cogent evidence was availed to show which holidays were in contention. Absent evidence on this, the claim is declined.

vi) The Claimant has asked for compensation equivalent to his gross salary for 12 months as compensation for wrongful termination. Having regard to the fact that the Respondent had no justification for its decision to terminate the Claimant and taking into account that the Claimant was under duty to mitigate his loss but provided no evidence that he had done this, I award damages equivalent to 6 months of the Claimant's gross salary. This works to Ksh. 240,000/=.

vii) I will also order that the Claimant be issued with a Certificate of Service.

viii) The total due for this Claimant is therefore Ksh. 312,000/=.

34. The Claimants are also awarded interest on the amounts awarded at court rates. They are also awarded costs of the claim. The awards shall be subject to the statutory deductions sanctioned by law.

### 35. Summary of the Award

**i) The termination of the Claimants by the Respondent is declared unlawful for want of substantive grounds and procedural fairness.**

**ii) The Claimants are awarded a consolidated sum of Ksh 933,939/=.**

**iii) The Claimants to be issued with Certificates of Service.**

**iv) The Claimants are awarded interest of the amounts awarded to run at court rates.**

**v) The Claimants are awarded costs of the claim.**

**vi) The award shall be subject to the applicable statutory deductions.**

**DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF SEPTEMBER, 2021**

**B O M MANANI**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B O M MANANI**

**JUDGE**