



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 827 OF 2016

FREDRICK ALAMBE.....1ST CLAIMANT
JOSEPH JULO.....2ND CLAIMANT
KHAMISI MWAGONA.....3RD CLAIMANT
JOHN NYAMAL.....4TH CLAIMANT
MARY MBULA.....5TH CLAIMANT
HARRISON SAFARI.....6TH CLAIMANT
VINCENT OBONYO.....7TH CLAIMANT
FRANCIS OCHIENG.....8TH CLAIMANT
MWAGONA KENGA.....9TH CLAIMANT
DEDAN WANYOIKE.....10TH CLAIMANT
RAMA JUMA.....11TH CLAIMANT
CECILIA MSIMBI.....12TH CLAIMANT
RAMA CHAI.....13TH CLAIMANT
CLINTON KATANA.....14TH CLAIMANT
PETER KURIA.....15TH CLAIMANT
HEZRON MSENSO.....16TH CLAIMANT

VERSUS

PAPIUS THUKU KINYUA.....1ST RESPONDENT
SALAMBO NIGHT CLUB.....2ND RESPONDENT

JUDGMENT

1. The Claimants were employed by the Respondents on diverse dates from March 1983 and August 2013 and worked until 8.6.2016 when their services were terminated on account of redundancy without any prior notice. It is the Claimants' case that the redundancy was unlawfully done and it amounted to unfair termination of their employment. They have therefore brought this suit claiming salary in lieu of notice, compensation for unfair termination, salary underpayment, redundancy pay, certificate of service, costs and interest.

2. The Respondents have denied the alleged unfair termination and averred that the redundancy genuine, necessary and justifiable because

since 2010, the business had steadily declined due to terror attacks on Mombasa County and as such, they had to close shop to stop further losses. They have therefore denied the dues quantified by the claimants urging that they are exorbitant and that some of the claimants were casual employees who don't qualify for the reliefs sought.

3. The issues for determination are whether the Claimants' contract of service were unfairly terminated and whether they are entitled to the reliefs sought. The Claimants called Fredrick Alambe and Hamisi Mwangona as their witnesses while the respondents called Joseph Ndungi Waweru as the only defence witness.

Claimants' case.

4. Fredrick Alambe testified as CW1 stated that he was employed by the respondents on 23.11.1989 as a Barman and his salary was Kshs.10,000 per month. He was working with the other 15 Claimants until 8.6.2016 when they were all terminated without any prior notice and payment of their lawful dues. He explained that on the fateful date the Respondents' General Manager Mr. Joseph Ndungi Waweru only paid the their salary for May and June and promised to pay their terminal dues within 7 days but defaulted hence this suit.

5. Cw1 contended that the termination was unfair because no reason and hearing was given to the Claimants and nor prior redundancy notice was served upon them. He therefore prayed for the reliefs sought in the suit contending that all the Claimants worked continuously although, while the first to tenth Claimants were paid salary on monthly basis the eleventh to sixth Claimant were paid on weekly basis.

6. Hamisi Mwangona testified as CW2 and echoed the testimony by the CW1 that the Claimants were employed by the Respondents until 8.6.2016 when they were terminated on redundancy by the respondents' General Manager Mr. Joseph Ndungi Waweru who promised to pay their terminal dues in 7 days but defaulted. He further stated that the termination was without prior notice and no reason for the termination was given to them. He therefore prayed for the reliefs stated above. He however admitted that the eleventh to sixteenth Claimants were casual employees paid on weekly while the rest were paid salary on monthly basis.

Defence case

7. Joseph Ndungi Waweru testified as Rw1 and admitted that he was employed by the respondents as the General Manager Salambo club Mombasa before it was closed on 8.6.2016. He explained that on the said date he called the staff to a meeting and told them that the business was to be temporarily closed down due to lack of business and that some of the staff were to be transferred to a sister business in Nairobi but they refused.

