



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1740 OF 2011

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT

VERSUS

JOHN KING'ORI – DIRECTOR VILLAZ

RESTAURANT BAR AND GRILL.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant brought this suit on 19.10.2011 alleging that the 16 grievants named in the claim were unlawfully and unfairly terminated on account of redundancy by the respondent on 5.7.2011. She averred that the alleged redundancy was done contrary to the procedure provided by section 40 of the Employment Act and prayed for salary in lieu of notice, accrued leave days, public holidays worked, salary for 5 days worked in July 2011 plus compensation for unfair redundancy for each grievant.

2. The respondents never filed any defence to the suit despite being served with summons and the statement of claim. The suit came up for hearing several but it never proceeded due to none attendance by the respondent until 10.4.2018 when the claimant sought and obtained direction to dispense with calling witnesses and asked the court to determine the suit on the basis of the record.

Claimant's Case

3. The grievants were all employed by the respondent at the Villaz Restaurant Bar and Grill situated at the Ground floor, County building, along Haille Sellasie Avenue Nairobi between May 2006 and 5.7.2011 when they were all terminated on account of redundancy. It is their case that they were never issued with any appointment letters and during their employment, they were underpaid including being denied house allowance, they worked during public holidays and accumulated their annual leave. It is further their case that the redundancy was procedurally unfair because it was done contrary to section 40 of the Employment Act.

Analysis and Determination

4. After careful consideration of the uncontested pleadings, evidence and submissions presented by the claimant, I found no dispute in the fact that the grievants were all employed by the respondent until 5.7.2011 when he was terminated on account of redundancy. The said redundancy was in deed corroborated by the fact the process server found that the respondent has since closed shop. The issues for determination herein are:

- a) Whether the grievants' employment was unfairly terminated.
- b) Whether the claimant is entitled to the reliefs sought.

Unfair Termination.

5. The burden of proving unfair termination is placed by section 47(5) of the Employment Act on the employee who alleges that he was so terminated after which the burden shifts to the employer to prove and justify the reason for the termination and the fairness of the procedure followed before the termination. In this case, there is no question that the Claimant alleged that the that the section 40 of the Employment Act was not complied with before laying off the grievants and as such the termination was rendered unfair.

6. Section 40 of the Act provides 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. Failure by the employer to comply with the said mandatory procedure renders the termination unfair within the meaning of section 45 of the Act.

7. After careful consideration of the material presented before me, I find that the Claimant has proved on a balance of probability that the Respondent did not comply fully with the said mandatory procedure provided by of section 40 of the Act and that rendered the termination unfair. Firstly, there is no evidence that she served the termination notice on the claimant and the area labour officer as required by subsection (1) (a). Secondly, she never conducted a fair selection process as required by subsection (1) (c). Thirdly, she failed to pay the grievants cash in respect of all accrued leave as required by subsection (1) (e). Fourthly, she failed to pay salary in lieu notice and severance pay to the grievants as provided under subsection (1) (f) and (g). In my considered view, the employer's obligation to comply with section 40 of the Act is not optional.

Reliefs sought

8. In view of the foregoing finding of fact above that the grievants' employment contracts were unfairly terminated and under section 49 of the Act I award each of them one month salary in lieu of notice, plus compensation for the unfair termination of 3 and 6 months' salary for the grievants who served for a period not exceeding 2 years and those who served over 2 years respectively. In awarding the said compensation I have considered the length of the period served and the fact that the grievants never contributed to their termination through misconduct.

9. The grievants are further granted the prayer for salary for the 5 days worked in July 2011 plus the claim for salary underpayment in arrears as prayed. I also grant the prayer for one year only because under Regulation 9 (1) (a) of the **Regulation Wages (Hotels & Catering trades) Order** leave cannot be accumulated without mutual agreement between the grievants and the employer. Under the said Regulation 9 (1) each grievant was entitled to 24 days annual leave after serving 12 consecutive months. The claim for service pay by the thirteen grievant is also granted as prayed at the rate of 15 days' pay per completed year of service. The claim for public holidays worked is however dismissed for lack of particulars and evidence in support.

10. The award for each claimant is summarized as follows:

LILIAN KERUBO ROBERT- WAITRESS

Notice	Kshs. 6,621.00
Compensation	Kshs. 39,726.00
Salary for July 2011	Kshs. 1,103.50
Leave	Kshs. 6,111.70
Salary underpayment	Kshs. 33,414.00

Kshs. 86,976.20

MARGARET JANE KATUMBI- WAITRESS

Notice	Kshs. 7,283.00
Compensation	Kshs. 21,849.00
Salary for July 2011	Kshs. 1,213.50
Leave	Kshs. 3,884.00
Salary underpayment	Kshs. 18,264.00

Kshs. 52493.50

MARY WANGITHI KARICHU- WAITRESS

Notice	Kshs. 7,283.00
Compensation	Kshs. 21,849.00
Salary for July 2011	Kshs. 1,213.50

Salary underpayment Kshs. 2,283.00

Kshs. 32,628.50

JOHN MEME KAMUKWA- WAITER

Notice Kshs. 7,283.00

Compensation Kshs. 21,849.00

Salary for July 2011 Kshs.1,213.50

Leave Kshs. 1,942.00

Salary underpayment Kshs. 9,132.00

Kshs .41419.50

ZIPPORAH NJERI MBAU - CASHIER

Notice Kshs. 15,216.00

Compensation Kshs. 91,296.00

Salary for July 2011 Kshs. 2,536.00

Leave Kshs. 14,045.55

Salary underpayment Kshs.404,041.00

Kshs. 527,134.55

JACKLINE NJERI WANGARI - WAITRESS

Notice Kshs. 7,283.00

Compensation Kshs.21,849.00

Salary for July 2011 Kshs. 1,213.50

Leave Kshs. 1,942.00

Salary underpayment Kshs. 9,132.00

Kshs. 41,419.50

JULIUS MATHEKA KITUTO- COOK

Notice Kshs. 7,283.00

Compensation Kshs. 21,849.00

Salary for July 2011 Kshs. 1,213.50

Leave Kshs. 6,722.75

Salary underpayment Kshs. 3,962.00

Kshs. 41,030.25

ONKANGI MOSOTI WALLACE- COOK

Notice	Kshs. 7,283.00
Compensation	Kshs. 21,849.00
Salary for July 2011	Kshs. 1,213.50
Leave	Kshs. 6,722.75
Salary underpayment	Kshs. 3,675.00

Kshs. 40,743.25

ROSTOR OUMA AGWIGI- WAITER

Notice	Kshs. 7,283.00
Compensation	Kshs. 21,849.00
Salary for July 2011	Kshs.1,213.50
Leave	Kshs.6,722.75
Salary underpayment	Kshs. 36,528.00

Kshs. 73,596.25

JOHN NYAGA KANGI- WAITER

Notice	Kshs. 7,283.00
Compensation	Kshs. 21,849.00
Salary for July 2011	Kshs.1,213.50
Leave	Kshs. 4,481.85
Salary underpayment	Kshs. 18,264.00

Kshs. 53,091.35

RODAH MWENDE MWEU- CASHIER

Notice	Kshs. 15,216.00
Compensation	Kshs. 45,648.00
Salary for July 2011	Kshs. 2,536.00
Leave	Kshs. 14,045.55
Salary underpayment	Kshs.145,740.00

Kshs. 223,185.55

JOHN ASIGO ENDERA- WAITER

Notice	Kshs. 7,283.00
Compensation	Kshs. 21,849.00
Salary for July 2011	Kshs. 1,213.50
Leave	Kshs. 6,722.75

Salary underpayment Kshs. 17,962.00

Kshs. 55,030.25

JANET MUSIMBI ALUKAYA – STOCK CONTROLLER

Notice Kshs. 15,000.00

Compensation Kshs. 90,000.00

Salary for July 2011 Kshs. 2,500.00

Leave Kshs. 13,846.15

Service pay 5 years at 15 days' pay per year

Kshs. 37,500.00

Kshs. 158, 846.15

FRANKLIN OCHIENG - COOK

Notice Kshs. 7,283.00

Compensation Kshs. 21,849.00

Salary for July 2011 Kshs. 1,213.50

Salary underpayment Kshs. 3,396.00

Kshs. 33,741.50

CHARLES DONDI WABUKO- WAITER

Notice Kshs. 7,283.00

Salary for July 2011 Kshs. 1,213.50

Salary underpayment Kshs. 6,849.00

Kshs.15,345.50

BURTON MUREITHI - WAITER

Notice Kshs. 7,283.00

Salary underpayment Kshs. 4,566.00

Kshs. 11,849.00

Disposition

11. For the reasons stated above, I enter Judgment for Claimant on behalf all the 16 grievants as set out herein above. The sums awarded shall attract interest at court's rate from the date hereof.

Dated and signed at Nairobi this 12th day of July, 2018

ONESMUS MAKAU

JUDGE

Delivered in Open Court at Nairobi this 13th day of July, 2018.

HELLEN WASILWA

JUDGE