



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 799 OF 2015

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

- VERSUS -

CLEMENT NGANGA KAMAU.....1ST RESPONDENT

MID RIVER BAR AND RESTAURANT.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th May, 2019)

JUDGMENT

The claimant trade union filed on 13.05.2015 the memorandum of claim alleging refusal by the respondent to pay terminal dues and accrued rights of Martin Chege Kinuthia, Daniel Maina Mugo, and Carolyne Nekoye Simiyu (the grievants) who had been declared redundant by the respondent

The claimant's case is that the respondents employed the claimants on diverse dates as stated in the memorandum of claim and the claimants worked diligently until 27.11.2014 when they reported on duty and found that the respondents' premises on River Road in Nairobi had been closed.

The claimant prayed for judgment against the respondent for:

- a) The declaration that the decision by the respondent to declare the grievant redundant was unfair and unprocedural.
- b) The grievants be paid by the respondents herein all their accrued terminal dues and be compensated at maximum as per exhibit C5.
- c) Any order the Court deems fit.
- d) Costs in favour of the claimant.

The evidence shows that the 1st respondent being the proprietor of the 2nd respondent was served at his home at Githurai Kimbo Estate, off Thika Road. Despite service the claimants failed to enter appearance or to file a response or to attend at the hearing.

The claimant relied on the documents as filed and Martin Chege Kinuthia (CW) testified to support the grievant's cases.

The Court has considered the evidence on record, the pleadings and the documents. The only issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

1) The evidence is that the 1st respondent employed the grievants to work in his establishment, the 2nd respondent. They were employed as waiters. Martin was employed on 01.01.2007, Carolyne on 01.05.2011, and Daniel on 01.01.2010. The Court returns that the parties were in a contract of service. They allege it was governed by the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2012 of 02.07.2012 yet they were in hotel industry.

2) The grievants were terminated on 27.11.2014 as per their testimony and when the 1st respondent closed the business. The Court returns that the termination amounted to constructive redundancy and the respondents failed to comply with the provisions of section 40 of the Employment Act, 2007 on redundancy. The prescribed procedure was not followed and the Court finds that it was unfair and unlawful termination.

3) The Wage Order relied on is effective 02.07.2012 and applies to agricultural industry and the claimant has not established why it would apply to the hotel industry in which the grievants were employed to serve. Thus the Court returns that the computation on notice pay, underpayments, pending leave days, public holidays and overtime as well as gratuity and severance pay will fail.

4) The Court has considered the period served by each grievant, the breach of section 40 of the Act leading to abrupt termination without a notice and that each of the grievants did not contribute to the termination but had a clean record of service. The Court returns that each is awarded 6 months salaries in compensation under section 49 of the Act and last monthly pay as at termination being Kshs. 4, 000.00 and making **Kshs. 24, 000.00** for each claimant. Each is awarded 2 months' pay in lieu of the prescribed 2 monthly notices under section 40 of the Act making **Kshs.8, 000.00** for each. Under the section each is awarded 15 days pay in severance for each completed year of service being Kshs.2, 000.00 per year making, **Kshs. 14,000** for Martin; **Kshs.6, 000.00** for Carolyne; and Daniel **Kshs. 8,000.00**. As there were no alternative retirement or pension arrangements, each is awarded one month salary for gratuity or service pay for each completed year of service making for Martin **Kshs. 28, 000.00**; Carolyne **Kshs.12, 000.00**; and Daniel **Kshs.16, 000.00**. The Court returns that each is awarded 3 months pay in lieu of annual leave and as prayed for making **Kshs.12, 000.00** for each.

5) Thus each grievant is awarded a sum Martin Chege Kinuthia **Kshs. 86, 000.00**; Carolyn Nekoye Simiyu **Kshs.62, 000.00**; and Daniel Maina Mugo **Kshs.68, 000.00**.

6) The claimant is awarded costs of the suit fixed at **Kshs.60, 000.00**.

In conclusion judgment is hereby entered for the claimant jointly and severally against the respondents for:

a) The declaration that the constructive redundancy was unfair and unprocedural.

b) The respondents to pay the claimant **Kshs.60, 000.00**, Martin Chege Kinuthia **Kshs. 86, 000.00**; Carolyn Nekoye Simiyu **Kshs.62, 000.00**; and Daniel Maina Mugo **Kshs.68, 000.00** by 01.07.2019 failing interest at Court rates to be payable thereon from the date of this judgment till full payment.

Signed, dated and delivered in court at Nairobi this Friday 17th May, 2019.

BYRAM ONGAYA

JUDGE