



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 137 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS AND ALLIED WORKERS UNION CLAIMANT

-Versus-

SUNSET HOTEL RESPONDENT

J U D G E M E N T

ISSUE IN DISPUTE:

WRONGFUL TERMINATION OF:

1. VERONICA OYUGA, 1ST GRIEVANT AND
2. MOSES OCHIENG, 2ND GRIEVANT

Introduction:

The Claimant is a union registered in Kenya to represent employees in hotel and catering industry. It has filed this suit on behalf of its members Veronica Oyuga, 1st Grievant and Moses Ochieng, 2nd Grievant. It is the Claimant's case that both Grievants were wrongfully terminated by the Respondent on grounds of joining membership of the union. The dispute was reported to the Minister for Labour by Claimant by letter dated 18th July 2011 following failure of parties to agree after meeting at their own level. The Minister appointed a conciliator who after meeting with the parties prepared a report in which the finding was as follows:

- i) That the parties have a recognition agreement in place and the signing of CBA is underway awaiting a case pending at the Industrial Court
- ii) That the aggrieved were indeed members of the union
- iii) That the aggrieved were employed by the Hotel on diverse dates but served erratically
- iv) That the aggrieved services were terminated unprocedurally
- v) That the management failed to pay terminal dues.

The minister recommended that the aggrieved be paid off as demanded by the union.

The demands of the union were that the Grievants be paid be paid the following:

- i) Notice
- ii) Public Holidays
- iii) Leave
- iv) Unpaid wages for days worked
- v) Underpayment of wages
- vi) Maximum compensation

It would appear that the Respondent did not agree with the findings and recommendations of the Minister and failed to pay as recommended compelling the Claimant to file the present suit.

In the memorandum of Claim the Claimant prays for the following:

- (a) The grievants be reinstated unconditionally without loss of any benefits.
- (b) In the alternative be paid and compensated as here below.

(i) MR. MOSES OCHIENG

1. Three months pay in lieu of notice

@ 324 x 30 x 3 29,160

2. Rest days for three years

@ 324 x 4 x 12 x 3 46,656

3. Public Holidays for three years

@ 324 x 11 x 3 10,692

4. Leave for 3 years

@ 324 x 21 x 3 20,412

5. Under payment @ Kshs.24 x 30 x 12 x 1 8,640

6. Overtime for three years @ 2 hours daily

x 30 x 12 x 3 x 40.5 87,480

7. 12 months compensation for loss of Employment

Unfairly 116,640

Total 319,680

(ii) VERONICA OYUGA

1. 2 months pay in lieu of notice

@ 365 x 30 x 2 21,900

2. Rest days for 3 years

@ 365 x 4 x 12 x 3 52,560

3. Leave for 3 years

@365 x 21 x 3 22,995

4. Public Holidays for 3 years

@ 365 x 11 x 3 12,045

5. Under payment

@(24 x 30 x 16) + (65 x 30 x 2)

11,520 + 1950 x 2 15,420

6. Overtime for 3 years

@2 hours x 30 x 12 x 3 x 45.5 98,280

7. 12 months compensation for Unfair

Termination @30 x 365 x 12 131,400

Total 354,600

(c) **THAT**, the grievants be issued with certificate of service.

(d) **THAT**, cost for this suit be provided for by the Respondent.

The Respondent filed a Replying Memorandum in which it states as follows:

MOSES OCHIENG had on several occasions up to 2010 been employed by the respondent on contract basis with the last contract being in 2010. That the respondent did pay to the said MOSES OCHIENG all due amounts on a monthly basis as per the contracts, and in accordance with the law. That all the said contracts either ran their full course or in case of termination, such termination was done in strict adherence with the contract terms and the relevant law. The respondent denies paragraphs 2.1.2 and 2.1.3 of the claim.

VERONICA OYUGA had on many occasions upto 2011 been employed on a contractual basis by the respondent. During the duration all the contracts the said VERONICA OYUGA was paid all contractual dues as per the contracts and law. Further to the above the said VERONICA OYUGA was allowed rest days and worked within prescribed hours and was paid for overtime worked. The Respondent avers that contracts in relation to VERONICA OYUGA either ran their course or were terminated in accordance with the contractual terms and relevant law.

The Respondent denies that there was unlawful termination of the Grievants and denies that they are entitled to the prayers sought.

The case was heard on 24th September 2015 when the Claimant's evidence was taken and on 10th October 2016 when the Respondent presented its evidence.

Claimants Case

Veronica Oyuga the 1st Grievant testified that she was employed by the Respondent as a laundry attendant on 10th August 2005 and worked in the same position until she was terminated. She joined the union on 2nd June 2010 and was terminated when the Respondent received a check off form from the union to deduct her union dues. The Respondent told her that it was unhappy with her joining the union because as a casual she had no right to join the union. She testified that she was never given annual leave and worked on all public holidays. She was however given off days. She testified that she had a clean working record.

Veronica prayed for payment of 2 months' salary in lieu of notice at Kshs. 21,000, rest days for 3 years at Kshs. 52,560, leave for 3 years at Kshs. 22,995, public holidays for 3 years at Kshs. 12,035, underpayments of Kshs 15,420, overtime of Kshs. 98,280 and 12 months' salary as compensation of Kshs. 131,400.

Veronica testified that her first salary was Kshs.6300 per month and was increased to kshs. 8100 and again to Kshs. 9000. She testified that she was terminated on 1st December 2010.

Under cross examination Veronica denied that she was ever given leave. She was shown a master roll which she said she never signed and was not present when it was marked. She said she reported to work between 6 and 6.30 am had a tea break at 10 am and also had a lunch break. She stated that she worked 2 hours overtime every day. She stated she was employed as a casual throughout, was paid monthly in cash and signed for the payment.

Moses Ochieng testified that he was employed by the Respondent on 14th September 1999 as a general cleaner at a salary of Kshs. 4650. The salary was increased to Kshs. 6300 per month when he was promoted to room steward. He was thereafter transferred to the kitchen at a salary of Kshs. 9000. In June 2010 he joined membership of the union. His employment was terminated on 1st December 2010 when the Respondent received check-off forms from the union. He was told that as a casual he had no right to join the union.

Moses prayed for reinstatement or in the alternative payment of 3 months' salary in lieu of leave at Kshs. 29,160, rest days for 3 years at Kshs. 46,656, public holidays, at Kshs. 10,692, leave for 3 years at Kshs. 20,412, underpayments for 3 years at Kshs. 8,640, overtime at Kshs. 87,480, compensation of Kshs. 116,640. He further testified that no remittance was made for NSSF. Moses testified that he started working at 5am and left work at 6pm, but whenever there were many guests he sometimes worked up to 10pm.

Respondents Case

Stephen Katambani, the Hotel Manager of the Respondent testified that he was seconded to the Respondent in 2011 as acting Manager and became the Hotel Manager in 2014. He testified that he was familiar with the facts of this case. He testified that he was aware that Moses joined the Hotel as a casual and at another time was employed on contracts on different dates. He testified that Moses was never employed on permanent terms. He referred to a contract signed by Moses for the period 1st August 2003 for a duration of 6 months up to 31st January 2004 and a letter of termination of contract dated 3rd December 2004. He testified that Moses was at one time a casual employee from January to March 2006 and signed for payments made to him.

Mr. Katambani testified that Moses is not entitled to 3 months' notice as this is only an entitlement of regular or permanent employees. That Moses is also not entitled to off days as he was taking one rest day every 7 days. He testified that Moses was paid on all the public holidays that he worked. He testified that Moses is not entitled to annual leave as casuals are not entitled to annual leave. He further testified that Moses did not work overtime as he worked in the laundry where there is no overtime. He further testified that Moses is not entitled to compensation as he worked on contract whose terms he consented to.

In the case of Veronica Mr. Katambani testified that she worked as a casual in the laundry. He referred to a master roll extract at the Respondent's Annexure B-1 which indicates that Veronica worked until 6th January 2007 and went on a break. That on 2nd May 2007 she again went on a break. He testified she is not entitled to leave as she was a casual. He testified that Veronica was given one rest day every 7 days and did not work overtime as no overtime work is done at the laundry.

