



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 763 OF 2016

KENYA HOTELS AND ALLIED WORKERS UNION.....APPLICANT

VERSUS

MADA HOLDINGS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant union brought this suit on 5.5.2016 on behalf of 20 former employees of the respondent (hereinafter called the grievants). The claimant alleged that the grievant's services were unfairly terminated on account of redundancy and prayed for the following reliefs:

- a. Declaration that the redundancy was unfair.
- b. Reinstatement of the grievants to their former employment on permanent basis.
- c. In the alternative the grievants be paid their terminal dues plus compensation for unfair termination.
- d. Costs and interest.

2. The respondent filed defence on 6.9.2016 contending that she had engaged the grievant on seasonal contract or daily basis. She stated that when she gave them fresh contracts to sign in February 2016, they refused to sign and voluntarily left employment and carried away the contract forms. She therefore averred that the grievants are not entitled to the reliefs sought and prayed for the suit to be dismissed with costs.

3. The suit was heard on 26.9.2019 when Mr. Sabastian Muindi Matheka testified as CW1 on behalf of the claimant but the respondent did not call any witness. However, after the hearing both parties filed written submissions.

Evidence

4. CW1 adopted his written statement dated 26.4.2016 as his evidence in chief. In brief, he stated that he was employed by the respondent on 22.2.2008 as a plumber under annual contracts upto the beginning of February 2016 when the contract was reduced to 3 months. He contended that before joining the claimant union, his terms and conditions of service were determined by an existing collective agreement (CBA) signed by the Kenya Hotel Keepers and Caterers Association but the respondent paid him below the salary set in said CBA.

5. He further stated that on 1.2.2016, he was dismissed from employment and reported to the claimant union on 2.2.2016. He stated that the other grievants case was similar to his and on 3.2.2016 they visited the respondent in the company of the claimant and thereafter lodged a dispute at the labour office. However the dispute was not resolved and they brought this suit.

6. In cross-examination, CW1 contended that he worked as a plumber for 7 years and 11 months under a one year contract which was renewed every time it expired. He admitted that on 1.2.2016 he and his colleagues were given fresh contracts for 3 months but they refused to sign and demanded audience because the term had been reduced to 3 months. However, they were chased away and told that there were many people seeking for jobs. He denied that they were dismissed for misconduct.

Claimant's submissions

7. The claimant submitted that the respondent terminated the grievants' services unfairly on account of redundancy. She contended that the procedure under section 40 of the Act was not complied with and the reason for the termination was not valid. She therefore contended that the respondent did not serve the grievants or the union and the labour office with a redundancy notice.

8. She further contended that the purported change of terms of service by the respondent was unlawful because she did not consult the grievants first and it breached section 18 of the Hotels and Catering Trades Order. She therefore prayed for judgment in terms of the reliefs set out in the claim.

Respondent's submission

9. The respondent submitted that the change of the grievants contract term to three (3) months was lawful and did not amount to redundancy or termination of the grievants' services as alleged by the claimant union. She contended that it is the grievants who terminated their services when they deserted their employment protesting the reduction of their contract term. She contended that the change in the contract term to three (3) or six (6) months was not retrospective but for the future contracts after the expiry of the 12 months contract.

10. She further submitted that the grievants' services were not terminated on account of redundancy and clarified that they expired after effluxion of time. She relied on **Margaret A. Ochieng v National Water and Pipeline Corporation [2014] eKLR** where the court held that renewal of a fixed contract is not automatic.

11. She further submitted that the Regulation of the Wages and Conditions of Employment Act was repealed in 2007 and as such section 18 thereof does not apply to this case. In conclusion, she maintained that the grievants services were not terminated by her but it is them who refused to sign new contracts after the expiry of their earlier contracts. She therefore prayed for the suit to be dismissed with costs because the grievants are not entitled to the reliefs sought.

Issues for determination

12. There is no dispute that all the grievants were employed by the respondent under twelve (12) months contracts which were renewed consecutively until January 2016. There is further no dispute that after the expiry of the last contract of twelve (12) months the grievants were given new contracts for three (3) or six (6) months but they declined to sign the same. The issues for determination are:

- a. Whether the grievants services were unfairly terminated by the respondent or they deserted.
- b. Whether reliefs sought should be granted.