8. RW1 contended that after termination, he paid all the Claimants their salary arrears but remained with creditors' debts. He maintained that only Claimant number 1 to 9 were permanent employees while the rest were casual employees. He also clarified that CW2 was only a Supervisor and not Assistant Manager as alleged in the claim. He maintained that the redundancy was caused by the reduced business due to terror threats in Mombasa and was done with good intention.

Analysis and Determination

9. There is no dispute that all the Claimants were employed by the Respondent in various positions on diverse dates but they were all laid off on 8.6.2016. I now proceed to determine the two issues raised herein above, namely:

- a) Whether the termination of the claimants' contract of service was unfair; and
- b) Whether the claimants are entitled to the reliefs sought.

Unfair termination.

10. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the reason for the termination was redundancy and the procedure followed was immediate termination without prior notice or payment of salary in lieu of notice. The reason for the termination has not been challenged. The court takes judicial notice that hotel businesses in the coastal town of Mombasa took a down turn from 2010 due to terror threats. The respondents were not spared that is demonstrated by their inability to pay salaries to the claimants promptly.

11. The Claimants have however taken issue with the procedure followed and I agree with them that the procedure followed before their lay off was unfair. It is also clear from the facts of the case that the mandatory procedure for terminating employment contract on account of redundancy prescribed by section 40 of the Employment Act was not complied with in this case. The said provision requires in mandatory terms that before terminating the services of an employee on account of redundancy, the employer shall first serve the employee (or his trade union) and Labour officer with at least one month written notice, followed by fair selection process, then payment of salary in lieu of notice, accrued benefits plus severance pay to the employees selected for the redundancy. The failure to prove that fair procedure was followed rendered the termination of the Claimant unfair within the meaning of section 45 of the Act, and I so hold.

Reliefs

12. The Claimants have prayed for one month salary in lieu of notice, twelve months' salary as compensation for unfair termination, underpaid salary for November 2013 to June 2016, redundancy pay and certificate of service. In making, the awards to the Claimants I have treated all the claimants as employees engaged under regular term contract.

term contract has not been defined by section 2 of the Act but section 37(1) has described it to mean a contract where wages are paid monthly and section 35(1) (c) of the Act applies. Section 35(1) (c) of the Act basically provides that where a contract of service is for payment of wages or salary periodically at intervals of or exceeding one month, the same is terminable by 28 days’ notice in writing. In my view, the whole essence of term contract is to protect an employee from unfair termination by the employer.

14. Under section 37(1), (2) and (3) of the Act, casual employment converts to term contract if the employee is engaged on casual basis for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or is engaged on piece work basis to do a task which cannot reasonably be expected to end within a period or a number of working days amounting in the aggregate of three months or more.

15. In this case, the ninth to sixteenth Claimants are alleged to have worked as casual employees continuously from the time they were engaged until termination on 8.6.2016 when they were laid off. The respondent has not challenged that piece of evidence and such I make a finding of fact that the casual employment of the said claimants had converted to term contract of services under section 37 of the Act and were therefore brought under the protection of the law from unfair termination.

16. The foregoing view is buttressed by Regulation 18 of the of the Regulation of Wages (Hotel and Catering Trades) Order which provides that:-

“18 (1) No person shall be employed on temporary or seasonal terms of employment for a period exceeding six months.

(2) An employee on temporary or seasonal terms of employment shall be deemed to have converted to regular terms of employment on completion of six months’ continuous service’.

Notice and compensation for unfair termination

17. In view of the finding herein above that the services of the claimants were unfairly terminated, I proceed to award each of them one month salary in lieu of notice plus compensation of 6 months' salary under section 49 and 50 of the Act. In awarding the said small compensation, I have considered the fact that the claimants worked for the respondents for a fairly long period and also the fact that they had not contributed to the termination through misconduct. The award will be based on the minimum wage published vide Legal Notice No.117 of 2015 plus house allowance at 15% which was much high than the salary offered by the respondents.

Underpayment

18. There is no dispute that the claimants were earning between Kshs.8,400 and 12,000 gross salary per month. Considering the minimum wages published vide Legal notice No.197 of 2013 and Legal Notice No. 117 of 2015, it is obvious that the respondents did underpay all the claimants' their salaries as demonstrated by pleadings, evidence, and submissions. I therefore allow the claim for the salary arrears occasioned by the said underpayment for the period between November 2013 and June 2016.

Redundancy pay

19. It is not clear what the claim for redundancy pay constitutes. However if the same refers to severance pay, the same is disallowed because the termination ceased from being a lawful redundancy and converted unfair termination due to the procedural unfairness and which has herein above been adequately compensated by 6 months gross pay.

Certificate of service

20. The claim for certificate of Service is granted because it is a right guaranteed subject to section 51 of the Employment Act.

21. The summary of award for each claimant is as follows:

Fredrick Alambe (bar-man treated as a waiter)

Salary in lieu of notice.....	13,605.90
Compensation.....	81,635.30
Underpayment.....	76,732.30

Kshs. 171,973.50

Joseph Julu (security)

Salary in lieu of notice.....	12,597.90
-------------------------------	-----------

Compensation.....75,587.40

Underpayment.....51,042.60

Kshs. 139,227.60

Khamisi Mwagona-assistant Manager/ cashier/ supervisor

No evidence of such senior position. I treat him as a waiter.

Salary in lieu of notice.....13,605.90

Compensation.....81,635.30

Underpayment.....49,809.70

Kshs. 145,050.90

John Nyamai- Cook

Salary in lieu of notice.....13,605.90

Compensation.....81,635.30

Underpayment.....76,732.30

Kshs. 171,973.50

Mary Mbula- waiter

Salary in lieu of notice.....13605.90

Compensation.....81635.30

Underpayment.....98954.65

Kshs. 194,195.85

Harrison safari - Assistant manager/ cashier

No evidence shown to prove such senior position. I will treat him as a waiter.

Salary in lieu of notice.....13605.90

Compensation.....81635.30

Underpayment.....17664.60

Kshs. 112,906.10

Vincent Obonyo- cook

Salary in lieu of notice.....13,605.90

Compensation.....81,635.30

Underpayment.....121,732.30

Kshs. 216,973.50

Francis Ochieng-security

Salary in lieu of notice.....14,054.30

Compensation.....84,325.60

Underpayment.....64,523.80

Kshs. 162,903.70

Mwagona Kenga- Supervisor but I treat him as a waiter

Salary in lieu of notice.....13,605.90

Compensation.....81,635.30

Underpayment.....106,732.30

Kshs. 201,973.50

Dedan Wanyoike-cook

Salary in lieu of notice.....13,605.90

Compensation.....81,635.30

Underpayment.....106,732.30

Kshs. 201,973.50

Rama Juma- Waiter

Salary in lieu of notice.....13,605.90

Compensation.....81,635.30

Underpayment.....124,732.30

Kshs. 219,973.50

Cecilia Msimbi- night security

Salary in lieu of notice.....14,054.30

Compensation.....84,325.60

Underpayment.....102,068.70

Kshs. 200,449.40

Rama chai-cleaner

Salary in lieu of notice.....12,597.90

Compensation.....75,587.40

Underpayment.....97,442.60

Kshs. 185,627.90

Clinton Katana-Waiter

Salary in lieu of notice.....13,605.90

Compensation.....81,635.30

Underpayment.....124,732.30

Kshs. 219,973.50

Peter Kuria-Waiter

Salary in lieu of notice.....13,605.90

Compensation.....81,635.30

Underpayment.....124,732.30

Kshs. 219973.50

Hezron Msengo-Disc jockey(not clear but as a machine assistant

Salary in lieu of notice.....14,278.40

Compensation.....85,670.40

Underpayment.....104,136.40

Kshs. 204085.20

Disposition

22. For the reasons stated above, I enter Judgment for Claimants in the aggregate sum of Kshs.2,969,234.65 plus costs and interest from the date hereof.

Dated and signed at Nairobi this 18th day of January, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE