



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

*(Before Hon. Lady Justice Maureen Onyango)*

**CAUSE NO. 2247 OF 2015**

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

*VERSUS*

**WILTON GATEWAY HOTEL LIMITED.....1<sup>ST</sup> RESPONDENT**

**GRACE WANJIKU..... 2<sup>ND</sup> RESPONDENT**

**AND**

**WILFRED MAGUSA NYANGENYO..... INTERESTED PARTY**

**CONSOLIDATED WITH CAUSE NO. 1615 OF 2015**

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

*VERSUS*

**WILTON GATEWAY HOTEL LIMITED..... RESPONDENT**

**JUDGMENT**

In Cause 1615 of 2015, the Claimant union, Kenya Hotels and Allied Workers Union filed Memorandum of Claim which was amended on 6<sup>th</sup> November 2015. The claim is against the Respondent, Wilton Gateway Hotel Limited for unfair and unprocedural redundancy of **Virginia Njeri Thuo, Benson Maina Julius** and **Victoria Mwithi Michael** on 5<sup>th</sup> September 2015. It avers that the Respondent engaged Virginia Njeri on 1<sup>st</sup> June 1999, Benson Maina on 1<sup>st</sup> June 2005 and Victoria Mwithi was engaged on 15<sup>th</sup> July 2006. That at the time of termination of employment, Virginia earned a basic salary of Kshs.20,504/= and house allowance of Kshs.3,076/=, Benson earned a gross salary of Kshs.18,000/= while Victoria's salary had from January 2012 been reduced from Kshs.13,080/= to Kshs.12,080/= without valid reasons.

The Claimant union avers that the three grievants worked on public holidays without compensation and that Benson and Victoria each had a leave balance of 2 years. Further, that Virginia never went on leave and worked from 8am – 10pm without being paid overtime. The tabulations of their claims are detailed at paragraph 3.8 of the Claim dated 6<sup>th</sup> November 2015 and they pray that:

1. The Respondent's decision to declare the grievant herein redundant be declared unfair.
2. The Court be pleased to order the Respondent to pay the grievant all the accrued rights and terminal benefits within 30 days as follows:
  - a. Virginia Njeri Thuo – Kshs.352,800/=
  - b. Benson Maina Julius – Kshs.670,559/=
  - c. Victoria Mwithi Michael – Kshs.190,188/=

3. The Court be pleased to order the Respondent to maximally compensate the grievant for unfair termination in accordance to section 50 of the employment act 2007 and pay within 30 days as hereunder:

- a. Virginia Njeri Thuo – Kshs.282,960/=
- b. Benson Maina Julius – Kshs.216,000/=
- c. Victoria Mwithi Michael – Kshs.156,960/=

4. The Court be pleased to award damages to the grievant as it may deem fit.

5. The Respondent pays cost of this suit.

6. Any order the court may deem fit to issue.

In the three statements filed on 18<sup>th</sup> December 2015:

Virginia Njeri states she started out as a Waiter earning Kshs.3,000 before she was promoted to Cashier in January 2003 earning Kshs.6,000 and that the Respondent kept adjusting her salary until 2009. That she was then promoted to Supervisor on 1<sup>st</sup> November 2012 and her salary adjusted to Kshs.23,580/= but that she only earned Kshs.20,504/=.

Victoria Mwithi states she started out as a Waitress on a salary of Kshs.2,250/= until September 2006 when the Respondent adjusted her salary to Kshs.4,500/= and further to Kshs. 7,500/= in 2009. That on 3<sup>rd</sup> January 2011, she was promoted to the position of Hostess earning Kshs.13,080/=. She was later promoted in December 2012 to the position of Supervisor but this time, without any wage increments save for entertainment allowance of Kshs.9,000/=. She states she is also entitled to leave on pro rata for 8 months from 1<sup>st</sup> January 2015 and that the Respondent did not pay her notice or severance pay, which are her rightful dues. That she had no formal transaction with the Respondent save for payslips and work ID.

Benson Maina states he started out as a Waiter on a salary of Kshs.2,500/= until January 2007 when the Respondent adjusted his salary to Kshs.3,500/= and further to Kshs.4,500/= in January 2009. That on 16<sup>th</sup> December 2012, the Respondent promoted him to a Supervisor and upgraded his salary to Kshs.9,000/= and that at the time of termination of his services, he was not paid any notice and severance pay as required by law.

The three grievants state they had clean records of employment with the Respondent and had enrolled and subscribed to the Claimant union since 1<sup>st</sup> November 2011. That on 4<sup>th</sup> September 2015, Mrs. Grace Wanjiku Ndirangu a director of the Respondent hotel summoned them and while alleging that business had gone down, verbally declared them redundant without paying them any terminal benefits and accrued rights. That Mrs. Grace Wanjiku promised to pay their dues on 6<sup>th</sup> September 2015 but failed to show up on the said date. That they then reported the case to the union offices. They all state that their official transaction with the Respondent was often informal. That the union was prompted to file these proceedings when it was rumoured that the Respondent planned to lease the business premises to Tequila Agencies.

The Respondent filed a Memorandum of Response to the Memorandum of Claim on 30<sup>th</sup> November 2015 denying it unfairly declared the claimants redundant or that they are entitled to the sums claimed in paragraph 3.8 of the Amended Memorandum. The respondent avers that the claimants' services were lawfully, procedurally and fairly terminated on the grounds of underperformance of duty and they were duly paid all their dues as per their service contracts. It further avers that when its Financial Director succumbed to illness on 17<sup>th</sup> July 2015, restraining orders were obtained on 7<sup>th</sup> September 2015 barring any withdrawal of funds from its company's account pending hearing and determination of the said cause. It contends that these facts are well within the claimants' knowledge. It further avers that the claimants were also accorded a fair hearing and that the circumstances leading to termination of their services was fully explained to them in accordance with company policies and legal requirements of the Employment Act. That by reason of the aforesaid matters, it prays for the dismissal of the claim with costs.

#### **Cause 2247 of 2015**

In *Cause 2247 of 2015*, the Claimant union filed a Memorandum of Claim dated 15<sup>th</sup> December 2015 against the Respondents, Wilton Gateway Hotel Limited and Grace Wanjiku Ndirangu while Wilfred Magusa Nyangenyio is included in the suit as an Interested Party. The Claimant sues for the unfair redundancy of: *Alice Njeri Karani, Margaret Wamiru, Purity Kagwiria, Mary Chang'ulo, Margaret Kirigo, Evans Jairo Kiano, Gedion Mageto, Rahab Wanjiku Kuria, Jacinta Nduku Makau, Rose Gatwiri Nkaabu, Patrick Ochieng, Erickson Momanyi, Richard Marende, Christopher Mutunga, Dennis Mutuku, Nancy Nyathira, Eric Mogeni* and *Martin Jagongo*. It avers that the 2<sup>nd</sup> Respondent is an agent of the 1<sup>st</sup> Respondent and is responsible for the payment of the accrued terminal benefits of the grievant herein.

At the time of their termination on 1<sup>st</sup> February 2015:

*Alice Njeri Karani* states she was a Receptionist earning a basic salary of Kshs.8,000/= per month and a house allowance of Kshs.1,750/=; *Margaret Wamiru* states she was employed on 1<sup>st</sup> July 2001 and was a House Keeper earning a basic salary of Kshs.6,500/= per month and a house allowance of Kshs.1,555/=; *Purity Kagwiria* states she was employed on 2<sup>nd</sup> July 2001 and was a House Keeper earning a basic salary of Kshs.6,500/= per month and a house allowance of Kshs.1,555/=; *Mary Chang'ulo* states she was employed on 4<sup>th</sup> November 2013 and was a House Keeper earning a basic salary of Kshs.6,000/= per month and a house allowance of Kshs.1,555/=; while *Margaret Kirigo* states she was employed on 3<sup>rd</sup> April 2004 and was a House Keeper earning a basic salary of Kshs.7,025/= per month and a house allowance of

Kshs.1,555/=. The abovementioned 5 grievants state they never went on leave in 2014 and 2015.

At the time of their termination on 30<sup>th</sup> November 2015:

**Christopher Mutunga** states he was employed on 2<sup>nd</sup> July 2007 and was a Butcher man earning a basic salary of Kshs.7,960/= per month and a house allowance of Kshs.1,120/=; **Evans Jairo Kiano** states he was employed on 7<sup>th</sup> October 2003 and was a Cook earning a basic salary of Kshs.8,900/= per month and a house allowance of Kshs.1,180/=; **Rahab Wanjiku Kuria, Jacinta Nduku Makau, Rose Gatwiri Nkaabu, Nancy Nyathira** and **Gedion Mageto** state that they were employed on 6<sup>th</sup> May 2002, 3<sup>rd</sup> April 2001, 6<sup>th</sup> April 2002, 23<sup>rd</sup> August 2012 and 8<sup>th</sup> September 2007 respectively and were Waitresses and Waiter each earning a basic salary of Kshs.7,960/= per month and a house allowance of Kshs.1,120/=; **Martin Jagongo, Richard Marende** and **Eric Mogeni** state they were employed on 15<sup>th</sup> February 2012, 10<sup>th</sup> April 2004 and 16<sup>th</sup> April 2013 respectively and were Security Guards, with Martin earning Kshs.7,960/= per month and a house allowance of Kshs.1,120/=, Richard earning Kshs.9,700 per month and a house allowance of Kshs.1,380/= and Eric earning Kshs.6,500/= per month with no house allowance. **Dennis Mutuku** states he was employed on 5<sup>th</sup> August 2012 and was a Cook earning a basic salary of Kshs.7,960/= per month and a house allowance of Kshs.1,120/=; **Erickson Momanyi** states he was employed on 3<sup>rd</sup> July 2015 and was a Barman earning a basic salary of Kshs.9,000/= per month and a house allowance of Kshs.2,080/=; and **Patrick Ochieng** states he was employed on 4<sup>th</sup> March 2015 and was a Cleaner earning a basic salary of Kshs.6,889/= per month and a house allowance of Kshs.971/=.

The Claimant union avers that it has a recognition agreement with the 1<sup>st</sup> Respondent signed on 2<sup>nd</sup> January 2005 and that it reported a trade dispute to the Cabinet Secretary, Ministry of Labour on 8<sup>th</sup> June 2015 culminating into Mrs. C Otiemo being appointed Conciliator. That the Respondents forestalled an earlier promise to settle rightful benefits of the aggrieved employees on 11<sup>th</sup> November 2015 and prompted the Conciliator to release her findings and recommendations on 18<sup>th</sup> November 2015. That the grievants whose services were terminated on 30<sup>th</sup> November 2015 had been issued with one month notice prior to being declared redundant and that the Respondent had then unprocedurally leased the business premises to Tequila Agencies.

The prayers in the two consolidated Causes herein are similar save for prayers 2 and 3 which differ in terms of the different grievants' computations of their terminal benefits and compensation. The Claimant union further prays that this Court be pleased to compel the Respondents to pay the accrued rights and terminal benefits of all grievants as tabulated at paragraph 4.2 in the Claim dated 15<sup>th</sup> December 2015 (pages 17 to 28); and order the Respondents to maximally compensate the grievants for unfair termination and pay within 30 days as tabulated.

Alice Njeri filed a Witness Statement on behalf of the grievants dismissed on 1<sup>st</sup> February 2015 in which she states that she was employed by the Respondent on 4<sup>th</sup> February 2009 as club supervisor before becoming a hotel receptionist. That the Respondent dismissed them after summoning them on 31<sup>st</sup> January 2015. That it had alleged it was in the process of commencing renovations and would be paying salaries during the said renovations. That the Respondent however failed to recall and pay them salaries which indicated that it had declared them redundant. She further states that the union made demand notice on 6<sup>th</sup> May 2015 and upon meeting the Respondents, it verbally requested for terminal computation for all of them but the Respondents declined to pay.

Evans Jairo filed a Witness Statement on behalf of the grievants dismissed on 30<sup>th</sup> November 2015 stating that they did not proceed on leave and that they worked extra hours. He contends that the Respondents paying them one month notice was not sufficient for those who had worked for over 5 years. He also states that the Respondents at all times irregularly deducted food levy from their pay.

Both Alice and Evans state that they were all not paid any house allowance by the Respondent even though the same was indicated on their pay slips. That they worked on public holidays without any compensation and that they were at all times underpaid below the government wage guideline. They state that the Respondent also declined to pay them the requisite severance contrary to employment laws. That the respondent also disregarded the laid down procedures in their decisions to declare them redundant. That they all privately subscribed to the union despite the existence of a recognition agreement and when the respondent declined to pay their accrued rights, they had no option but to report the matter to their union in May 2015. That the union made several interventions but the Respondents still declined to make any payments, prompting the union to file this suit. They both urge this court to order the Respondents to pay their terminal dues as tabulated in their Memorandum of Claim filed herein.

The Interested Party avers in his claim filed on 24<sup>th</sup> February 2016 that he was employed by the Respondent on 3<sup>rd</sup> July 2006 as a Manager earning a salary of Kshs.20,000/= until September 2014 when his salary was adjusted to Kshs.25,000/=. He avers that he also had a clean record with the Respondents before he was summoned by Mrs. Grace Ndirangu on 2<sup>nd</sup> November 2015 and served with a month's notice of termination of his services as of 30<sup>th</sup> October 2015. He admits that Mrs. Grace Ndirangu paid him his November salary and requested to pay his dues in two weeks. That after two weeks the Respondent only paid him one month's notice and has never settled his dues. He also avers that he worked on public holidays and extra hours without compensation at all material times and that the respondent also deducted monies for meals from his salary. He contends he never took leave for 9 years, which the Respondent had promised to settle in cash and that in November 2014, it settled 4 months leave and had a balance of 5 months which he now claims in full. He further claims pro rata leave for 5 months from July to August 2015.

The Interested Party prays for judgment against the Respondent as follows: a declaration that the termination of his employment was unfair; the respondents be ordered to pay him all his terminal benefits as set out in paragraph 28 of his claim amounting to Kshs.1,502,420/=; the respondent be ordered to compensate him for the unprocedural redundancy equivalent to 12 months' gross salary and any other accrued rights; this court does issue such orders and give such directions as it may deem fit to meet the ends of justice; respondents to pay costs of this suit; and interest on the above at court rates.

The Respondents filed a Memorandum of Response to the Memorandum of Claim on 10<sup>th</sup> March 2016 denying that they unfairly declared the claimants redundant and state that the contracts of the claimants were lawfully terminated. They aver that Evans Jairo who is a chef, was

employed by the new tenant courtesy of the Respondents. They deny that the 1<sup>st</sup> Respondent has a recognition agreement with the Claimant union. They further deny they unprocedurally leased the business premises to Tequila Agencies or that they are liable for breach of specific provisions of the Government Wage Guidelines, Hotels and Catering Traders Order Cap 229, the Employment Act and the Constitution. They aver that the grievants' terminal dues having been lawfully settled, they are not entitled to the sums they claim or any dues as contained in the Memorandum of Claim. The Respondents admit jurisdiction of this Court and pray for the dismissal of the Claimant's claim with costs.

### **Claimant's Submissions**

The Claimant submits that the actions of the Respondents were unfair and contrary to **section 40 of the Employment Act** which sets out the criteria and procedures for fair redundancies, including notification. That in the instant case, the Respondents did not notify either the trade union or labour officer and that where they purported to notify the aggrieved employees, they failed to observe the required notice period. It submits that notification in redundancy matters ensures consultation before termination of employment. The claimant further submits that **Article 13 of Recommendation No. 166 of the ILO Convention 158 - Termination of Employment Convention 1982** states:

**1. When the employer contemplates termination for reasons of an economic, technological, structural or similar nature, the employer shall:**

- a) Provide the workers' representatives concerned in good time with relevant information including the reasons for the termination contemplated, the number and categories of workers likely to be affected and the period over which the termination are intended to be carried out.**
- b) Give in accordance with national law and practice, the workers' representatives concerned as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the termination and measures to mitigate the adverse effects of any terminations or the workers concerned such as finding alternative employment.**

It submits that apart from issuing sufficient notice, the Respondents ought to have given valid reasons to the concerned employees as to why they contemplated declaring them redundant. That for the employees who were declared redundant in February 2015 the Respondent made fresh recruitments after the alleged renovations of the premises and disadvantaged the aggrieved employees in retaining their positions. The employees declared redundant on 5<sup>th</sup> September 2015 on the other hand did not understand the criteria used to pick them since they were more skilled and senior than some of their colleagues. Lastly, those declared redundant on 30<sup>th</sup> November 2015 were issued with a one day notice. That evidently, the notices had no established reasons and the Respondents failed to establish convincing reasons and thereby breached **section 43 of the Employment Act** while failing to also observe **section 40(c) of the Act**.

It further submits that **section 45 of the Employment Act** read together with **Article 41 of the Constitution** renders the actions of the Respondents unfair especially where valid reasons are not given and the laid down procedures are generally not adhered to before effecting any termination of employment.. It cites **Cause No. 502 of 2016, Angela Shukuru v Airtel Kenya Limited** where the court concluded that the respondent failed to show there was a genuine reason for terminating the claimant's contract of employment on account of redundancy and that the said termination of employment on account of redundancy was procedurally and substantively unfair.

It is submitted by the Claimant that the grievant are entitled to notice pay as under **section 35 of the Employment Act** which grants payment in lieu of notice where one is terminated without sufficient notice. Further, **section 20 of the Hotel and Catering Traders Order, Cap 229 now repealed under section 63 of the Labour Institution Act** classifies payment of notice in accordance with the length of period of service. That they are also entitled to accrued rights as under **section 49(4)(i) read together with section 50 of the Employment Act** which it prays to this court to invoke. To that extent and further under **section 12 of the Employment and Labour Relations Court Act**, this court therefore has jurisdiction to award the grievant maximum compensation or as it deems fit. It relies on **Civil Appeal No. 31 of 2015, Kenfreight (E.A) Limited v Benson K. Nguti** where the appellate court observed that a range of remedies is available subject to certain considerations and where it is demonstrated that termination of a contract of service was unjustified and that for the unfair termination, an employer can be made to pay:

1. The wages which the employee would have earned had he been given the period of notice to which he was entitled.
2. The equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal
3. Reinstatement of the employee.
4. Re-engagement.

On the issue of underpayment of wages, it submits that the Cabinet Secretary for Labour is privileged to gazette wage guidelines within provisions of **section 46 of the Labour Institution Act**, but that the Respondents herein unfortunately paid the grievant below the statutory wage guideline. It refers the court to annexure **JS4** being **Legal Notice No. 116** as evidence of the same. That the underpayment is a breach of the grievant's constitutional rights to acquire and own property as under **Article 40** and it calls upon this Court to protect them by ordering the Respondents to pay all the accrued underpayments.

It submits that it is entitled to costs of this suit as the court considers just and within the provision of **section 12(4) of the Employment and Labour Relations Court Act**. That this court has the mandate to protect the grievant's fundamental rights as stipulated in **Article 23 of the Constitution** read together with **section 12 of the Employment and Labour Relations Court Act** to grant the reliefs sought by the Claimant in court.

## Respondents' Submissions

The 1<sup>st</sup> Respondent submits that all the grievant in the consolidated did not produce any copies of their employment letters or any documents to support their allegations of working overtime, working on public holidays, not going on leave, underpayments or deduction of wages. It urges the court to consider that the Claimants have failed to discharge the burden of proof that they were its employees and that the claims they seek can only be tabulated if the employment contract exists. That the claims they have tabulated in their claims are therefore erroneous and fictitious as they cannot be ascertained in the absence of the employment contract. That the documents produced by the Claimant union under annexures **JS3** and **JS5** being the payroll for April 2014 and July of an unstated year, are contentious since the originals are not produced to authenticate them. Further, that the author of the said documents is unknown as they do not bear any seal and look like excerpts. The Respondents urge the court to therefore disregard the two payroll documents for being totally unreliable.

The 1<sup>st</sup> Respondent further submits that while the Claimant has annexed 11 copies of termination letters all issued on 31<sup>st</sup> October 2015, seven of the grievants do not have the said contentious letters or any document linking them to the 1<sup>st</sup> Respondent. That the termination letters are contentious as they were signed by the now deceased director, one James Karanja Gitau who passed away on 17<sup>th</sup> July 2015 and that there is no way he could have signed the termination letters. He further submits that the letters produced under **JS6** are all forged documents that should not stand as evidence before this Court and that 6 copies of ID cards also produced in the said annexure cannot be authenticated and this court cannot rely upon them for any reason. He also urges the court to disregard annexure **JS 10** which are copies of a list of persons appending their signatures of diverse dates, as they are photocopy excerpts and since the originals were not produced in court, its authenticity is uncertain. That Margaret Wamiru and Jecinta Nduku alleged being employed on dates when the 1<sup>st</sup> Respondent Company had not even been incorporated as shown in its Certificate of Incorporation annexed at **JS 10**. He urges the court to take note of this discrepancy and dismiss the claims brought by the two as they are fictitious claims.

The Respondents rely on the case of *Maurice Oduor Oketch –v- Chequered Flag Ltd [2013] eKLR* where the court stated that the court should go beyond terminologies used by parties to determine existence of an employment relationship. That the claimants in the present case were however unable to prove existence of a contract of service between them and the 1<sup>st</sup> Respondent and that it is therefore wanting and insufficient to infer a contract of employment existed. The Respondents further submit that before this court invokes section 40 of the Employment Act, it must first address whether the claimants were employees of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent ideally submits that it denies the claimants were its employees and that even if they were employees, none was terminated based on redundancy.

It is submitted by the 1<sup>st</sup> Respondent that no documents have been adduced to show that the 2<sup>nd</sup> Respondent was a director or functioning as an agent in its company and it contends that the 2<sup>nd</sup> Respondent's nexus to this suit is unknown. That the 2<sup>nd</sup> Respondent cannot be personally liable for the wrongs of the 1<sup>st</sup> Respondent if any as she is a separate legal entity. Further, that with no evidence having implicated her, the claim against her should be dismissed with costs.

The 1<sup>st</sup> Respondent submits that the Interested Party has also not tendered any proof of his employment or documents showing he was declared redundant on 2<sup>nd</sup> November 2015 and contends that the documents he has produced in court cannot be verified. That his claim in this suit is illegal, unprocedural and an abuse of the court process and that under **Rule 10(5) of the Employment and Labour Relations Court Rules**, his claim should have been assigned a serial number unique to itself. Further, that he did not obtain leave of court to file the claim and that summons was not procured against the Respondents as provided for under **Rule 11 of the Employment and Labour Relations Court Rules**. It submits that his claim should be dismissed with costs for being incompetently filed and for further not meeting the provisions of **Rule 4(1)(a-g) of the Employment and Labour Relations Court Rules Rules**.

## Interested Party's Submissions

The Interested Party submits that the Respondent did not follow the mandatory procedure stipulated in section 40 of the Employment Act as regards notification to the area labour officer or himself and he cites on *Cause No. 2104 of 2017, Gerishom Mukhuti Obayo v DSV Air and Sea Limited* where the court held that the result was the redundancy of the claimant was unprocedural and therefore unfair. That redundancy procedure as set out in law is mandatory and that where an employer fails to do so, the termination becomes an unfair termination within the meaning of **section 45 of the Employment Act** as was held in *Francis Maina Kamau v Lee Construction [2014] eKLR*. That the Respondent also breached section 43 of the Act by not stating its reasons for declaring him redundant and that he is entitled to his accrued rights and maximum compensation as under **section 49 and 50 of the Act**.

## Analysis and Determination

The first issue for determination is whether there was an employment relationship between the aggrieved employees, Interested Party and the Respondents. The second issue for determination is whether the Claim by the Interested Party is properly before Court. The third issue for determination is whether there was redundancy of the aggrieved employees and Interested Party and if the redundancy was unprocedural. The fourth issue for determination is whether the aggrieved employees and Interested Party are entitled to their dues together with interest and costs as sought in their claims.

The 1<sup>st</sup> Respondent has purported to deny in its submissions that the grievants in the consolidated suit were its employees citing that no employment contract was produced in court this was not pleaded in the Memorandum or response to the claim. It is trite law that parties are bound by their pleadings. Further, the documents annexed in the two claims sufficiently establish that the grievants were employees of the respondent. With regards to the second issue, the Interested Party is properly before court pursuant to orders of this Court given on 16<sup>th</sup> February 2016 enjoining him in the proceedings. The court while issuing the orders directed the Interested Party to file a response to the Claim in Cause 2247 of 2015.

**Section 2 of the Employment Act** defines redundancy as “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.” The facts of the case herein all point to a redundancy case.

In the case of **Josphat Ulenje Mando –v- ARM Cement (Formerly Known as Athi River Mining Ltd) [2018] eKLR** that:

*“It is now settled that redundancy is a legitimate form of termination of employment but there are stringent conditions to be found in Section 40 of the Employment Act that must be observed. These conditions have to do with adequate notice to the affected employees, their Trade Union and the Labour Office, a fair selection criteria based on length of service skill and reliability as well as payment of terminal dues.*

*Regarding the issue of notice, the Court of Appeal in **Thomas De La Rue v David Opondo Omutelema [2013] eKLR and Kenya Airways v Aviation & Allied Workers Union of Kenya & 3 others [2014] eLKR** confirmed that in cases of redundancy, two separate and distinct notices are required. The first which is the redundancy notice is issued to all employees likely to be affected by the redundancy and the second is a termination notice specific to each employee individually.*

*The requirement on selection of employees to be sent home on account of redundancy is intended to assure objectivity and fairness in the process.*

*From the evidence on record, the Respondent made no attempt to comply with any of the conditions set under Section 40 of the Employment Act. This renders the termination of the Claimant’s employment substantively and procedurally unfair and he is entitled to compensation.”*

In the report of the Labour Officer dated 18<sup>th</sup> November 2015, she states that the management (respondent) submitted as follows –

*“Initially the management offered to meet with the Union at shop level on 14<sup>th</sup> October 2015 and agree on a way forward on how to pay the employees. The management stated that the employees were laid off by the owner on February 2015 to pave way for renovations and they would continue earning their salaries, but unfortunately he passed away on 17<sup>th</sup> July 2015. The renovations were completed by August 2015.”*

The Labour Officer made the following findings –

*“The findings noted that the employees were indeed laid off by the late Director due to hotel renovations and had not been paid their redundancy benefits even before his demise. No employment records relating to the employees were produced to the conciliator so as to advise the parties on the way forward.*

*The widow Ms Gladys Karanja who is also a Director through her representatives Mr. Wilfred Magusa stated on 11<sup>th</sup> November 2015 that she was unable to pay the employees until she receives the letters of administration. It was noted that the business at the hotel was still continuing despite the death of the Director and revenues was being generated that could actually pay the former employees their redundancy benefits.*

*The management had also expressed earlier on 7<sup>th</sup> October 2015 that they were willing to pay the employees the rightful benefits only to have a change of mind on 11<sup>th</sup> November 2015 and forestalling the whole conciliation process.”*

The Labour Officer made the following recommendations –

*“In view of the above findings of the report, coupled with submissions from both parties, I hereby recommend that the Unions decision should be upheld. I strongly recommend that the management of Wilton Gateway Hotel to should be compelled to pay all outstanding redundancy benefits to the five former employees and a compensation of six months’ salary for unfair redundancy.*

*It is noted that the dispute has not been resolved by conciliation despite three meetings being held at conciliation level. The period of conciliation has also expired.*

*I therefore also issue this Report as a Certificate of Unresolved Dispute to either party who may seek to use it in another course of action in accordance with Section 69 (a) of Labour Relations Act 2007.”*

From the foregoing, it is clear that there was redundancy as admitted by the respondent before the Labour Officer. What was not agreed upon at the Labour Office was the redundancy settlement.

I thus find that the respondent declared the grievants and Interested Party redundant but failed to comply with the statutory requirements as set out in Section 40. The grievants and Interested Party were entitled to notification of at least one month that should also have been sent to the union and the Labour Officer. They were further entitled to termination notice, leave, salary to the last day worked and severance pay. Further, the respondent did not deny deducting money for meals as prayed but had no authority to do so as provided under Section 17(5) of the Employment Act.

Taking into account the circumstances under which the grievants and Interested Party left employment, their lengths of service and the severance package payable to them, I award each of them compensation equivalent to four months’ gross salary.

Notice of termination according to the **Regulation of Wages (Hotel and Catering Trades) Order Rule 20** is as follows –

## 20. Termination of employment

(1) Every contract of employment shall be terminated in the following manner—

(a) in the case of an employee who has completed ten years continuous service "with the employer by not less than three months\* notice to be given by either party in writing or otherwise by the payment by either party, in lieu of notice, of not less than three months' wages;

(b) in the case of an employee who has- completed five years continuous service with the employer by not less than two months' notice, to be given by either party in writing or other-wise by the payment by either party, in lieu of notice, of not less than two months' wages;

(c) in the case of an employee who has completed the probationary period but less than five years continuous service with the employer, by not less than one month's notice to be given by either party in writing or otherwise by the payment by either party, in lieu of notice, of not less than one month's wages.

I thus enter judgment for the grievants and Interested Party as follows –

### Alice Njeri Karani

Pay in lieu of Notice x 2.....	Ksh.30,129.30
Annual leave 24 days at 2 years.....	Ksh.24,103.40
5 days Public Holidays.....	Ksh3,012.00
Severance pay for 6 years.....	Ksh.45,192.00
4 months' compensation.....	<u>Ksh.60,258.60</u>
<b>Total</b>	<b>Ksh.162,695.30</b>

### Margaret Wamiru

Pay in lieu of Notice x 3.....	Ksh.29,342.85
Annual leave 24 days at 2 years.....	Ksh.15,649.50
5 days Public Holidays.....	Ksh.3,012.00
Severance pay for 14 years.....	Ksh.68,466.65
4 months' compensation.....	<u>Ksh.39,120.00</u>
<b>Total</b>	<b>Ksh.155,591.00</b>

### Margaret Kirigo

Pay in lieu of Notice x 3.....	Ksh.29,342.85
Annual leave 24 days at 2 years.....	Ksh.15,649.50
5 days Public Holidays.....	Ksh.3,012.00
Severance pay for 14 years.....	Ksh.53,795.20
4 months' compensation.....	<u>Kshs.39,120.00</u>
<b>Total</b>	<b>Ksh.140,919.55</b>

### Purity Kagwiria

Pay in lieu of Notice x 2..... Ksh.19,561.90  
Annual leave 24 days at 1 year..... Ksh.7,824.75  
21 days Public Holidays..... Ksh.7,000.00  
Severance pay for 8 years..... Ksh39,123.80  
4 months' compensation..... Kshs.39,123.80  
**Total            Ksh.112,634.25**

**Mary Changu'lo**

Pay in lieu of Notice x 1..... Ksh.9,780.95  
Annual leave 24 days at 1 year..... Ksh.7,824.75  
21 days Public Holidays..... Ksh.3,012.00  
Severance pay for 1 year..... Ksh.4,890.40  
4 months' compensation..... Kshs.39,123.80  
**Total            Ksh.64,631.90**

**Virginia Njeri Thuo (Cause No. 1615 of 2015)**

Pay in lieu of Notice x 3..... Ksh.70,740.00  
Annual leave 24 days at 16 years..... Ksh.301,824.00  
160 days-Public Holidays..... Ksh.109,355.00  
Severance pay for 16 years..... Ksh.188,640.00  
4 months' compensation..... Ksh.94,320.00  
**Total            Ksh.764,879.00**

**Benson Maina Julius (Cause No. 1615 of 2015)**

Pay in lieu of Notice x 3..... Ksh.54,000.00  
Annual leave 24 days at 2 years..... Ksh.28,800.00  
100 days Public Holidays..... Ksh.180,000.00  
Severance pay for 10 years..... Ksh.90,000.00  
4 months' compensation..... Ksh.72,000.00  
**Total            Ksh.424,800.00**

**Victoria Mwithi Micheal (Cause No. 1615 of 2015)**

Pay in lieu of Notice x 2..... Ksh.26,160.00  
Annual leave 24 days at 2 years..... Ksh.20,928.00  
180 days-Public Holidays..... Ksh.39,240.00  
Severance pay for 14 years..... Ksh.58,860.00

4 months' compensation..... Ksh.52,320.00

**Total            Ksh.197,508.00**

**Evans Jairo Kiana**

Pay in lieu of Notice x 2..... Ksh.23,662.00

20 days-Public Holidays..... Ksh.15,774.90

Severance pay for 12 years..... Ksh.70,987.90

Unlawful deduction (food) 3 years..... Ksh.74,880.00

One year over time..... Ksh.337,708.90

4 months' compensation..... Ksh.47,324.80

**Total            Ksh.570,337.70**

**Rahab Wanjiku**

Pay in lieu of Notice x 2..... Ksh.23,662.40

Annual leave 24 days at 2 years..... Ksh.18,929.90

30 days Public Holidays..... Ksh.23,662.40

Severance pay for 15 years..... Ksh.76,902.80

Unlawful deduction (food) 3 years..... Ksh.74,880.00

One year over time..... Ksh.163,737.00

4 months' compensation..... Ksh.47,324.80

**Total            Ksh.429,099.30**

**Jacinta Nduku Makau**

Pay in lieu of Notice x 2..... Ksh.26,662.40

Annual leave 24 days at 2 years..... Ksh.18,929.90

30 days-Public Holidays..... Ksh.23,662.40

Severance pay for 14 years..... Ksh.82,818.40

Unlawful deduction (food) 3 years..... Ksh.74,880.00

One year over time..... Ksh.204,672.00

4 months' compensation..... Ksh.53,324.80

**Total            Ksh.484,949.90**

**Dennis Mutuku Munyao**

Annual leave 24 days at 2 years..... Ksh.18,929.90

20 days Public Holidays..... Ksh.15,774.90

Severance pay for 2 years..... Ksh.11,831.20

Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.102,336.00  
4 months' compensation..... Ksh.47,324.80

**Total            Ksh.271,076.80**

**Christopher Mutunga**

Pay in lieu of Notice x 1..... Ksh.11,831.20  
Annual leave 24 days at 6 years..... Ksh.56,789.70  
30 days-Public Holidays..... Ksh.23,662.40  
Severance pay for 8 years..... Ksh.47,342.80  
Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.322,358.40  
4 months' compensation..... Ksh.47,324.80

**Total            Ksh.584,189.30**

**Gideon Mageto**

Pay in lieu of Notice x 1..... Ksh.11,831.20  
Annual leave 24 days at 2 years..... Ksh.18,929.90  
30 days-Public Holidays..... Ksh.23,662.40  
Severance pay for 8 years..... Ksh.47,324.80  
Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.81,868.80.  
4 months' compensation..... Ksh.47,324.80

**Total            Ksh.411,137.80**

**Rose Gatwiri Nkabu**

Pay in lieu of Notice x 2..... Ksh.23,662.40  
Annual leave 24 days at 2 years..... Ksh.18,929.90  
30 days Public Holidays..... Ksh.23,662.40  
Severance pay for 15 years..... Ksh.76,902.80  
Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.163,737.00  
4 months' compensation..... Ksh.47,324.80

**Total            Ksh.429,099.30**

**Nancy Nyathira Njuguna**

Annual leave 24 days at 3 years..... Ksh.28,394.80  
20 days Public Holidays..... Ksh.15,774.80  
Severance pay for 3 years..... Ksh.17,746.80  
Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.102,336.00  
4 months' compensation..... Ksh.47,324.80

**Total            Ksh.286,457.20**

**Erickson Momanyi**

4 months prorated leave..... Ksh.3,154.96  
Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.110,864.00  
4 months' compensation..... Ksh.47,324.80

**Total            Ksh.248,852.76**

**Richard Ojwang Marende**

Pay in lieu of Notice x 2..... Ksh.24,442.20  
Annual leave 24 days at 11 years..... Ksh.107,545.68  
20 days Public Holidays..... Ksh.16,294.80  
Severance pay for 15 years..... Ksh.67,216.00  
Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.129,950.00  
4 months' compensation..... Ksh.48,884.40

**Total            Ksh.469,213.08**

**Erick Mogeni Obong'o**

Annual leave 24 days at 2 years..... Ksh.19,553.70  
20 days Public Holidays..... Ksh.16,294.80  
Severance pay for 2 years..... Ksh.12,221.10  
Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.184,204.80  
4 months' compensation..... Ksh.48,884.40

**Total            Ksh.356,038.80**

**Martin Jagongo**

Annual leave 24 days at 2 years..... Ksh.19,553.70

20 days Public Holidays..... Ksh.16,294.80  
Severance pay for 2 years..... Ksh.18,331.70  
Unlawful deduction (food) 3 years..... Ksh.74,880.00  
One year over time..... Ksh.129,950.00  
4 months' compensation..... Ksh.48,884.40

**Total            Ksh.307,894.60**

**Patrick Ochieng**

Pay in lieu of Notice ½ month..... Ksh.5,477.00  
7 months prorated leave leave..... Ksh.4,452.00  
3 days-Public Holidays..... Ksh.2,190.90  
Unlawful deduction (food) 3 years..... Ksh.14,560.00  
4 months' compensation..... Ksh.43,816.00

**Total            Ksh.70,495.90**

**Wilfred Magusa Nyangeny (Interested Party)**

Pay in lieu of Notice x 2..... Ksh.50,000.00  
5 years annual leave 5 x 25,000..... Ksh.125,000.00  
9 years public holidays 10 x 9 x 1,106..... Kshs.99,540.00  
Severance pay for 9 years  
15 x 9 x 1,106..... Ksh.149,310.00  
Unlawful food deductions 2,080 x 113..... Ksh.235,040.00  
Overtime 36 hours a week x 4 x 2 x 12 x 120..... Ksh.414,720.00  
4 months' compensation..... Kshs.100,000.00  
SACCO refund..... Ksh.44,000.00

**Total            Ksh.1,217,610.00**

The Claimant and Interested Party are awarded costs of the suit and interest shall accrue at court rates from the date of this judgment until payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF NOVEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**