Unfair termination or desertion

13. The Claimant's case is that the grievants were unfairly terminated when they protested against an offer of three (3) months contracts in February 2016. She relied on **section 18 of the Regulation of Wages and Conditions of Employment (Hotels and Catering Trade) Order** to argue that the change of terms of employment for the grievants to three (3) months fixed term without consulting them amounted to unfair termination. On the other hand, the respondents' case is that after the grievants' contracts expired she offered new contracts to them for 3 or 6 months but they declined and deserted work.

14. I have carefully considered the evidence and the submissions presented by the parties. Cw1 admitted in evidence that their twelve (12) months contract lapsed and the employer gave all the grievants contracts of three (3) months but they declined and sought audience with the management. However, they were instead chased away by security and went to report the matter to their union who brought this suit. The said evidence was not rebutted by the respondent who did not call any evidence. I therefore find and hold that the grievants never deserted their job but they were indeed dismissed by the respondent after declining to sign contracts of three (3) or six (6) months.

15. Section 18 of the Regulation of Wages and Conditions of Employment (Hotels and Catering Trades) Order provides that:

“(1) No person shall be employed on temporary or seasonal terms of employment for a period exceeding six (6) months.

(2) An employee on temporary or seasonal terms of employment shall be deemed to have been converted to regular terms of employment on completion of six months' continuous service.”

16. The foregoing provision is part of the Regulations under the Repealed Regulation of Wages and Conditions of Employment Act which were preserved when the Act was repealed by the Labour Institutions Act in 2007. It follows therefore that the grievants herein having worked continuously for more than 6 months before February 2016, it is obvious that by dint of section 18 of the said Regulations their seasonal employment had converted to regular terms of employment.

17. Also in view of section 18 above, the alleged expiry of their contract and renewal for three (3) months was neither here nor there because they were no longer temporary or seasonal employees. After the conversion under section 18 of the said Regulations the issue of expiry of seasonal contract did not arise and the grievants were entitled to decline further seasonal contracts and continue serving as if they never signed any seasonal contract. Consequently, I find that chasing the grievants away for declining to sign new contracts for three (3) or Six (6) months term amounted to terminating their regular terms contract under section 18 of the said Regulations.

18. Under Section 45 (2) of the Employment Act, termination of employees contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reason(s) and that fair procedure was followed. In this case the respondent did not call any witness to rebut the claimant's evidence that she terminated the grievants employment without any justification and without following a fair procedure. I therefore return that the termination of the grievants services were unfairly done by the respondent in February 2016.

Reliefs

19. In view of the foregoing I make a declaration that the grievants' services were unfairly terminated by the respondent. Accordingly the grievants are entitled to salary in lieu of notice and compensation for unfair termination under section 49 of the Act. Section 20 of the said Regulation provides that employee in the industry who serves continuously for ten (10) years is entitled to three (3) months notice, above five (5) years service is entitled to two (2) months notice while below five (5) years is entitled to one month notice. The grievants herein served between one (1) year and ten(10) years and I award them salary in lieu of notice commensurate to their length of service. I also award them salary compensation for the unfair termination considering years of service and the fact that they were dismissed for no misconduct.

20. The claim for severance is dismissed because the grievants were not declared redundant

21. The claim for leave has not been rebutted by leave records. However I award the claimants only one year leave because under section 9(1) (a) of the said Regulations leave may not be accumulate except through mutual agreement between the employer and employee. Each grievant is therefore, awarded 24 days.

22. The claim for tools allowance is not substantiated by particulars and evidence and it is dismissed.

24. The claim for under payment has also not been substantiated by evidence and particulars and is dismissed.

Conclusion

25. In view of the declaration made herein above and the finding that the grievants are entitled to the reliefs sought, I now enter judgment for each grievant in the following terms:-

