

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. 24 OF 2001

(Formerly HCT CC No. 856 of 2005

(Before Hon. Justice Hellen S. Wasilwa on 11th December, 2018)

KENYA UNION OF DOMESTIC,

HOTELS, EDUCATIONAL HOSPITAL AND ALLIED WORKERS...CLAIMANT

VERSUS

WINDSOR GOLF AND COUNTRY CLUB.....RESPONDENTS

ALEXANDER MWANGI GICHIRA & 21 OTHERS.....INTERESTED PARTIES

JUDGMENT

Introduction

1. The Claimant herein filed a claim in its Memorandum dated 27th April 2001 on the ground of failure by management to pay the arrears of underpayment of audited service charge and payment of auditors' fee as per CBA; seeking prayers that the Honourable Court do determine that:-

- a. The Respondents collected and failed to distribute service charge in accordance to Clause 21 of the CBA;*
- b. There is real dispute between the parties and that the Respondents are injuring the Claimants by misusing wrong procedures for solving the real disputes and by reaping where they had not planted and particularly from undetailed "adjustments".*
- c. The Respondents pay arrears of underpayment of the audited service charge and also pay the auditors' fee including interest.*
- d. The Respondents have failed to observe, implement and adhere to the relevant Clause 21 of the Parties CBA in total.*
- e. The Audit report on service charge is not subject to review by any other party especially non-professionals since there is no such provision in the parties CBA.*

2. In turn, the Respondent filed its Response dated 8th October 2001 disputing the averments set forth in the Claimant's Memorandum. In its prayers, it proposed that:

- a. An audit be carried out on its accounts in accordance with the established practice in the industry that gives effect to appropriate adjustments on revenue collected.*
- b. The auditing agency should be appointed and instructed strictly as provided under the CBA or as agreed by parties or as ordered by Court provided the firm of M/s Wanyeki & Associates shall not be appointed because the Respondent has no confidence in them.*
- c. The appointment of and the work done by M/s Wanyeki & Associates be declared inappropriate and void.*

Facts of the suit

3. On 27th March 1995 the shop steward requested the Secretary-General to appoint a qualified auditor, who was appointed on 30th March 1995 by the Secretary-General and according to Clause 21(iii) of the CBA.

4. On 6th November 1995 Mr. Wanyeki of Wanyeki & Company Associates informed the Respondents that they were given instructions to audit the service charge on food, accommodation, seminar and conference facilities. In addition, he requested the Respondents to provide them with the monthly schedules of service charge computation and payment for the years 1992 to 1995 to enable them plan for the audit.

5. On 23rd February 1996, Mr. Wanyeki wrote another letter to the Respondents requesting them to provide the copies of computerized annual summaries of gross sales, net sales after taxes, copies of the audited accounts for each of the years 1992 – 1995, and service payroll showing staff members who received service charge for each of the months in 1992 to 1995.
6. After several joint meetings and several letters among the parties, the audit check was finally concluded and it revealed malpractices on the part of the management. The audited service charge for the period 1992 to 1995 amounted to KShs. 5,597,055/= which came about as a result of the Respondent's deductions that included undetailed "adjustments which are not provided for in Clause 21 of the CBA.
7. On 18th July 1996, the Claimants received the Respondent's two letters for 13th and 29th May 1996 in which they had informed the Claimant of their intention of appointing M/s Mwiti and Associates as their consultants to advise on service charge arrears. In addition, the Respondent wanted the parties to appoint a commercial arbitrator to hear the parties' submissions but the proposal was rejected by the Claimants.
8. On 30th April 1996, the Claimants reminded the Respondents to forward to M/s Wanyeki & Associates a cheque for KShs. 417,351 being their professional fees. The Respondents were further reminded of the payment on 17th February 1997 but it was all in vain.
9. On 2nd July 1988 the Claimants reported the matter to the Joint Industrial Council which appointed a sub-committee on 21st July 1988. After carrying out its investigations, it reported to the Joint Council on 17th November 1997. The Council considered the report as presented by the Investigations sub-committee and upheld its recommendation that parties be allowed to the next stage of the dispute settlement.
10. As a result of the aforesaid, on 8th April 1999 the Secretary General of the Claimant reported the dispute to the Minister in accordance with **Section 4 of the Trade Dispute Act, Cap 234 (repealed)**. The Minister, in accordance to **section 6 (2) of the Act**, appointed Mrs. E. W. Mwai of Labour Headquarters to act as conciliator.
11. During the last joint conciliation meeting held on 3rd August 2000 at Mrs. Mwai's office, the parties signed an agreement of disagreement. They also completed and signed Form A which was forwarded to the Industrial Court through the Minister for Labour to enable the parties be heard and arbitrated.

The response

12. This dispute arises out of calculation and payment of service charge between 1992 to 30th September 1995. The Respondent avers that it overpaid the Claimant's members excess service charge amounting to KShs. 2,707,956.00 and intends to recover the amount from future service payouts to the Claimant's members.
13. The dispute begun when at a Joint Consultative Committee (JCC) Meeting held on 21st May 1992, the Works Committee at the Respondent's establishment expressed concern over low service charge levels and sought to be involved in the calculation of service charge. The Committee's request was heeded to by allowing them to verify the modality of calculating service charge. It immediately became clear that the bone of contention was the adjustment that the invoice billing or the anticipated revenue was being subjected to before applying service charge.
14. The Respondent explained to the Works Committee in detail at various meetings that the concept of AR adjustments was to reflect the actual revenue received from accommodation and food sales. The AR adjustments involved complimentaries, discounts, rate adjustments and overcharges where a room is checked out but is charged extra nights by the computer. A page by page breakdown of the AR adjustments made over the period in question was handed over to the Claimant's representatives.
15. Unconvinced by the explanation given by the Respondent, the Works Committee referred the matter to the Claimant and the latter unilaterally appointed M/s Wanyeki & Associates to audit the service charge account. The Auditors came up with a report alleging underpayment of KShs. 5,597,055.00 and the Claimant immediately sought payment of that amount plus an auditors' fee of KShs. 417,351.00.
16. The Respondents sought time to seek a second opinion on the audit report. In their letter dated 15th May 1996, the Claimant objected to the re-audit or any verification of the audit report maintaining that the audit conducted by M/s Wanyeki & Associates was final according to Clause 21 of the CBA. This refusal by the Claimants created a stalemate thus this suit.
17. According to Clause 21 of the CBA, service charge is payable only on food and accommodation sales. In case of all other revenue centers, service charge is only payable if the same is being collected from guests for purposes of being paid to workers. However, there was no such service charge being levied on guests. The Respondent adopted the following formula in calculation of service charge:-

a. Invoiced amounts or advertised rates less AR adjustments = Gross Income

b. Gross Income less Taxes = Net Revenue

c. Net Revenue x 10% = Service Charge levied

d. Service Charge levied x 90% = Service Charge payable to employees.

e. The Respondent retains 10% of the Service Charge.

18. The Claimant's auditor used figures of invoiced and/or advertised rates applicable before AR adjustments in calculating service charge. The affected points of sale were:-

- a. Food;*
- b. Accommodation;*
- c. Rent of Shop and Service Desk;*
- d. Beverages;*
- e. Seminars and Conferences;*
- f. Tournaments, Functions and Competition;*
- g. Health Club Facilities and Swimming Pool;*
- h. Laundry and Valet;*
- i. Courtesy Bus; and*
- j. Telephones, Telexes and Faxes.*

19. As such, the auditor based his calculation on non-received (income receivable) and on sales which are not subject to service charge. He worked on "point of sale" figures as opposed to "back office" figures. The figures relied upon did not give the actual revenue earned by the Respondent as they were not subjected to adjustments of commission, discount, entertainment etc.

20. The Respondent avers that service charge is not taxed on a hotelkeeper but is met by a customer as a percentage to the hotelkeeper. The hotelkeeper is merely an agent. Where no revenue is earned, a hotelkeeper cannot be expected to pay service charge.

21. An internal audit conducted by the Respondent revealed that there was overpayment of service charge to the Claimant's members during the following period and as follows:

PERIOD	AVAILABLE FOR DISTRIBUTION (KSHS.)	PAID (KSHS.)	VARIANCES OVER/UNDER (KSHS.)
1992	5,796,137.00	5,161,916.00	634,221.00
1993	15,520,299.00	15,604,715.00	(84,416.00)
1994	19,306,609.00	20,868,525.00	(1,561,916.00)
1995	16,559,500.00	18,255,345.00	(1,695,845.00)
TOTAL	567,182,545.00	59,890,501.00	(2,707,956.00)

NB: Bracket represent over-payment on three occasions.

22. The Respondent claims to recover KShs. 2,707,956.00 from future service charge payable to the Claimant's members.

23. The Respondent avers that the appointment of the auditors was in breach of the parties' CBA and therefore null and void since neither the Respondent nor the Kenya Association of Hotelkeepers was consulted. It is also unclear as to how the auditor arrived at his report without a detailed consideration of the Respondent's bookkeeping methods.

24. The Respondent avers that the KShs. 5,597,055.00 being sought by the Claimant is illusory and arrived at by the auditor to justify the fee of KShs. 471,351.00. There is no evidence that the said fee was agreed upon prior to the work being undertaken by the auditor. Further, the auditor as an appointee of the of the Claimant and who did not adhere to the procedure set out in Clause 21 of the CBA and was bound to be biased against the Respondent.

The evidence

25. CW1 Alexander Mwangi testified that he was a member of the Claimant and Works Committee and served as the Secretary in 1994. He further stated that the matter brought in court, he was the shop steward.

26. Further, that in late 1994 the members of the Works Committee started complaining of not being supplied with records of service charge being supplied as per the CBA. The Committee wrote a letter to the management but nothing was forthcoming.

27. CW1 further stated that in March 1995, the Works Committee requested Wanyeki & Company Auditors Associates, who were external auditors, to conduct an audit. They wrote a letter to the Management on this asking for documents and conducted the audit in 1996. They found that the accounts were not tallying with what was indicated. Once the audit was concluded, the auditors wrote to the management requesting them to make payments of the underpayments detected amounting to KShs. 5,587,055.00.

28. Upon cross-examination, CW1 stated that he was in security department and had no access to financial documents. Further, he stated that Wanyeki & Company Auditors Associates was from the panel of 10 auditors but conceded that he was not involved in the selection process. In addition to this, CW1 confirmed that the signature appended in the Service Charge Summary which was annexed in the Respondent's bundle of documents was his but was for the year 2001 and not the year 1994. Upon re-examination, CW1 clarified that it was mandatory for the management to issue them with summaries.

29. RW1 Paul Wambua Mutuku, a payroll officer of the Respondent, testified that the issue first came to his attention in 1996 through an audit commissioned by the Claimant. He further testified that the Audit Report was brought to him and that he was not involved in the process and the management only came to know of it after the report was done.

30. RW1 stated that the management went through the report to verify its correctness and informed the union that it would be reviewing the figures. However, the Claimant responded on 18th July 1996 refusing any form of re-auditing. He further stated that the auditors did not provide any documents or how they arrived on the figure.

31. Upon cross-examination, RW1 stated that what was paid as per payroll was KShs. 59,703,230.00 but conceded that he did not have proof that the management paid the said amount. He further admitted that he was not conversant with the provisions of the CBA.

32. RW2 Mwai Mbutia a partner at Mungai & Associates and a qualified accountant testified that he carried out an analysis on the figures he was given and captured how service charge is compiled. In addition, he stated that he had made a finding that the report of Wanyeki & Associates ignored any adjustments and some of its findings did not appear in the books of accounts.

33. Upon cross-examination, RW2 testified that it is the Respondent who appointed him but he had not carried the letter to prove that in court. He further stated that he had found that Wanyeki & Company's report did not tally with the books of account and that he had used the documents available to him but did not have the evidence in court. During re-examination RW1 stated that the issue in calculation was the formula and that his sources were very many.

The Claimant's Submissions

34. The Claimant in its submission dated 1st August 2018 and filed on 24th August 2018, submits that the issue in dispute emanates from the CBA between the Claimant and the Hotel Keepers Association of Kenya for which the Respondent was a member. The Respondent relies on Clause 21 of the CBA which in summary provides that:

1. The employer will operate a service charge on accommodation sales provided. Where an organization charges service charge on other revenue items, then the service charge shall be collected and distributed equally to all unionisable employees.

