

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 663N OF 2010

(Before Hon. Lady Justice Maureen Onyango)

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

VERSUS

THE PANARI HOTEL..... RESPONDENT

CORRIGENDA RULING

Judgment in this suit was delivered on 14th December 2018 when the court entered judgment as follows –

“On the salary arrears due to the 1st Grievant, Dorcas Njeri Macharia, it is indicated that a sum of Kshs.42,495 was due to her being salary arrears. In her witness statement dated 8th September 2017 she states at paragraph 8 that the Respondent had unreasonably withheld her salary if June 2010. In her April 2010 payslip the 1st grievant’s gross pay was Kshs.14,260. It is therefore clear that her salary arrears for the month of June 2010 cannot be Kshs.42,495 as pleaded.

From the foregoing, the claim herein has not been proved and is accordingly dismissed with no orders for costs.”

By a notice of motion dated 28th January 2019, the claimant sought the following orders –

1. That the court be pleased to review its own judgment in accordance with the amended claim dated 19th August 2013 and filed on 20th August 2013.
2. The Court be pleased to amend Dorcas Njeri Macharia’s salary from Kshs.15,908 to Kshs.14,200 as stated in the amended memorandum of claim.

The application being unopposed was granted on 20th February 2019 as follows –

“The figure Kshs.15,908 is substituted with Kshs.14,200 as the last consolidated salary for Dorcas Njeri Macharia. The court will amend the judgment accordingly.”

The court accordingly reviews the last two paragraphs by setting aside the same and substituting therefore the following –

The respondent by consent recorded in court on 20th February 2019 conceded that the last salary for the grievant as at June 2010 was Kshs.14,200. Judgment is therefore entered in favour of the 1st grievant Dorcas Njeri Macharia in the sum of Kshs.14,200 being salary not paid for June 2010.

There shall be no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE

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

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JUDGMENT

The Claimant filed its Memorandum on 10th June 2010, on behalf of the following grievants Dorcas Njeri Macharia, Geoffery Alukwe Suchi, Peter Munguti Muia and Boniface Mukwate Kioko. It seeks the following reliefs:

1. That permanent Orders be issued against the Respondent either herself or agency from terminating the service of the four grievants herein without following the law and laid down procedure.
2. That if there is any of the four grievants herein who has been terminated be reinstated back to their former position without loss of nay benefit
3. That the Respondent be ordered to pay the grievants their service charge and any pending rightful dues dating back when each of them was employed as hereunder:

Name	Salary Arrears	Service Charge	Overtime	Total
Dorcas Njeri M	42,495	150,000	55,864	248,359
Geoffrey A. Suchi	-	430,000	45,952	475,942
Peter Munguti M.	-	460,000	45,942	505,942
Boniface M. Kioko	-	460,000	45,952	505,942

4. That in the alternative this Honourable Court to find the termination unlawful and Order the following payment in a given time frame.

Name	Salary Arrears	Service Charge	Overtime	12 Months Compensation	Total
Dorcas Njeri M	42,495	150,000	55,864	166,996	414,355
Geoffrey A. Suchi	-	430,000	45,952	77,064	553,006
Peter Munguti M.	-	460,000	45,942	77,064	583,006
Boniface M. Kioko	-	460,000	45,942	77,064	583,006

On 2nd July 2015 the Court directed the parties to resolve outstanding issues since part of the claim had been compromised. However, the issue of accrued dues was never resolved and the parties agreed to file written submissions. The Respondent only filed grounds of opposition and a replying affidavit in respect to the claimant's notice of motion but neither filed a response to the memorandum of claim nor submissions as directed by the court.

Claimant's Case

The Claimant avers that the grievants are its members and were employed by the Respondent on diverse dates and engaged as cashier/ice rink attendant, ice rink attendant and ice rink scrapers respectively. The Claimant avers that the four grievants are employees of the Respondent which has been changing the name of the grievants' employer but all the companies are owned by the same directors.

The Claimant avers that the grievants fellow workers are paid service charge but the grievants have never been paid any service charge.

It is the Claimant's case that the Respondent's action is meant to defeat justice by the removal of persons from the Union without following the laid down procedure and defraud the grievants of their rightful dues in form of service charge which is to be shared equally amongst all unionisable Hotel employees.

The Claimant further avers that the Respondent intends to terminate the grievants.

Claimant's Submissions

The Claimant submitted that the two main issues for determination were the discrimination of the 3 grievants, Dorcas Njeri Macharia, Bonface Mukwate Kioko and Peter Munguti Muia and the refusal by the Respondent to pay the grievants service charge. It however submitted that the issue on discrimination had been overtaken by events since the 1st grievant, Dorcas Njeri Macharia, had terminated her services with the Respondent while the other 2 grievants, Bonface Mukwate Kioko and Peter Munguti Muia, were re-employed by the Respondent with full terms as at January 2015.

In respect of the service charge and accrued benefits the Claimant submitted that the Respondent's failure to pay the grievants service charge was discriminatory and contrary to section 5 of the Employment Act.

The Claimant further submitted that the accrued benefits include severance pay, withheld salaries for the month of June 2010, underpayments (below the minimum wages), pending leave days, pending public holidays, overtime and leave travelling allowance.

The Claimant submitted that the 1st grievant earned below the general wages order and that the payment for extra working hours is statutory within the meaning of section 7 of the Regulation of Wages (Hotels and Catering Trades) Order Cap 229 now repealed under section 61 of the Labour Institutions Act 2007.