Salary in lieu of notice

1. Douglas Mwanzia Musyoka Kshs. 17,003 salary per month for 4 years

Notice of one monthKshs. 17,003

Compensation 6 months Kshs. 102,018

Leave 24 daysKshs 15,695.07

TOTAL Kshs. 134,716.07

2. Sebastian Muindi Matheka Kshs.17,004 salary per month for 7 years

Notice of two monthsKshs. 34008

Compensation 8 months.....Kshs. 136032

Leave 24 days.....Kshs 15,696.07

TOTAL Kshs. 168,732

3. Felix Mboya Omieri Kshs.17,004 salary per month for 5 years

Notice of 2 monthsKshs. 34008

Compensation 6 months Kshs. 102024

Leave 24 days.....Kshs 15,696.07

TOTAL Kshs. 151,728

4. Joash Odiyo Kshs. 17,004 salary per month for 7 years

Notice of 2 monthsKshs. 34008

Compensation 8 months Kshs. 136032

Leave 24 daysKshs 15,696.00

TOTAL Kshs. 168,732

5. Hamilitone Ayula Shioso Kshs. 12,598 salary per month for 5 years

Notice of 2 monthsKshs. 25196

Compensation 6 months..... Kshs. 75588

Leave 24 daysKshs.11628.92

TOTAL Kshs. 112412.92

6. James Njoroge Kamande Kshs. 17,004 salary per months for 10 years

Notice of 3 monthsKshs. 51012

Compensation 10 monthsKshs. 170,004

Leave 24 daysKshs.15696.00

TOTAL..... Kshs. 236712.00

7. Ophilus Tito Mulwa Kshs. 12, 598 salary per month for 2 years

Notice of one monthKshs. 12598

Compensation 3 monthsKshs. 37794

Leave 24 days.....Kshs.11,628.92

TOTAL Kshs. 62020.92

8. Geoffrey W Kimathi Kshs. 17,004 salary per month for 10 years

Notice of 3 months.....Kshs 51012

Compensation 10 monthsKshs. 170,004

Leave 24 days.....Kshs.15696.00

TOTAL Kshs.236,712.00

9. Eric Okudo Were Kshs. 20,500 salary per month for 4 years

Notice of one monthKshs 20,500

Compensation 6 monthsKshs. 123,000

Leave 24 days.....Kshs.18,923.07

TOTAL Kshs.162423.07

10. James Njoroge Karanja Kshs. 527 salary per month for 4 years

Notice of one month.....Kshs 13676

Compensation 6 months.....Kshs. 82056

Leave 24 daysKshs.12624

TOTAL Kshs.108,356.00

11. Urbanus Mutisya Musau Kshs.16,300 salary per month for 10 years

Notice of 3 monthsKshs 48900

Compensation 10 monthsKshs. 163000
Leave 24 days.....Kshs.15046.15
TOTAL Kshs.194,346.15

12. Mathew Maweu Kshs. 17,004 salary per month for 7 years

Notice of 2 months.....Kshs 34008
Compensation 8 months.....Kshs. 136032
Leave 24 days.....Kshs.15696
TOTAL Kshs.168732

13. Felix Oduor Ochieng Kshs.10,540 salary per month for 1 year

Notice of one monthsKshs 10,540.00
Compensation 2 monthsKshs. 21080.00
Leave 24 daysKshs.9729.23
TOTAL Kshs.41349.23

14. Robert Imai Omojong Kshs. 17,004 salary per month for 4 years

Notice of one monthKshs 17004
Compensation 6 monthsKshs. 102,024
Leave 24 daysKshs.15696
TOTAL Kshs.134724

15. Eric Oyoo Kshs. 16,300 salary per month for 8 years

Notice of two monthsKshs. 32600
Compensation 8 monthsKshs. 130400
Leave 24 daysKshs.15096.15
TOTAL Kshs.178046.15

16. Peter Kikusyi Mbatha Kshs.22,000 salary per month for 8 years

Notice of two monthsKshs 44000
Compensation 8 monthsKshs. 176000
Leave 24 daysKshs.20307.69
TOTAL Kshs.240307.69

17. Abrahamim Ochieng Kshs. 17,004 salary per month for 4 years

Notice of one month.....Kshs 17004
Compensation 6 monthsKshs. 102024
Leave 24 daysKshs.15696

TOTAL Kshs.134724

18. Nicholas M Ngolia Kshs. 12,598 salary per month for 8 years

Notice of 2 months.....Kshs 25196

Compensation 6 months.....Kshs. 100784

Leave 24 daysKshs.11628.92

TOTAL Kshs.137608.92

19. John Ngugi Kiarie Kshs.17,004 salary per month for 7 years

Notice of 2 months.....Kshs 34008

Compensation 8 monthsKshs. 136032

Leave 24 days.....Kshs.15696

TOTAL Kshs.168732

20. Daniel Musyoka Kimeu Kshs. 17,004 per month for 5 years

Notice of 2 months.....Kshs 34008

Compensation 6 monthsKshs. 102024

Leave 24 daysKshs.15696

TOTALKshs.151,728

The awards are less statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated, signed and delivered in open court at Nairobi this 6th day of March, 2020.

ONESMUS N. MAKAU

JUDGE