



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 265 OF 2013

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

VERSUS

WELLCOME INN HOTELS/MALINDI INVESTMENTS

LIMITED HERALD KAMPA.....RESPONDENTS

JUDGMENT

Introduction

1. The claimant brought this claim on 17.9.2013 after several years of conciliation before the Labour Office. The claim was amended on 18.9.2014 with the leave of the Court. The claimant seeks on behalf of the 37 grievants the following orders:

- (a) Declaration that lockout the 37 grievants on 15.7.2001 was unlawful and are entitled to damages;
- (b) Declaration that the summary dismissal of the 37 grievants was unfair and unlawful and that they are entitled to 3 months' salary in lieu of notice plus severance pay for the years served;
- (c) Refund of cooperative shares plus accrued interest to 19 grievants;
- (d) Costs of the suit.

2. The Respondent filed defence on 13.1.2014 and amended it on 6.2.2015. The respondent denied that the 37 grievants were locked out of work as alleged and further denied that the claimant had the legal capacity to sue on behalf of the grievants for want of any Recognition agreement with the respondents. It is further defence case that the grievants were temporarily redeployed from Lawfords Beach Hotel to other Sister Hotels in Diani South Coast but they refused and consequently they were summarily dismissed for insubordination. Finally, the respondents denied the claim for the refund of the cooperative shares and prayed for the suit to be dismissed with costs.

Claimants' Case

3. Mr. David Mwatsame Ngila (29th grievant) testified as Cw1. He told the Court that he was employed by the respondent in the Lawfords Beach Resort as an Electrician earning a basic salary of Kshs.5,914 plus House Allowance of Kshs.2,541. He further stated that the second Respondent was the director of hotel and that for some time, relationship between the employees and the management was not good due to delays in paying of salary. As a result, the grievants joined the claimant union in 2001 to agitate for their interests.

4. On 2.7.2001, the work committee wrote a letter protesting deployment of all the staff to security duties at the hotel. Again on 28.11.2001, the works committee wrote another letter protesting against the delayed salary that was followed by a letter from the union dated 3.12.2001 also protesting against delayed salary.

5. On 1.7.2002 the employer served the union with a letter giving notice that all the staff of the respondent had been transferred to Diani effective 3.7.2002. However, no transfer allowance was paid and after protest the effective date was extended to 16.7.2002. On the 15.7.2002, the grievants reported to work as usual only to find the gates locked and under the guard of Administration police. As a result, the staff wrote the letter dated 23.8.2002 to the Labour officer complaining about the lock out.

6. On 11.11.2002, the claimant union reported a Labour dispute to the Minister for Labour who appointed Mr. Kase as the Conciliator. The

dispute was “locked out and non payment of salaries” but the dispute was never resolved. However, Mr. J. Nyanga another Labour Office, wrote a report recommending for payment of unpaid salaries, refund of unremitted cooperative shares and payment of the accrued leave. After the report, the grievants were only paid salary less 12 days pay, cooperative shares and accrued leave prompting the union to bring this suit. He prayed for the dues sought in the suit.

7. He referred to the dismissal letter dated 2.7.2002 by which he was dismissed with the other grievants and contended that as at that time he was on duty. He referred to letters for deployment of his colleagues to Diani and maintained that he and other grievants were discriminated and dismissed unfairly without any chance to defend themselves.

8. On cross examination, Cw1 admitted that he did not know his union membership number but maintained that he was paying union subscription by checkoff system. He however did not have any payslip to prove that. He admitted that the respondent had sister Hotels in the Kenyan coast. He admitted that in 2002 he and other employees were verbally transferred from Malindi to Diani Sea Lodge but they declined because there was no written transfer enable them go from one entity to another. He denied being served with the transfer letter but admitted that some of employees signed the same and they were deployed to Diani.

He however did not know whether they were paid transfer, allowance and got housing at Diani.