The Claimant further submitted that the grievants' claims are as follows:

Dorcus Njeri Macharia

a. Withheld Salary for June 2010	15,908.00
b. Wages underpayment Oct. 2008 - June 2010	127,264.00
c. Overtime 3 extra hours 17/10/2008 – 25/3/2010	59,860.00
d. Applicable Service Charge 17/10/2008 – 30/6/2010	150,000.00
e. 4 days pending leave	1899.00
f. 8 public holidays	3798.00
g. Severance Pay	7965.00
Total	366,683.00

Bonface Kioko Mukwate

a. Withheld salary for June 2010	10,866.00
b. Overtime 3 extra hours daily 1/2/2008 – 31/3/2010	45,942.00
c. Applicable Service Charge 18/12/2005 – 30/6/2010	460,000.00
d. 21 days pending leave	7,606.20
e. 2 public holidays	724.40
f. Severance Pay	16,299.00
Total	541,437.00

Peter Munguti Muia

a. Withheld Salary for June 2010	10,866.00
b. Overtime 3 extra hours daily 1/2/2008 – 31/3/2010	45,942.00
c. Applicable Service Charge 1/3/2006 – 30/6/2010	420,000.00

d. 21 days pending leave	8,692.80
e. 8 public holidays	2,897.60
f. Severance pay	16,299.00
Total	504,697.00

Determination

The claim herein having been partially resolved the only issue for determination is whether the grievants are entitled to service charge and the other benefits as prayed for in prayer 4.3 of the Memorandum of Claim.

The Claimant did not plead most of the prayers outlined in the submissions including underpayment, leave days, severance pay and holiday pay. These prayers must therefore fail as it is trite law that parties are bound by their pleadings as held by the Court of Appeal in **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR**

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.”

It is worth noting that the Claimant in its written submissions made reference to 3 grievants instead of 4 as stated in the Memorandum of Claim. No Notice of Withdrawal was filed in respect of the 4th grievant Geoffrey A. Suchi but in a letter dated 2nd July 2015 addressed to the Respondent’s Counsel and copied to the Court, the Claimant stated that one grievant had left and that other two grievants had been re-employed.

The Claimant alleges that the grievants were not paid service charge yet other employees were paid service charge. The Claimant produced payslips belonging to other employees who were paid service charge. The Claimants were indeed members of the Union as evident in the Contribution list sent to the Claimant detailing the contributions made in respect of 375MNT, 388MNT and 424IR and 710IR who are the Claimants herein. In respect of the payment of service charge the grievants Letters of Confirmation and Employment Offer Letters dated 1st August 2006 (Peter Munguti Muia), 10th April 2006 (Boniface M. Kioko) and 26th March 2010 (Dorcas Njeri Macharia) do not have provision for payment of service charge.

In particular the Remuneration Clause in the Offer Letter dated 26th March 2010 addressed to Dorcas Njeri Macharia provides:

“In your remuneration, you shall NOT be eligible for an equal share of the hotel’s service charge”

A similar provision existed in the contracts of the other grievants.

Despite annexing an excerpt of the Union’s Constitution and Rules to the Memorandum of Claim, the Claimant did not specify how much was expected to have been paid to the grievants as service charge neither does the excerpt of the Union’s Constitution indicate that service charge was payable to its members. It is therefore not clear if there was any agreement between the Claimant and the Respondent on the payment of service charge in respect of the grievants.

In **Joseph R. Matoka v Severin Sea Lodge [2016] eKLR** Onesmus Makau J. held:

“Finally the claim for service charge is also dismissed for lack of particulars and evidence. There is no dispute that the claimant was unionisable employee. He was a member of the trade union during when he served under seasonal contract and that he also used to pay Agency fee during the time when he was serving on casual basis. He was therefore entitled to earn service charge every month during the whole period of service. There is no dispute that such benefit is not a fixed sum and as such the claimant ought to have assisted the court with the basis upon which to make an award.”

Further in **Kenya Hotels and Allied Workers Union v Pinewood Resort and SPA [2018] eKLR** Justice Rika held:

“The service charge in question is given under a CBA concluded between KUDHEIHA and Hoteliers’ Association. The Claimant Union is a Successor Union in the Hotel Industry. It was unable to show to the Court how service charge, negotiated in a CBA which the Claimant was not party to, is to be computed and availed to the grievants. It is not sufficient to submit that service charge was payable to all unionisable employees. The Claimant ought to have given satisfactory evidence on service charge, and probably called a Witness from KUDHEIHA, to enlighten the Court on this. The figures contained in the Claim are unsupported in evidence. The prayer for service charge is declined.”

In respect of the claims for salary arrears and overtime no satisfactory evidence was produced to prove the exact overtime hours worked as tabulated under prayer 4.3 of the Memorandum of Claim.

On the salary arrears due to the 1st Grievant, Dorcas Njeri Macharia, it is indicated that a sum of Kshs.42,495 was due to her being salary arrears. In her witness statement dated 8th September 2017 she states at paragraph 8 that the Respondent had unreasonably withheld her salary if June 2010. In her April 2010 payslip the 1st grievant’s gross pay was Kshs.14,260. It is therefore clear that her salary arrears for the

month of June 2010 cannot be Kshs.42,495 as pleaded.

From the foregoing, the claim herein has not been proved and is accordingly dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE