



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 256 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

ANOOP GARG.....1ST RESPONDENT

UMAKANT J. DAVE.....2ND RESPONDENT

DAVES CATERING.....3RD RESPONDENT

JUDGMENT

The claimant herein is a trade union registered in Kenya to represent employees engaged in hotel and catering services. By its memorandum of claim dated 25th and filed on 26th February 2015, and which was amended on 13th February 2018, the claimant alleges that its members who were employees of the respondents were unprocedurally declared redundant on 14th February 2015 and their terminal dues withheld.

That on 31st January 2015, the respondent was served with notice by the management of Nairobi Gymkhana Club, declining to renew their catering service contract by 14th February 2015.

That with this turn of events the respondent unfortunately was forced to declare the claimant's members redundant unprocedurally.

That on 5th February 2015 the grievants informed the claimant, proceeded to indulge the respondent on 9th February 2015. That the respondent agreed with the claimant that her accountant tabulates terminal dues of the 23 grievants on 11th February 2015 and this would facilitate payment on or before 14th February 2015.

That the respondent has since declined to make payment of the terminal dues and has resorted to a blame game to circumvent justice to the grievants.

The computation of the terminal dues as filed by the claimant for each of the grievants is as follows –

- 1..... Robert Museveni Nyarombe..... 48,837.20
- 2..... Antony M. Isika..... 75,947.90
- 3..... Paul M. Kamunzyu..... 42,542.90
- 4..... Stephen K. Butich..... 83,484.40
- 5..... Dominic M.Musyoka..... 47,430.20
- 6..... Dennis N Okemwa..... 78,022.90
- 7..... Joseph M. Mulimu..... 54,748.00
- 8..... Kenneth Kizieyil..... 63,410.80

9.... William M Mwaka.....	89,279.00
10... Elijah Ngunjiri.....	54,748.00
11... Thomas M Muchende.....	55,135.60
12... Jairus M. Chasia.....	52,958.10
13... Mutau Mutui.....	54,748.00
14... John K. Kioko.....	47,068.40
15... Henry Moi Maranje.....	64,360.10
16... Samson K. Mwanzia.....	142,043.40
17... Robert M. Luvutse.....	71,020.30
18... Fidelis M. Kioko.....	71,020.30
19... Bennington Kitunga Tuti.....	53,929.50
20... Eric M. Ndenga.....	43,476.40
21... George M. Nzau.....	64,622.00
22... Oliver Mutesh.....	49,119.80
23... Bonface O. Muranga.....	61,860.40

The computation is composed of one month's salary in lieu of notice, annual leave, public holidays, severance pay, service gratuity (where applicable) and overtime.

The 1st and 2nd respondents are proprietors of Daves Catering, the 3rd respondent and employer of the grievants on whose behalf the claimant filed this claim. They filed their memorandum of response dated 24th April 2015 but did not file a response to the amended memorandum of claim.

In the response the respondents aver that there were implied terms of the respective contracts of employment between the grievants and the Respondent that the grievants would;

- a. *Act towards the Respondent in their course of employment with all good faith, fidelity, loyalty and or not to the detriment of or in competition with the Respondent's interests;*
- b. *Obeys the reasonable and lawful instructions of the Respondent;*
- c. *Act with all due skill, prudence, care and competence required of them as employees of the Respondent;*
- d. *Not neglect their duties to the Respondent;*
- e. *Not to act in any manner as to damage or destroy the trust and confidence between them and the Respondent or to expose the Respondent to financial and or any loss.*

The Respondents aver that contrary to the grievants' obligations and responsibilities set out above, the grievants acted in breach of their contractual obligations to the Respondent by inter alia;

- a) *Absconding from duty.*
- b) *Failing to serve the Respondent diligently and faithfully.*
- c) *Neglecting their duties without notice to the Respondent.*

They pray that the claim be dismissed with costs.

The claim was disposed of by way of written submissions. However, only the claimant filed submissions.

Determination

I have considered the pleadings and submissions on record. The issues in dispute are whether the grievants were declared redundant as alleged by the claimant or absconded duty as averred by the respondents. The other issue is whether the grievants are entitled to the remedies sought on their behalf by the claimant.

The respondents did not deny the specific averments in the amended memorandum of claim or in the memorandum of claim as originally filed. The response contains matters which are not in the claim, and which are not demonstrated in the defence.

The averment that all the employees were never terminated and that they deliberately refused to report to work is not supported by evidence or by demonstration through action taken by the respondents following the alleged refusal to perform work.

This court has on numerous occasions stated that an employer must demonstrate that an employee absconded duty. In the case of **Simon Mbithi Mbane v Inter Security Services Limited (2019) eKLR**, Abuodha J. stated –

“...an allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”

Similarly, in **Joseph Nzioka v Siment Coatings Limited (2017) eKLR**, Nduma J. stated –

“... dismissal on account of absconding duty must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee claiming upon such employee to show cause why his services should not be terminated on account of absconding duties.”

In the instant suit, the respondent avers that all its 22 employees deliberately refused to report to work without any proof of the same. This is contrary to the letter from its advocates dated 11th February 2015 which is reproduced below –

“Mr. Anup

C/o Daves Catering

Nairobi Gymkhana

P.O. Box 11800-00100

NAIROBI

Dear Sir,

RE: RESTAURANT EMPLOYEES

We have been instructed by your partner Mr. Umakant J. Dave, to write to you as follows;

That you and Mr. Umakant J. Dave jointly entered into a partnership in the name and style of Daves Catering and you assumed full management of the restaurant including the hiring, termination and payment of the employees working in the restaurant while your partner, Mr. Umakant, assumed the management of the Bandas including the hiring, termination and payment of the employees operating in the Bandas.

That as you are fully aware pursuant to the letter dated 24 January 2015, the Nairobi Gymkhana declined to renew Daves Catering contract which effectively has an impact on the employees whose contracts are now in jeopardy.*

The purpose of this letter is to call upon you to manage and or settle any claims that may arise from the employees working in the restaurant in view of the non-renewal of Daves Catering contract by the Club all of whom were personally hired by you without the involvement of your partner Mr. Umakant whatsoever.

Please note that in the event of any claim being made against Daves Catering by your restaurant employees then your partner Mr. Umakant shall be entitled to full indemnity from you against any claims that he may be exposed to as a result of your employees' action.

Yours faithfully

For: BONIFACE MASINDE AND COMPANY ADVOCATES

SIGNED

B. MASINDE”

This is further contrary to the notice from Nairobi Gymkhana dated 31st January 2015 as reproduced below –

NOTICE

THERE HAS BEEN CHANGES IN THE CATERING ARRANGEMENT EFFECTIVE 14TH FEBRUARY 2015.

THE BANDA WILE BE UNDER SAM RAD CATERING LTD AND THE RESIDENTIAL RESTAURANT WILL BE UNDER CAFÉ MACCHIATO.

SIGNED

Swaran S. Sodi

HON SECRETARY

31ST JANUARY 2015”

All the grievants have appended copies of their employment identify cards at Appendix C2 page 13 of the claim. The respondent did not deny that any of them were not its employees. The respondents further did not dispute the tabulation by the claimant.

Redundancy is defined at Section 2 of the Employment Act as –

“redundancy” means 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 or occupation and loss of employment;

The termination of employment due to refusal by a Landlord to renew a lease where the employer does not provide alternative premises results in redundancy of the employees whose services become superfluous. The grievants were thus declared redundant.

Section 40 of the Employment Act provides for the procedure of redundancy which the respondents did not comply with. In the circumstances the redundancy of the grievants was unprocedural.

Section 40 further provides for terminal dues of redundant employees to include leave due to be paid in cash, notice in addition to notification, and severance pay.

An employee declared redundant is also entitled to terminal dues such as public holidays and overtime earned and not paid for.

The grievants have claimed pay in lieu of notice, pro rata leave (where due), public holidays worked, severance pay, overtime and certificate of service.

For Fidelis Kioko, Eric M. Ndenga, George M. Nzau and Oliver Mutesh, the claimant has in addition prayed for service gratuity in the sum of Kshs.6,500 for each of them. This was however not prayed for in the claim and must fail.

