



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 334 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

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

**VERSUS**

**CRESCENT HOTEL.....RESPONDENT**

**JUDGMENT**

Vide Memorandum of claim dated 25<sup>th</sup> November 2014 and filed on 2<sup>nd</sup> December 2014, the claimant, a trade union, avers that its members, Calvin Seda, Peter Ogutu and Elgah Anyango were unfairly terminated by the respondent. The claimant avers that Calvin Seda was employed on 4<sup>th</sup> April 2010 as a waiter with a salary of Kshs4,530 without house allowance. He was not allowed to take any annual leave. He worked on public holidays and was not paid for the same. His employment was terminated on 31<sup>st</sup> January 2014. His last salary was Kshs.5,300.

The claimant further avers that the second grievant, Peter Ogutu was employed in August 2012 as night watchman at a basic salary of Kshs.4,000. He was not paid house allowance, was not given annual leave or paid in lieu, worked on public holidays for which he was not paid. His employment was terminated on 1<sup>st</sup> February 2014.

Further that the 3<sup>rd</sup> grievant Elgah Anyango was employed on 9<sup>th</sup> January 2008 as a waitress at a salary of Kshs.3,852 without house allowance. Like the 1<sup>st</sup> and 2<sup>nd</sup> grievants, she was not given annual leave or paid in lieu thereof and worked on public holidays for which she was not paid. Her employment was terminated on 31<sup>st</sup> January 2014. Her last salary was Kshs.5,447.

It is pleaded that all grievants were declared redundant. That all of them were not enrolled into the membership of National Social Security Fund (NSSF).

The claimant pleads that it reported the dispute to the Ministry of Labour after attempts to engage the respondent for an amicable settlement failed. The Minister accepted the dispute for conciliation and appointed Mr. Joel Omweno of Kisumu County Labour Office as Conciliator. Parties were invited for a conciliation meeting on 10<sup>th</sup> July 2014 but the meeting failed to reach amicable resolution. The Conciliator issued a Certificate of Disagreement on 7<sup>th</sup> August 2014 paving the way for filing of the present claim.

It is the claimant's position that the termination was unprocedural and in breach of Articles 41 of the Constitution. That the respondent breached Sections 28, 35, 40, 41, 43 and 45 of the Employment Act. Further that the respondent did not comply with statutory wages orders in respect of minimum rates of pay and payment of overtime for work done on public holidays.

The claimant prays for the following remedies –

1. That the court finds the redundancy of the grievants unfair and in breach of the law.
2. That the court be pleased to invoke Section 50 of Employment Act, 2007. Section 12 of the Industrial Court Act, 2011 and Section 15 of the Labour Institution Act, 2007 and order –
  - a) For reinstatement of the aggrieved employees
  - b) In the alternative pay terminal benefits accrued rightful dues and be fully compensated for loss of job unfairly as calculated below –

**CALVIN SEDA**

i) 2 months' salary in lieu of notice = 21,128.00

ii) Leave for 3 years

$$\underline{10,564 \times 72 \text{ days}} = 25,354.00$$

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iii) Service Pay

$$\underline{10,564 \times 15 \times 3} = 15,846.00$$

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iv) Severance Pay for 3 years

$$\underline{10,564 \times 15 \times 3} = 15,846.00$$

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v) Public Holidays

$$\underline{10,564 \times 30 \text{ days}} = 10,564.00$$

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vi) Underpayment of Wages

May 2013 – January 2014

$$(12,149 \times 9) - (5,300 \times 9)$$

$$109,341 - 47,700 = 61,641.00$$

May 2012 – April 2013

$$(10,656 \times 12) - (5,300 \times 9)$$

$$127,872 - 47,700 = 80,172.00$$

May 2011 – April 2012

$$(9,422 \times 12) - (5,300 \times 12)$$

$$113,064 - 47,700 = 65,364.00$$

vii) 12 months compensation

$$10,656 \times 12 = 126,768.00$$

**Total = Kshs.422,683.00**

**PETER OGUTU**

i) One month' salary in lieu of notice = 10,921.00

ii) Leave for 3 years

$$\underline{10,921 \times 36 \text{ days}} = 13,094.00$$

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iii) Service Pay

$$\underline{10,921 \times 15 \times 1} = 5,456.00$$

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iv) Severance Pay for 3 years

$$\underline{10,921 \times 15 \times 1} = 5,456.00$$

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v) Public Holidays

$$\underline{10,921 \times 15 \text{ days}} = 5,456.00$$

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vi) Underpayment of Wages

August 2012 – April 2013

$$(11,008 \times 9) - (4,000 \times 9)$$

$$99,072 - 36,000 = 80,172.00$$

May 2013 – January 2014

$$(12,549 \times 9) - (4,000 \times 9)$$

$$112,941 - 36,000 = 76,941.00$$

vii) 12 months' compensation

$$10,912 \times 12 = 130,944.00$$

**Total = Kshs.305,875.00**

#### **ELGAH ANYANGO**

i) 2 months' salary in lieu of notice = 21,128.00

ii) Leave for 3 years

$$\underline{10,564 \times 72 \text{ days}} = 25,354.00$$

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iii) Service Pay

$$\underline{10,564 \times 15 \times 6} = 31,692.00$$

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iv) Severance Pay for 3 years

$$\underline{10,564 \times 15 \times 6} = 31,692.00$$

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v) Public Holidays

$$\underline{10,564 \times 30 \text{ days}} = 10,564.00$$

## vi) Underpayment of Wages

May 2013 – January 2014

 $(12,149 \times 9) - (5,447 \times 9)$  $109,341 - 49,023 = 60,318.00$ 

May 2012 – April 2013

 $(10,656 \times 12) - (5,447 \times 9)$  $127,872 - 65,364 = 62,508.00$ 

May 2011 – April 2012

 $(9,422 \times 12) - (5,447 \times 12)$  $113,064 - 65,364 = 47,700.00$ 

## vii) 12 months compensation

 $10,656 \times 12 = 126,768.00$ **Total = Kshs.417,724.00**

c) Any other order that the court may be pleased to issue.

d) The grievant be issued with certificate of service.

At the hearing all the grievants testified and reiterated the averments in the memorandum of claim.

**Respondent's Case**

On 24<sup>th</sup> February 2015, the respondent filed a response to the memorandum of claim in which it denied ever employing any of the grievants. It further denied all the averments in the Memorandum of claim in toto, putting the claimant to strict proof. On 26<sup>th</sup> July 2017 when the respondent's defence was scheduled for hearing neither the respondent or its counsel were present in court. The respondent's case was closed at the request of the claimant and dates taken for filing of written submissions.

In the submissions both parties adopted the positions in their pleadings with the claimant justifying why the grievants ought to be awarded remedies as prayed while the respondent argued that the claimant had not proved the case against it and was not entitled to any of the remedies sought.

**Determination**

I have considered the pleadings, the evidence on record and the submissions filed by the parties.

This is a claim in which apart from the averments in the memorandum of claim and the testimony of the grievants there is no independent evidence that the grievants were ever in the employment of the respondent. All that was filed with the memorandum of claim are letters from the claimant to either the respondent or the Ministry of Labour.

In a case like this where the respondent has denied ever employing the grievants and has adduced no other evidence, it is incumbent upon the claimant to at least submit some proof of existence of an employment relationship such as a payslip or some other evidence of payment or even a letter of discipline from the respondent. No such evidence has been produced leaving the court in doubt as to whether the grievants were ever in the employment of the respondent.

In the case of *Kipkebe Limited v. Peterson Ondieki Tai (2016) eKLR* the court in upholding section 107 and 108 of the Evidence Act on burden of proof observed as follows:

*“It is trite Law in evidence that he who asserts must prove this case. No evidence was adduced by the plaintiff. In such cases the burden of proof lies with whoever would want the court to find in his favour in support of what he claims.”*

*Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts*

*must prove that those facts exist'*

*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side"*

In the present case, the claimant has not proved that there was any employment relationship between the grievants and the respondent. Without this very elementary evidence, the court is unable to pry further to consider whether the averments of unfair termination have been proved and if the grievants are entitled to the remedies sought.

For these reasons the claim is unsustainable and is accordingly dismissed with no orders as to costs.

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF APRIL 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 14<sup>TH</sup> DAY OF MAY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**