9. Cw1 maintained that the grievants were discriminated on 15.7.2002 when they were locked out while other employees were let in to work. He confirmed that the Report by Mr. David Osoro Omwoyo the District Labour Officer dated 8.11.2002 stated that the employees were not declared redundant but they were only transferred to Diani. He confirmed further that the report found the dismissal of the grievants proper but recommended for payment of their dues, salary and refund of shares. He contended that all SACCO shares ought to have been remitted to the SACCO account.

10. He maintained that the email dated 1.7.2002 was discriminatory because 2 out of 12 maintenance staff were left out during the transfer to Diani but admitted that there was no evidence to prove that they were left out with intention to dismiss them. He further admitted that the letter dated 2.7.2001 never stated that all the staff were supposed to perform security duties. He however denied that he refused to obey a transfer order from his employer

11. On re-exam Cw1 contended that the email for transfer to Diani talked of only 59 employees and not all the employees. He further contended that the transfer was extended to 16.7.2002 but the lock out was done on 15.7.2002. He further contended that despite recommendation by the Labour officer Mr. Osoro for issuance of individual transfer letters, Cw1 never received any. In conclusion, he stated that he was the secretary to the SACCO and he knew that the respondent never remitted all SACCO contributions deducted from the workers.

12. Mr. Ramanson Sanga Jilani testified as Cw2. He testified that the respondent locked out the grievants on 15.7.2002 but allowed in their colleagues who were deployed to Diani. He further contended that on 16.7.2002 the grievants were unfairly and discriminatively terminated on allegation that they had declined a transfer to Diani. He further contended that the grievants were denied hearing before the termination of their services. He admitted that the dispute was subject of conciliator but stated that the report by Mr. J. Nyaga, a Labour Officer should be ignored because he was not the appointed conciliator. He prayed for the reliefs sought in the claim.

13. On cross examination Cw2 stated that he was the elected shop steward under KUDHEIHA and the claimant. He admitted that they were verbally redeployed to Diani Sea Resort and Diani Sea Lodge which are part of the Welcome In Hotels. He further admitted that the reporting dated was 4.7.2002 but they protested the verbal transfer and the employer reduced it in to writing and extended the reporting date to 16.7.2002 after payments on 15.7.2002. However, on 15.7.2002, they were locked out discriminatively and a few of their colleagues were selected and taken to Diani. He denied ever seeing the list of dismissed employees dated 3.7.2002 where he appeared as number 72. He was shocked to learn that he was dismissed earlier than 15.7.2002 when he was locked out.

14. He admitted that he had an outstanding loan balance of Kshs.46,000 the SACCO. He denied that the employer remitted Kshs.1,000,987 to the SACCO. He however denied the report by the Labour Officers that found that the termination of his service was lawful because the officer, were not the appointed conciliator. He maintained that he was wrongfully dismissed by the second Respondent acting as the Director of the first Respondent. He prayed for 2 months’ salary in lieu of notice because he served on permanent basis from 1998.

15. Aggrey Ikonge testified as Cw3. He adopted his written statement which is identical to the written statement by the Cw2. On cross examination he explained that on 3.7.2002 the grievants were told that they were to be redeployed to Diani Lodge owned by the respondents. He however contended that it was not fair to transfer then to Diani before payment of their salary arrears and other benefits. He denied that they refused the transfer and that they caused disturbance at the hotel.

16. Cw3 contended that he joined the claimant’s union in January 2001 and paid Kshs.100 for membership. He however admitted that he never wrote resignation letter from KUDHEIHA. He further admitted to having forgotten his union membership number. He prayed for the reliefs sought in the suit and contended that he authorized the union to sue on his behalf.

Defence Case

17. Mr. Harold Kampa testified as Rw1 for the defence. He confirmed that he is one of the Directors of the Companies owned by the first respondent. He listed the said Hotels are Lawfords Beach owned by Malindi Investments Limited, Blue Marline owned by Malindi Properties Limited, Diani Sea Resort owned by Karmlink Nominees Limited and Diani Sea Lodge owned by Diani Properties Limited. He confirmed that the four companies are separate entities but under the first respondent. He contended that the suit herein should have been against Malindi Investments Limited trading as Lawfords Beach Club to which he is a Director.

18. He denied the alleged salary arrears. He explained that business was low at the end of March 2002 and the Lawfords Beach Club was

closed until 1.11.2002. He further explained that the employees were transferred to Diani Sea Resort and Diani Sea Lodge on temporary basis. He explained that the grievants were to report at the new stations on 1.7.2002 but the date was extended to 15.7.2002 by the memo to the union which gave notice that if the employees failed to comply with the transfer, they would be terminated for gross misconduct. He further stated that the employees were given a reminder dated 9.7.2002 and a list of staff dated 2.7.2002 was also given to them to sign acceptance of the transfer. He explained that some employees accepted the transfer and they are still employed but the grievants declined the transfer and they were dismissed on 16.7.2002. He denied that the grievants were declared redundant. He further explained that it was not the first or the last time the respondent transferred employees from the Malindi Hotel to Diani Hotels. He confirmed that the Lawfords Beach Club eventually closed down for lack of business.

19. Rw1 contended that after the grievants were terminated the lodged complaint at the Labour Office and conciliation was done before Mr. Osoro Omwoyo who prepared a report dated 8.11.2002 which upheld the dismissal of the grievants. Later the claimant requested for fresh conciliation which was done by Mr. Z. B. Kase, who upheld the dismissal of the grievants by the unsigned report dated 24.11.2006. The report also blamed the claimant for misleading the grievants and stated that without a recognition agreement, the claimant could not represent the grievants.

20. Rw1 further testified that the Welcome In SACCO paid the loans and Interest outstanding to KUSCO. He further testified that all SACCO shares were refunded except for a few employees.

21. On cross examination he admitted that there was indeed a recognition dispute involving the claimant KAHC and KUDHEIHA. He further admitted that the present suit is not about recognition but termination of the employees' employment. He further admitted that on 15.7.2002, police came to the Malindi Hotel but he was not there and as such, he did not know whether the police barred the grievants from entering the hotel.

22. On further cross examination, Rw1 admitted that Lawfords Hotel under Malindi investment was a distinct entity from Dianai Beach Resort and Diani Beach Lodge. He admitted that he had no copy of transfer letters for each of the 37 grievants and stated that he was not sure whether they were given individual transfer letter.

Analysis and Determination

23. There is no dispute that the grievants were employed at the Lawfords Beach Club at Malindi until they were summarily dismissed in July 2002 for refusing to go on transfer. The issues for determination are:

- (a) Whether the grievants were employed by the respondents.
- (b) Whether the summary dismissal of the grievants was unlawful and unfair.
- (c) Whether the grievants are entitled to the reliefs sought.

Employment Relationship

24. The respondents have denied that the grievants were their employees. According to them the grievant were employed by Malindi Investments Limited at her Lawfords Beach Club, Malindi. The grievants have however maintained the first respondent was the owner of the Lawfords Beach Club while the second Respondent was the Director of the first respondent and the Lawfords Beach Club. Rw1 has corroborated the claimants' case by confirming on oath that he is one of the Directors of the companies owned by the first Respondent including Malindi Investments Limited. Under section 2 of the repealed Employment Act which was in force in 2002, employer was defined as:

“Any person, or public body or any firm, corporation or company, who or which has entered into contract of service to employ any individual, and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”

25. It has been submitted by the defence counsel that the 2nd Respondent was not a manager of the Lawfords Beach Club. I am however of the view that by holding the office of Director of the company which operated the Lawfords Beach Club, the second respondent was a manager of the said hotel. He cannot therefore run away from the obligations of employer within the meaning of section 2 of the Employment Act (repealed). The said definition of employer was retained by section 2 of the current Employment Act, which was passed in 2007. In addition, it is this court's opinion that the joinder of the second respondent was proper because he is a necessary party to the suit because without him court may not effectively adjudicate upon the dispute herein.

Unlawful and unfair dismissal

26. The respondents' case is that the claimants refused a lawful transfer and were summarily dismissed because declining the transfer amounted to summary dismissal. The claimants' case is however, that the dismissal was unfair because they were locked out without notice and without being given any hearing. It is further claimants case that the grievants never refused the transfer but they were only demanding for written transfer plus outstanding salary, and SACCO shares among other dues before proceeding to the new workstation.

27. After careful consideration of the evidence and submissions presented to the Court, it is clear that the Lawfords Beach Club closed shop in July 2002 and the management decided to transfer the grievants to two other Hotels owned by sister companies under the umbrella of the first respondent. There was no clear or well negotiated agreement for the transfer of service from Lawfords Beach Club to the new hotels which were materially owned by independent entities from the former hotel. The grievants raised concern over their outstanding salaries, refund of SACCO shares among others. The respondents did not sort out the said dispute and summarily dismissed the grievants on

15.7.2002 alleging gross misconduct and locked them out on 15.7.2002.

28. In my view, the said summary dismissal was neither here nor there because the purported transfer of the grievants to another employer without proper agreement for transfer of service due to low business and closure of the club amounted to terminating their services on account of redundancy. The summary dismissal letter dated 16.7.2002 stated as follows:

“Due to the closure of the Lawfords Beach Club (L.B.C) and lack of business you were officially transferred to DSR/DSL which have better occupancies with effect from 4/07/2002.

The reporting date was extended upto 15th July, following your request, which you failed to comply contrary to instructions. This failure, constitutes an offence, gross misconduct.

You are therefore summarily dismissed from employment with effect from 16th July 2002. You will be paid any amount due to you at Diani Sea Resort after handing over all Company property in your possession and on presentation of duly signed exit form.”

29. The procedure followed to lay off the grievants was contrary to section 16A of Employment Act (now repealed) and Regulation 15 of the Regulation of Wages and conditions of service (Hotel and Catering Trades) order. The said order required that before layoff one month's notice ought to have been served on the union or Labour Officer. Consequently, the summary dismissal of the grievants was therefore unlawful and unfair in the circumstances.

Reliefs

30. The claimant has prayed for 3 months' salary in lieu of notice, severance pay and refund of unremitted SACCO share contributions. The grievants served for a period of between 5 and 17 years. Under Regulation 20 of the said Regulations provides that an employee in the industry who completes 5 years continuous service is entitled to 2 months' notice in writing before termination while the employee who has completed ten years is entitled to 3 months' notice. Consequently, I award 2 months' salary in lieu of notice to all the grievants who served between 5 and 9 years, while all those who served 10 years and above are awarded 3 months' salary in lieu of notice.

31. In addition and in the absence of any other evidence, I award each grievant severance pay at the rate of 12 days pay per year of service as provided by the Regulation 15(e) of the said Regulations.

32. The claim for refund of the unremitted SACCO shares is allowed as prayed because it was not contested. Indeed, Rw1 admitted in evidence that the unremitted SACCO shares were not refunded to all the employees.

33. Summary of award:

Isaac Mwanjele

Notice 3 months 18,027.00

Severance pay 16 years 44,374.15

SACCO shares 15,500.00

77,901.15

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Arthur Kidele

Notice 2 months 15,640.00

Severance pay 9 years 32,483.10

SACCO shares 42,233.00

90,356.10

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Jeremiah Kazungu

Notice 3 months 21,447.00

Severance pay 10 years 32,995.40

SACCO shares 18,500.00

72,942.40

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Julius Kimondi

Notice 3 months 25,440.00

Severance pay 17 years 56,073.85

81,513.85

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James Kasena

Notice 3 months 18,027.00

Severance pay 17 years 47,147.55

65,174.55

=====

William Mumba

Notice 3 months 18,027.00

Severance pay 17 years 47,147.55

SACCO shares 9,500.00

74,724.55

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Maurice Baya

Notice 2 months 14,296.00

Severance pay 9 years 29,691.70

43,987.70

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Aggrey Ikonge

Notice 3 months 15,117.00

Severance pay 11 years 25,582.60

SACCO shares 6,000.00

46,698.60

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Joseph Baya

Notice 3 months	15,117.00
Severance pay 11 years	25,582.60
SACCO shares	23,700.00
	64,398.60

=====

Shida Baya

Notice 3 months	15,117.00
Severance pay 11 years	25,582.60
SACCO shares	18,965.00
	59,664.60

=====

Alphonse Kahindi

Notice 3 months	15,117.00
Severance pay 13 years	30,234.00
SACCO shares	30,700.00
	76,051.00

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Muramba Masha

Notice 3 months	23,460.00
Severance pay 10 years	36,092.30
SACCO shares	36,000.00
	95,552.30

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Kitsao Charo

Notice 2 months	9,970.00
Severance pay 6 years	13,804.60
SACCO shares	7,266.00
	31,040.60

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Pole Kai

Notice 3 months	13,020.00
Severance pay 15 years	<u>30,046.15</u>
	43,066.15

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David Mitsanze

Notice 3 months	18,027.00
Severance pay 15 years	41,600.80
SACCO shares	<u>31,500.00</u>
	91,127.80

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James Ndundi

Notice 3 months	15,117.00
Severance pay 15 years	<u>34,885.40</u>
	50,002.40

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Ramanson Sanga

Notice 2 months	12,780.00
Severance pay 5 years	<u>14,746.15</u>
	27,526.15

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Karisa Fondo

Notice 3 months	14,955.00
Severance pay 15 years	<u>34,511.55</u>
	49,466.55

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Danold Masabo

Notice 3 months	15,117.00
Severance pay 15 years	<u>34,885.40</u>

50,002.40

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Katana Sanga

Notice 2 months 9,970.00

Severance pay 16 years 13,804.60

23,774.60

=====

Samson Ngumbao

Notice 2 months 12,780.00

Severance pay 5 years 14,746.15

27,526.15

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Kazungu Charo

Notice 3 months 15,117.00

Severance pay 13 years 30,234.00

45,351.00

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Andreson Karisa

Notice 3 months 14,817.00

Severance pay 14 years 31,913.55

SACCO shares 32,400.00

79,130.55

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Morris Charo

Notice 3 months 13,671.00

Severance pay 11 years 23,135.55

SACCO shares 23,700.00

60,506.55

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Alfred Muye

Notice 3 months	15,102.00
Severance pay 10 years	23,233.85
	38,335.85

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Charles Kahindi

Notice 3 months	15,117.00
Severance pay 10 years	23,256.90
SACCO shares	12,670.00
	51,043.90

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John Kahindi

Notice 3 months	15,117.00
Severance pay 10 years	23,256.90
	38,373.90

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Jonathan Ndoro

Notice 3 months	15,117.00
Severance pay 10 years	23,256.90
SACCO shares	5,450.00
	43,823.90

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David Ngila

Notice 2 months	15,434.00
Severance pay 8 years	28,493.55
SACCO shares	44,500.00
	88,427.55

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Martin Masha

Notice 3 months	21,456.00
Severance pay 15 years	49,513.85
SACCO shares	36,000.00

106,969.85

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James Kazungu

Notice 3 months 14,817.00

Severance pay 14 years 31,913.55

SACCO shares 20,600.00

67,330.55

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Jonathan Furaha

Notice 3 months 15,117.00

Severance pay 17 years 39,536.80

54,653.80

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Samson Changawa

Notice 3 months 14,802.00

Severance pay 13 years 29,604.00

SACCO shares 29,006.00

73,412.00

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Fredrick Hinza

Notice 3 months 23,460.00

Severance pay 15 years 54,138.45

SACCO shares 20,600.00

98,198.45

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Jonathan Kisochi

Notice 3 months 20,109.00

Severance pay 10 years 30,936.90

51,045.90

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Nzaro Ngumbao

Notice 3 months 15,117.00

Severance pay 14 years 32,559.70

47,696.70

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Shida Jeffa

Notice 3 months 15,117.00

Severance pay 13 years 30,234.00

45,351.00

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Disposition

34. For the reasons that the grievants were unlawfully laid off, I enter Judgment for the claimant, and against the respondents in terms of the awards made to each grievants above plus interest at Court's rates till payment in full. The awards shall be subject to statutory deductions. Each party to bear her own costs.

Signed and dated and at Nairobi this 21st day of May, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26th day of July, 2018.

JAMES RIKA

JUDGE