I find and declare that the grievants lost their jobs as a result of redundancy and that the respondents did not comply with the procedure set out under the Employment Act. They are thus entitled to terminal benefits as prayed which I accordingly award each of them as follows –

1. Robert Museveni Nyarombe

i.) 1 month’s pay in lieu of notice.....	15,000.00
ii.)..... Pro - rated leave 2014/15	10,000.00
iii.)..... 15 public holidays	7,500.00
iv.)..... Severance pay	7,500.00
v.)..... Overtime	<u>8,837.20</u>

Total Kshs.48,837.20

2. Antony M. Isika

i.) 1 month's pay in lieu of notice.....	19,000.00
ii.)..... Pending leave 2013/15	26,755.25
iii.)..... 15 public holidays	9,500.00
iv.)..... Severance pay	9,500.00
v.) Overtime.....	<u>11,192.70</u>

Total Kshs.75,947.90

3. Paul M. Kamunzyu

i.) 1 month's pay in lieu of notice.....	12,500.00
ii.)..... Pro - rated leave 2014/15	9,375.00
iii.)..... 15 public holidays	6,666.00
iv.)..... Severance pay	6,250.00
v.) Overtime.....	<u>7,751.90</u>

Total Kshs.42,542.90

4. Stephen K. Butich

i.) 1 month's pay in lieu of notice.....	17,000.00
ii.)..... 2 years annual leave	34,000.00
iii.)..... 20 public holidays	11,333.30
iv.)..... Severance pay	8,500.00
v.) Overtime.....	<u>12,651.10</u>

Total Kshs.83,484.40

5. Dominic M. Musyoka

i.) 1 month's pay in lieu of notice.....	12,000.00
ii.)..... 1 year annual leave	12,000.00
iii.)..... 20 public holidays	8,000.00
iv.)..... Severance pay	6,500.00
v.) Overtime.....	<u>8,930.00</u>

Total Kshs.47,430.20

6. Dennis N Okemwa

i.) 1 month's pay in lieu of notice.....	22,000.00
ii.)..... Pro - rated leave 2014/15	22,000.00
iii.)..... 15 public holidays	7,333.00
iv.)..... Severance pay	11,000.00

v.) Overtime..... 15,689.90

Total Kshs.78,022.90

7. Joseph M. Mulimu

i.) 1 month's pay in lieu of notice..... 12,500.00

ii.)..... 1 year annual leave 12,500.00

iii.)..... 20 public holidays 8,333.30

iv.)..... Severance pay 12,500.00

v.) Overtime..... 8,914.70

Total Kshs.54,748.00

8. Kenneth Kizieyi

i.) 1 month's pay in lieu of notice..... 16,000.00

ii.)..... 1 year annual leave 2014 16,000.00

iii.)..... 15 public holidays 8,000.00

iv.)..... Severance pay 8,000.00

v.) Overtime..... 11,410.80

Total Kshs.63,410.80

9. William M Mwaka

i.) 1 month's pay in lieu of notice..... 16,500.00

ii.)..... 2 annual leave 33,000.00

iii.)..... 18 public holidays 11,000.00

iv.)..... Severance pay 16,500.00

v.) Overtime..... 12,279.00

Total Kshs.89,279.00

10. Elijah Ngunjiri

i.) 1 month's pay in lieu of notice..... 12,500.00

ii.)..... 1 year annual leave 12,500.00

iii.)..... 20 public holidays 8,333.30

iv.)..... Severance pay 12,500.00

v.) Overtime..... 8,914.70

Total Kshs.54,748.00

11. Thomas M Muchende

i.) 1 month's pay in lieu of notice..... 12,500.00

ii.)..... Annual leave 2014/15	12,500.00
iii.)..... 20 public holidays	8,333.30
iv.)..... Severance pay	12,500.00
v.) Overtime.....	<u>9,302.32</u>

Total Kshs.55,135.60

12. Jairus M. Chasia

i.) 1 month's pay in lieu of notice.....	12,000.00
ii.)..... Annual leave 2014/15	12,000.00
iii.)..... 21 public holidays	8,400.00
iv.)..... Severance pay	12,000.00
v.) Overtime.....	<u>8,558.10</u>

Total Kshs.52,958.10

13. Mitau Mutui

i.). 1 month's pay in lieu of notice.....	12,500.00
ii.) 1 year annual leave.....	12,500.00
iii.)..... 20 public holidays	8,333.30
iv.)..... Severance pay	12,500.00
v.). Overtime.....	<u>8,914.70</u>

Total Kshs.54,748.00

14. John K. Kioko

i.) 1 month's pay in lieu of notice.....	12,500.00
ii.)..... 11 months' pro -rated leave	11,458.30
iii.)..... 20 public holidays	8,333.30
iv.)..... Severance pay	6,250.00
v.) Overtime.....	<u>8,527.10</u>

Total Kshs.47,068.40

15. Henry Moi Maranje

i.) 1 month's pay in lieu of notice.....	12,500.00
ii.)..... Pending leave 2013/15	22,500.00
iii.)..... 15 public holidays	8,333.30
iv.)..... Severance pay	12,500.00
v.) Overtime.....	<u>8,527.10</u>

Total Kshs.64,360.10

16. Samson K. Mwanzia

i.) 1 month's pay in lieu of notice.....	40,000.00
ii.)..... Pro - rated leave 2014/15	33,333.30
iii.)..... 15 public holidays	22,666.60
iv.)..... Severance pay	20,000.00
v.) Overtime.....	<u>26,046.50</u>

Total Kshs.142,043.40

17. Robert M. Luvutse

i.) 1 month's pay in lieu of notice.....	13,000
ii.)..... Pending annual leave 2013/15	24,916
iii.)..... Pending public holidays	17,333
iv.)..... Severance pay	6,500
v.) Overtime.....	<u>9,271.30</u>

Total Kshs.71,020.30

18. Fidelis M. Kioko

i.) 1 month's pay in lieu of notice.....	13,000.00
ii.)..... Pending leave 2013/15	24,916.00
iii.)..... 15 public holidays	17,333.00
iv.)..... Severance pay	6,250.00
v.) Overtime.....	<u>9,271.30</u>

Total Kshs.71,020.30

19. Bennington Kitunga Tuti

i.)..... 1 month's pay in lieu of notice	13,000.00
ii.)..... 1 year annual leave	16,250.00
iii.)..... 20 public holidays	12,133.30
iv.)..... Severance pay	12,500.00
v.)..... Overtime	<u>6,046.50</u>

Total Kshs.53,929.50

20. Eric M. Ndenga

i.)..... 1 month's pay in lieu of notice	13,000.00
ii.)..... Annual/pro – rated leave	14,000.00

iii.).....	15 public holidays	4,333.00
iv.).....	Severance pay	6,500.00
v.).....	Overtime	<u>5,643.40</u>

Total Kshs.43,476.40

21. George M. Nzau

i.)	1 month's pay in lieu of notice.....	13,000.00
ii.)	Annual/pro - rated leave.....	18,416.60
iii.).....	Public holidays	13,000.00
iv.).....	Severance pay	6,500.00
v.)	Overtime.....	<u>13,705.40</u>

Total Kshs.64,622.00

22. Oliver Mutesh

i.)	1 month's pay in lieu of notice.....	13,000.00
ii.).....	Annual/pro - rated leave	14,000.00
iii.).....	Public holidays	4,333.30
iv.).....	Severance pay	6,500.00
v.)	Overtime.....	<u>11,286.80</u>

Total Kshs.49,119.80

23. Bonface O. Muranga

i.)	1 month's pay in lieu of notice.....	12,000
ii.).....	Annual leave 2014/15	12,000
iii.).....	Public holidays	8,000
iv.).....	Severance pay	12,000
v.)	Overtime.....	<u>17,860.40</u>

Total Kshs.61,860.40

All the grievants are in addition entitled to certificate of service in terms provided for under Section 51 of the Employment Act.

The respondents shall further pay the claimant's costs which I assess at Kshs.50,000 to cover the reasonable expenses for filing, service and other associated expenses of the suit.

The decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2020

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 15th March 2020 and subsequent directions of 21st 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, the 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 the 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