



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 129 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS AND ALLIED WORKERS UNION

CLAIMANT

VERSUS

PRAYING MANTIS LIMITED (OCTOPUS CLUB)

RESPONDENT

JUDGMENT

Vide Memorandum of Claim dated 10th May 2013 and filed on 24th May 2013, the Claimant a trade union registered under the Labour Relations Act, 2007, to represent unionisable employees engaged in Hospitality Industry (Hotels) filed this claim on behalf of its members Willis Owiti Oswago 1st Grievant, Nicholas Okeyo Kitoto 2nd Grievant, Francis Owino Ouma 3rd Grievant, Job Kapelo Elim 4th Grievant and Alex Eboy Bulimo 5th Grievant. It is the averment of the Claimant that the Grievants were employees of the Respondent in various capacities as cook, barman and waiter and were engaged on various dates between 1997 and 2013. That their employment was terminated unfairly on various dates between June and July 2012 on invalid grounds but which the Claimant suspects to be their trade union affiliation/activities.

The Claimant avers that the grievants were underpaid, NSSF deducted from their salaries but not remitted and that they were not allowed to take annual leave contrary to the provisions of Regulation of Wages (Hotel and Catering Trades) Order.

The Claimant avers that it filed a trade dispute following the unfair termination of the employment of the Grievants but parties failed to agree during conciliation before Joel Omweno of Kisumu Labour Office, who was appointed as Conciliator.

The Claimant prayed for reinstatement of the grievants or in the alternative payment of their terminal dues tabulated as follows –

Grievant	Willis Owiti Oswago	Nicholas Kitoto Okeyo	Francis Owino Ouma	Job Elim Kapelo	Alex Bulimu Eboy
Notice	11,114.25	11,114.25	11,114.25	11,114.25	11,114.25
Leave	26,674.20	21,487.55	26,674.20	11,119.60	2,963.80
Days Worked	4,816.20	4,816.20	4,816.20	9,632.35	5,927.60
Holidays	16,679.30	11,119.60	16,679.20	11,119.60	2,471.00
Gratuity	23,356.90	11,114.25	16,671.40	11,114.25	
12 months compensation	133,371.00	133,371.00	133,371.00	133,371.00	133,371.00

Underpayment	238,113.00	218,799.00	227,313.00	203,170.50	32,457.00
TOTAL	514,124.85	411,821.85	437,750.75	398,786.65	188,304.65

The Claimant further sought costs of the suit.

The Respondent filed a response to the Memorandum of Claim in which it admits engaging the Grievants. The Respondent however denies underpaying the grievants, failing to give them annual leave or failing to remit NSSF for the grievants. The Respondent denies terminating the services of the grievants without assigning reason thereof or that the grievants were terminated due to union affiliation or activities and avers that the grievants left work on their own volition without giving notice of resignation after the Respondent discovered theft of stock and overcharging customers by the employees.

The Respondent avers that the Claimant reported a dispute without any effort to discuss the issue with the Respondent and denies that any meeting took place before the Conciliator, which aborted due to the failure of the representative of the Respondent to appear before the Conciliator for the meetings.

The Respondent further avers that the claim is defective due to the fact that the Memorandum of Claim is not signed and the accompanying verifying affidavit is not commissioned. Further, that the claim is frivolous and should be referred back to the Conciliator for further negotiations.

The Respondent raised a preliminary objection in the response

which was argued in court and disposed of. At the hearing the Claimant called all five grievants while the Respondent called one witness. Parties thereafter filed and exchanged submissions.

CW1 FRANCIS OWINO OUMA testified that he was employed by the Respondent as a Waiter on 10th February 2009. He was promoted to Barman and later to Manager. His salary as a waiter was Kshs.3,000. As Barman he was also paid Kshs.3,000 while as Manager he was paid Kshs.4,800. He testified that he joined the Claimant union on 16th July 2011.

CW1 testified that his relationship with the Respondent was not good because the workers were mistreated. Their salaries were deducted for lateness, food and tea. He testified that his employment record was good. That he never failed to report for duty.

CW1 testified that his employment was terminated on 13th June 2012 on grounds that he was negligent during the day yet he was on duty in the evening. He testified that he knew the reason for termination was because he joined the union. That he was not given an opportunity to defend himself.

CW1 testified that he never took leave during the period he worked for the Respondent, and worked from Monday to Monday without off days. He reported for work at 6 pm and left the following day between 9 am and 12 pm (noon). That he also worked on all public holidays without payment.

He testified that he was deducted NSSF and NHIF but he same was never remitted.

CW1 testified that after termination he reported to the union. A union official accompanied him to see the employer who refused to hear them. The Claimant union thereafter reported a trade dispute to the Minister for Labour who appointed a Conciliator. The Respondent attended conciliation meeting. The parties did not agree and the Conciliator issued a certificate of disagreement following which the Claimant filed the instant dispute in court.

CW1 testified prayed for his salary for May 2012 which he was not paid at the statutory rate of Kshs.11,114.25. He further prayed for notice Kshs.11,114.25, annual leave Kshs.16,679, service gratuity Kshs.16,671, 12 months salary as compensation Kshs.133,371 and underpayments Kshs.227,317. His total claim was thus Kshs.448,865. He stated that he had annexed the tabulation of his claim as annexure 3 and 4 of claim.

Under cross examination CW1 testified that his employer was

Praying Mantis Limited/Octopus which operated a club and hotel. He denied that any of his colleagues diluted alcohol.

He testified that Willis, Kitoto and himself left work the same day. Job left earlier and Alex left later. He testified that they were all dismissed and denied that they absconded duty. He testified that his letter of termination was titled "warning". He referred to a copy in the court file.

CW1 testified that at the Labour Office the Respondent paid Kshs.50,000 and Kshs.94,000. He testified that the letter from Labour Office does not refer to unpaid salary for May 2013. He testified that he was Manager for 6 months and as Manager he was paid Kshs.20,000 per month.

Under re-examination he testified that he was paid salary of an ordinary employee when he was Manager. He stated he had never seen documents at exhibit 1 – 5 of Respondent's bundle before the date he saw them in court. He testified that the certificate of disagreement is dated 13th February 2013.

CW2 JOB KAPELO ETIM testified that he was employed by the Respondent on 8th April 2010 as a Waiter at a salary of Kshs.3,000 per month. He earned the same salary until he left employment. He testified that he joined the union in 2011.

He testified that they reported to work at 6 pm and worked until

9 or 10 am the following morning. He stated his relationship with the employer was not good. That salaries of workers were deducted arbitrarily. Their salaries were also deducted at Kshs.1,000 for not wearing aprons even though the aprons were not enough for all staff.

CW2 testified that his employment was terminated on 1st May 2012 because the employer discovered he had joined the union. That after receiving check off forms from the union, the employer started witch hunting. That the reason given for his termination was fighting the employer son which he denied. He testified that the employer's son wanted to play pool without paying. He refused to allow this because he would be charged for the same. When he took the sticks and tokens for pool and walked out, the employer's son created a scene. That evening he was told not to report for work.

CW2 testified that the employees worked from Monday to Monday with no leave, off days or public holidays. That there was no overtime, or extra pay.

He testified that after termination he reported to the union who attempted to discuss with the employer but was not allowed to enter the premises. The union thereafter filed the dispute with the Minister for Labour and a Conciliator was appointed. That no agreement was reached during conciliation.

He stated he was claiming notice Kshs.11,114.25, leave Kshs.19,265.70, public holidays Kshs.11,119.65, days worked Kshs.9,632, gratuity Kshs.11,114.25, 12 months compensation Kshs.113,337.1, underpayments Kshs.203,170.05 and days worked and not paid for December.

He testified that he was never given a hearing before termination. He referred to the tabulation of his terminal benefits at exhibit 3 to 7 of claim.