2. The Secretary General of the Union may appoint a qualified accountant/auditor from a panel of 10 qualified accountants/auditors as agreed with the Associations, to check the book of accounts maintained by the employer for service charge. Such an employer is required to pay half of the Auditor's fee and the whole of the auditor's fee where a malpractice is revealed on its part.

3. The employer shall supply the shop steward or the local union representative, an audited reconciliation of the service charge collected and distributed covering the audit period.

4. A deduction of 10% will be retained by the employer from service charge collection for administrative purposes and the balance of 90% will be distributed equally among all unionisable employees.

35. The Claimant submits that the service charge was duly collected but was not accounted for and therefore underpaid to the Respondent's employees who were entitled to it.

36. The Claimant further submits that the Respondent contravened **article 41 (1) of the Constitution** and **section 25 of the Employment Act 2007** which anchors on fair labour practice and payment of remuneration wrongfully withheld. The Respondent distributed service charge in a manner that revealed non-compliance with the requirement of the law.

37. The Claimant humbly submits that the Respondent should be compelled to pay the audited amount of KShs. 5,559,055.00 for underpayment of service charge and KShs. 417,351.00 auditor's fee together with interest accrued on both figures from the time of deduction to date.

The Respondent's Submissions

38. The Respondent in its submissions dated 26th September 2018 and filed on 27th September 2018, submits that it is trite in law that he

who alleges must prove and that the Claimant fell short of this principle by relying on unsubstantiated testimony. Further, the report by Wanyeki & Associates was not produced nor was the maker availed to be cross-examined on its preparation and findings.

39. The Respondent also submits that the appointment of M/s Wanyeki & Associates was unprocedural and which brings the entire audit exercise to disrepute. Further, that unlike the appointment of the Respondent's Auditors, the appointment of the Claimant's auditor was predicated upon clause 21 of the CBA. There is no evidence to prove that Wanyeki & Associates were among the panel of 10 qualified auditors. In addition, the employer was not notified of the intended audit in which it was required to advance the auditor's fee before the audit was carried out.

40. The Respondent concludes that the Claimant's case is misconceived, unsubstantiated and lacks merit. Similarly, the Claimant has failed to prove its case on a balance of probability and the same should be dismissed with costs.

The Interested Parties' Written Submissions

41. The Interested Parties in the submissions dated 4th October 2017 and filed on even date, submits that service charge had not been paid strictly within Clause 21 of the Parties' CBA and that the Respondent violated the CBA intentionally.

42. Further, the Respondents violated clause 21 (ii) by refusing to provide the shop steward with a monthly reconciliation as to the service charge collected and distributed. In addition, the Respondent further violated the Clause by failing to distribute the service charge provided.

43. In conclusion, the Interested Parties submit that the Respondents failed to pay the arrears of underpayment of audited service charge amounting to KShs. 5,597,055.00 together with the auditors' fee of KShs. 417,351.00 and prayed that the Court grants the orders prayed for in the Claimant's Memorandum.

44. I have examined the evidence and submissions of the Parties. The bone of contention is the service charge payable to the Claimants. The Claimants aver that they were underpaid and Respondents aver they overpaid.

45. This is a case where both Parties seek special damages without presenting to Court documents to prove them. In cross-examination, CM1 indicated that they asked management for accounts but the management refused to supply the same in the period under consideration.

46. It is not clear then what the auditors relied on in arriving at the service fee payable to 5,597,055.

47. The Respondents too commissioned their own auditor to review their documents and he came up with a different figure indicating that the Respondent had in fact overpaid the service charge. No documents were also submitted before Court to prove this fact.

48. What the Parties are expecting from this Court is therefore a miracle. The Parties want Court to find for each of them based on their averments without any tangible proof. He who alleges must prove but in the instant case, none of the Parties have proved their case.

49. In fact RW1 told Court that the documents were destroyed after 8 years. I do not find this case proved as indicated, therefore I dismiss it in its entirety.

50. Each Party will pay its own costs.

Dated and delivered in open Court this **11th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Were for Respondent – Present

Claimant