



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1960 OF 2013**

**BONIFACE OKUMU OBOKU.....1<sup>st</sup> CLAIMANT**

**BONIFACE KIVALA MUTUA.....2<sup>nd</sup> CLAIMANT**

**FERDINARD WABULE BARASA.....3<sup>rd</sup> CLAIMANT**

**SUSAN WAIRIMU GITHUKA.....4<sup>th</sup> CLAIMANT**

v

**HOTEL BILMAS LIMITED.....RESPONDENT**

**JUDGMENT**

1. On 18 July 2018, the Court in the presence of Mr. Osewe for the Claimants and Mr. Wanyanga for the Respondent scheduled the Cause for hearing on 12 November 2018.
2. The Claimants in the meantime sought and secured leave on 17 October 2018 to amend the Memorandum of Claim and the Court granted the leave sought
3. The Claimants filed an *Amended Statement of Claim* on the same day while the Respondent filed a *Response to Amended Claim* on 8 November 2018 (the same should have been filed and served within 14 days of service of the *Amended Statement of Claim*).
4. When the Cause was called out for hearing on 12 November 2018 as scheduled, Ms. Achieng, holding brief for Mr. Apollo for the Respondent sought to have the Cause heard at 1200 hours, but because the whereabouts or engagements of Mr. Apollo were not disclosed, the Court directed that the hearing proceed at 9.30am, after the cause list call over.
5. When the file was eventually reached at 9.42am, the Respondent and its advocate were not in Court. The Court allowed the hearing to proceed.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Claimant testified and filed submissions on 15 November 2018.
7. The Court has considered the pleadings, evidence and submissions.
8. The Court was informed that the 3<sup>rd</sup> Claimant had resolved her claims with the Respondent and therefore the Court will not examine his case.
9. Before examining the heads of claims, the Court notes that the Court entered judgment in favour of the Claimants in respect of the heads of claim relating to pay in lieu of notice, severance pay and leave on 27 January 2015.

**Unfair termination on employment**

10. The Claimants pleadings, and this was borne out by the unchallenged/uncontroverted testimony of the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were that on 11 July 2013 and 1 August 2013, a Manager called Onjung instructed them not to report to work until advised otherwise and that when no communication was forthcoming, they sought legal advice and a demand letter dated 17 September 2013 was sent.
11. These 2 Claimants testified that they were not given any reasons for the instruction to stay away from work and that they only came to know the reason from the Response filed in Court.

12. The reason outlined in the Response were *poor performance and theft*.

13. In an affidavit deposed to by the Respondent's Managing Director and filed in Court in support of the Response on 30 June 2014, it was stated that the Claimants services were terminated on account of business not doing well.

14. The deponent further deposed that attempts to resolve the dispute out of Court did not succeed.

15. In most employment relationships and more so those brought to an end at the behest of the employer as in this case, it is the employer which knows the real reasons for bringing the employment relationship to an end.

16. Although the Respondent did not call any witness, the Court can conclude from the Respondent's Managing Director's aforesaid affidavit that the real reason for separation was on account of operational reasons.

17. In terms of section 40 of the Employment Act, 2007, the Respondent was under a statutory obligation to notify the Claimants and the local Labour Office at least a month in advance of the intended redundancies.

18. There is nothing on record to suggest that the Respondent complied and on that account, the Court concludes that the termination of the Claimants employment on account of operational requirements was unfair.

#### **Leave**

19. Under section 28 of the Employment Act, 2007, an employee is entitled to at least 21 days annual leave with full pay.

20. The Claimants sought Kshs 80,000/- each on account of leave but did not disclose the period in respect of which the leave related or whether they applied for leave which was declined.

21. The Court is therefore unable to find that the Respondent was in breach of statute or contract as far as leave is concerned (in any case accrued leave was subject of Court order on 27 January 2015 which is allowed on admission).

#### **Salary arrears**

22. The Claimants sought salary arrears, being the lost income from date of separation to time of trial and judgment.

23. The justification given by the Claimants was that there had been no formal notification of termination of employment.

24. In the view of the Court, the Claimants cannot validly claim salary post termination of their respective contracts.

25. The Claimants were in fact aware of the breach of fundamental terms of the contract when they sought legal advice and caused their advocate to write a demand letter alleging breach of contract on 17 September 2013.

26. This Court would endorse as applicable in this case the legal principle by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

#### **Appropriate remedies/orders**

##### **Pay in lieu of notice**

27. The Court entered judgment on 27 January 2015 on this head of claim based on admission by the Respondent.

##### **Severance pay**

28. The Claimants quantified the severance pay as Kshs 85,000/- for the 1<sup>st</sup> Claimant and Kshs 50,000/- for the 2<sup>nd</sup> Claimant (at rate of 15 days' pay for each year of service).

29. The Court equally entered judgment on admission of this head of claim on 27 January 2015 but the Claimants appear to suggest they were entitled to much more.

30. However, the Claimants did not explain the formula used to arrive at the amounts sought and the Court will decline the relief.

##### **General damages for unfair termination**

31. One of the primary remedies for unfair termination of employment in terms of section 49(1)(c) of the Employment Act, 2007 is compensation.

32. However, it is a discretionary remedy and considering the length of service of the Claimants, the Court will award the 1<sup>st</sup> Claimant the equivalent of 9 months wages as compensation, the 2<sup>nd</sup> Claimant the equivalent of 6 months wages compensation.

### **Conclusion and Orders**

33. The Court finds and holds that the termination of the Claimant's services on account of redundancy was unfair and awards them

#### **1<sup>st</sup> Claimant**

- (i) Compensation Kshs 90,000/-
  - (ii) Pay in lieu of Notice Kshs 10,000/-
  - (iii) Severance pay Kshs 15,000/-
  - (iv) Leave Kshs 20,000/-
- TOTAL     **Kshs 135,000/-**

#### **2<sup>nd</sup> Claimant**

- (i) Compensation Kshs 60,000/-
  - (ii) Pay in lieu of Notice Kshs 8,500/-
  - (iii) Severance pay Kshs 15,000/-
  - (iv) Leave Kshs 15,000/-
- TOTAL     **Kshs 98,500/-**

#### **4<sup>th</sup> Claimant**

- (i) Pay in lieu of Notice Kshs 8,000/-
  - (iii) Severance pay Kshs 12,000/-
  - (iv) Leave Kshs 16,000/-
- TOTAL     **Kshs 36,000/-**

34. If the sums awarded on 27 January 2015 have been paid, the same should be deducted from the final awards herein.

35. The 4<sup>th</sup> Claimant's case is dismissed for failure to testify/prove the claims save for the judgment on admission on 27 January 2015.

36. Claimants to have costs.

**Delivered, dated and signed in Nairobi on this 16<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimants Mr. Kuloba instructed by Kuloba Simiyu & Co. Advocates

For Respondent Akolo Wanyanga & Co. Advocates

Court Assistant Lindsey