Under cross examination CW2 testified that he was not issued with a letter of appointment or payslip. He testified that he was a member of the union and produced receipts to that effect. He stated he had no union membership card or membership number.

He stated he was terminated on 1st May 2012 and produced a copy of the termination letter. According to the letter the reason for termination was that he took bottles of soda from outside the Club which is not permitted and when asked by Stephen why he did so, he hit Stephen on the head with a bottle causing him harm. He denied hitting Stephen with a bottle. He testified that he ran away when the Manager's son wanted to hit him. That after reporting back he was issued with the letter of termination. He denied that he escaped from work because he beat up and injured someone with a bottle of soda or that he stole soda.

He testified that he did not collect the money deposited at the Labour Office by the Respondent because they did not know how the tabulation was done.

He testified that he worked overtime. That the hotel opened at 6 pm and closed between 3 am and 4 am when the last customer left. That his working hours were up to morning the following day as agreed with the employer.

CW3 ALEX EBOY BULIMU testified that he was employed as a barman at a salary of Kshs.3,000 per month on 2nd March 2012. That he never earned the full Kshs.3,000 as the salary was always deducted. That at one time Shs.500 was deducted from everyone's salary because a cat ate food. Another time the toilet was dirty and the employer recovered Kshs.100. He testified that he joined the union on 5th April 2012 and his employment was terminated on 16th July 2012. He testified that the reason for his termination was shortage of stock as three beers and one soda were unaccounted for when stock was taken. He testified that on that day, although he was supposed to work at the night club, he was sent to work at the public bar where nobody handed over to him. He testified that the correct procedure should have been that he was given his own stock which he would account for at the end of his shift but on that day nobody handed over to him. His claim is Kshs.11,114.25 for notice, Kshs.2,963.80 for leave, Kshs.5,927.60 for days worked, Kshs.2,471 for public holidays, Kshs.32,457 for underpayments and Kshs.113,337.1 for compensation.

Under cross examination he testified that he was not given a letter of appointment or letter of termination. He testified that he did not collect the money deposited at the Labour Office by the Respondent. He testified that he was not paid salary for June 2012.

CW4 WILLIS OWITI OSWAGO adopted his witness statement as his evidence in chief. In the witness statement he states that he was employed as a cook on 4th February 1997 at a salary of Kshs.3,500. At the time of termination he was earning Kshs.4,500.

Like the other grievants he stated that he was a member of the union, that he was subjected to unfair labour practice, worked for 24 hours, had no rest day or public holidays, never took leave and was underpaid.

He states that his employment was terminated on 13th June 2012

on allegations that he purchased bar drinks contrary to company regulations, which he denied. That he was never heard before termination. He prayed for salary for May 2012 Kshs.11,114.25, pay in lieu of notice Kshs.11,114.25, accrued leave Kshs.26,274.20, days worked in June 2012 Kshs.4,816.20, public holidays Kshs.16,679.00, service gratuity Kshs.23,356.90, compensation Kshs.133,371.00 and underpayments Kshs.238,113.00.

CW5 NICHOLAS OKEYO KITO also adopted his witness statement in which he states he was employed on 8th February 2010 as barman and kitchen cashier at a salary of Kshs.3,300, which he earned until his termination on 13th June 2012. That he was subjected to inhuman treatment including assault by the proprietor of the company **William Mctough**. The reason for termination of his employment was that he had facilitated illegal purchase of bar drinks and manipulated stock to fraudulently enrich himself, accusations he denied. He stated he was never given any opportunity to defend himself. He prayed for –

1. *Pay in lieu of Notice Kshs.11,114.25*
2. *Accrued annual leave Kshs.21,487.55*
3. *Days worked for June 2012 Kshs.4,816.20*
4. *Public holidays worked Kshs.11,119.60*
5. *Service gratuity Kshs.11,114.25*
6. *Salary for May 2012 Kshs.11,114.25*
7. *Underpayment Kshs.218,799.00*
8. *Compensation for unfair termination Kshs.133,371.00*

Like other grievants he lamented about his unfair treatment. He states in the witness statement that he worked from 6 pm to 9 am the following day without rest days, leave, public holidays. His shift was later changed to 24 hours followed by off duty for 24 hours.

Respondent's Case

RW1 WILLIAM ROMAN MCTOUGH testified that he operates Praying Mantis Limited which is the managing company of Octopus Club, a members' club. He testified that the club operates for 24 hours. He stated he did not know the claimant union but knew the grievants who were all his former employees whose services were terminated after they absconded duty.

He testified that Alex Eboy was a barman who diluted drinks with water, Francis was a supervisor and was indirectly involved in robbing a customer, an incident that led to the customer's death. Nicholas was a barman who fought a customer and also brought his own drinks to sell at the club. Job was a pool attendant and was fighting. Willis was a cook who brought his own beer to sell at the club. He also stole food. Dominic absconded.

He testified that this matter was reported to the County Labour Officer Hellen Maneno who tabulated the terminal dues on 23rd August 2012. The total amount of Kshs.94,850 was to facilitate withdrawal of complaints to police. He testified that the union did not participate in negotiations at Labour Office.

He denied that employees were overworked. He testified that they worked in shifts, were given holidays and leave. That one shift was 8 hours.

He testified that he was not aware if the grievants collected the money deposited at the Labour Office. That the agreement at Labour Office was binding.

Under cross examination, RW1 stated he does not recall filing a response to the claim. He stated that the warning letters issued to the grievants terminated their services.

RW1 conceded that letters at exhibits 5, 6 and 7 of the claimant's

bundle were letters reporting trade dispute. Exhibit 6 was acceptance of dispute and is dated 27th September 2012. That the person appointed as Conciliator was J. Omweno of Kisumu Labour Office. That exhibit 7 was certificate of disagreement.

RW1 conceded that the letter dated 14th November 2013 annexed to the respondent's document is after the Conciliator issued a Certificate of Disagreement. That the letter dated 3rd December 2013 by Mr. Omweno was written after the dispute had been concluded at the Labour Office as the Certificate of Disagreement is dated 13th February 2013.

He denied underpaying the employees. He conceded that the minimum wage for a cook was Kshs.8,193 yet he paid Kshs.4,800.

He stated that he paid NSSF but did not file proof in court. He stated that he paid leave but had no proof of payment. He conceded that the

tabulation by Hellen Maneno had leave but explained that leave was not paid that particular year.

He stated days worked were never paid because the grievants absconded duty. That public holidays claim is not genuine as in hotel industry they worked on public holidays and gave an alternative day off. That he did not file the documents because nobody asked for them.

Determination

I have considered the pleadings, evidence and submissions by the parties. The issues for determination are whether the employment of the grievants was terminated unfairly and whether the claimant and grievants are entitled to the remedies sought.

The Respondent has made various averments in respect of misconduct by the grievants. The Respondent however did not file any documents in support thereof. All the documents filed by the Respondent are in respect of purported agreements at the Labour Office where the Labour Officer tabulated the entitlement of the grievants as follows –

1. Alex Eboyi Bulimu

Notice 660.00

Leave (7 days) 770.00

Arrears 6,122.00

Total 7,552.00

2. Francis Owino Ouma

Notice 4,800.00

Leave 11,200.00

Salary for May 2012 4,800.00

Salary for 13 days June 2012 2,080.00

Total 22,880.00

3. Nicholas Okeyo Kitoto

Notice 3,300.00

Leave 5,390.00

Salary for May 2012 3,300.00

Salary for 13 days June 2012 1,430.00

Arrears 10,500.00

Total 23,970.00

4. Job Capello Elim

Notice 3,300.00

Leave 4,620.00

Salary for April 2012 3,300.00

Total 11,220.00

5. Nicholas Okeyo Kitoto

Notice 4,500.00

Leave 9,450.00

Salary for May 2012 4,500.00

Salary for 13 days June 2012 1,950.00

Arrears 8,830.00

Total 29,230.00

What is interesting is that all the documents filed by the Respondent were made after the appointed Conciliator Mr. Joel Omweno had issued a Certificate of Disagreement on 13th February 2013. Neither Hellen Maneno nor Joel Omweno, both Labour Officers, were seized of the dispute after 13th February 2013. The documents filed by the Respondent were thus made by persons who had no authority to make any inquiry into the dispute as clearly provided under Section 69 and 73 of the Labour Relations Act which provide as follows –

69. Dispute unresolved after conciliation

A trade dispute is deemed to be unresolved after conciliation if the —

(a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or

(b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.

73. Referral of dispute to Industrial Court

(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.

(2) Notwithstanding the provisions of subsection (1), if a trade dispute —

(a) is one in respect of which a party may call a protected strike or lockout, the dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect of an employment matter or the recognition of a trade union which has not been acceded to by the other party to the dispute; or

(b) is in an essential service, the Minister may, in addition, refer the dispute to the Industrial Court.

(3) A trade dispute may only be referred to the Industrial Court by the authorised representative of an employer, group of employers, employers' organisation or trade union.

The foregoing raise doubt over the authenticity and probative value of the evidence of RW1.

The grievants testified that they were issued with warning letters with remarks “*Your services are terminated.*” They produced the letters in court. The letters do not refer to absconding duty as stated by RW1 in his evidence. RW1 did not refer to any hearing having taken place before termination of employment.

RW1 referred to reports made to the police but did not adduce evidence to prove the same.

Section 41 of the Employment Act is couched in mandatory terms and requires an employer to give reasons for termination and hear the defence of the employee in the presence of either a fellow employee or a union official before deciding to terminate employment. The Section is reproduced below –

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

Section 43 further requires proof of grounds of termination in the following terms –

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

In the Respondent's submissions, it is argued that the grievants were dismissed for absconding duty. I have already stated above that there is no evidence of absconding duty as the letters of termination titled "WARNING ORDER" do not refer to absconding duty. Section 41 is however clear that even termination under section 44(4) requires a hearing before the termination. Section 45(1) prohibits unfair termination of employment while Section 45(2) provides that termination is unfair if the employer fails to prove –

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

From the foregoing it is clear that the termination of the employment of all the grievants was unfair and I declare so.

The termination having been unfair, the grievants are all entitled to pay for all days worked up to date of termination and to pay in lieu of notice as provided in Section 49(1)(a) and (b) of the Employment Act. They are further entitled to compensation in terms of Section 49(1)(c). In awarding compensation, I have taken into account the factors set out in Section 49(4).

The prayers for underpayments succeed as RW1 conceded that he paid less than the statutory minimum wages. Section 48(1) of the Labour Institutions Act provides as follows –

48. Wages Order to constitute minimum terms of conditions of employment

(1) Notwithstanding anything contained in this Act or any other written law?

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

Further, Sections 3(6) and 26 of the Employment Act provide as follows –

3(6) Subject to the provisions of this Act, the terms and conditions of employment set out in this Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms herein set shall be null and void.

26. Basic minimum conditions of employment

(2) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(3) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

The grievants are for the same reason entitled to pay in lieu of leave, public holidays and gratuity/service pay. Gratuity is provided for in Rule 19 of Regulation of Wages (Hotel and Catering Trades) Order while service pay is provided for under Section 35(5) and (6) of the Employment Act.

I have checked the tabulation by the Claimant and find it to accurately represent the sums payable to each grievant. I therefore award each of the grievants the following –

1. Willis Owiti Oswago Kshs.514,125.00
2. Nicholas Okeyo Kitoto Kshs.411,822.00
3. Francis Owino Ouma Kshs.437,751.00
4. Job Kapelo Elim Kshs.398,787.00
5. Alex Eboyi Bulimu Kshs.188,305.00

Kshs.1,950,790.00

The Respondent shall pay Claimant's costs assessed at Kshs.50,000 to cover reasonable expenses and disbursements. The decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 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, 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