Under cross examination Mr. Katambani stated Veronica was a casual but did not work continuously. He stated that the master roll did not have attendance sheet.

He further testified that Moses was terminated on 3rd December 2004 and there is no other evidence of his termination that he worked in the laundry and as a general worker in the kitchen. Mr. Katambani stated that there were original casual payment journals which he did not bring to court. He testified that he could not trace the master roll for 2007 to prove that Moses went on rest days. He stated that Moses was paid for working on public holidays. He denied that he had testified that Moses was not entitled to overtime. He denied that Moses was underpaid.

Mr. Katambani stated that he was aware about Hotels and Catering Service Order and about the provisions therein in relation to seasonal and casual employment. He stated that according to what was before the court he believed the Grievants had clean working records. He stated that at the time of termination the Grievants were being paid Kshs. 270 per day and the cause of their termination was staff reduction. He further stated that he believed the procedure for staff reduction was followed. He stated that he could not tell whether there were any other employees who were laid off apart from the Grievants. He admitted participating in conciliation meetings at the Ministry of Labour but did not agree with the findings. He stated he wrote to the conciliator rejecting the recommendations but did not have a copy of the letter in court.

Determination

I have carefully considered the pleadings and evidence before court. I have also considered the written submissions filed on behalf of the parties. The issues arising for determination are the following

1. Date of employment of Grievants and whether or not they were on casual employment;
2. Whether the Grievants were wrongfully terminated; and
3. Whether the Grievants are entitled to the orders sought.

Casual employment

Casual employment is defined in section 2 of the of the Employment Act (the Act) to mean-

"a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time"

The duration and terms of casual employment is provided for in section 37 of the Act as follows:

(1) Notwithstanding any provisions of this Act, where a casual employee—

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.

In the present case the Respondent states at paragraph 1.i. as follows:

MOSES OCHIENG had on several occasions up to 2010 been employed by the Respondent on contract basis with the last contract being in 2010

and at paragraph 11.i. that:

VERONICA OYUGA had on many occasions up to 2011 been employed on contractual basis by the Respondent.

It is a cardinal rule of evidence that parties are bound by their pleadings (See *Laslie John Wilkins v Buseki Enterprises Limited*[2015]eKLR)

In his evidence in court Mr. Katambani stated that Grievants were casual employees. The Respondent is bound by its pleadings that the Grievants were employed on contractual terms and cannot be heard to again shift and aver that they were casual employees.

The foregoing notwithstanding, the law on casual employment as I have restated above is clear, that no person can be a casual employee when they are engaged on daily contracts for a period in excess of one month if continuous or in excess of three months intermittently.

It was also the evidence of the Grievants that their salary was paid monthly, a fact not denied by the Respondent, and which is confirmed by wage payment sheet produced in court for the month of June 2007. It is therefore my finding that the Grievants were not employed on casual terms but on the contrary were regular employees on monthly contract terms by operation of section 37(1) of the Act.

Wrongful Termination

The Claimant alleges that the Grievants were wrongfully terminated while the Respondent insists the termination is compliant with the law. Termination of employment is unfair unless the employer complies with sections 41 and 43 which provide for fair procedure and valid reason as follows:

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 prohibits the unfair termination of employment by employers and provides that for termination to be lawful the employer must comply with both fair procedure and have valid reason for the termination. The section provides as follows:

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where—

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

Mr. Katambani testified that the Respondent laid off the Grievants according to the provisions of the law. Lay off constitutes redundancy and the procedure as provided for in section 40(1) of the Act is as follows:

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

No evidence was provided by the Respondent as proof that it complied with the law. Even in the Defence filed by the Respondent there is no plea of redundancy or lay off. Whether considered as redundancy or termination, the Respondent did not comply with the law making the termination of employment of the Grievants unlawful and therefore unfair.

I find and declare the termination of employment of the Grievants by the Respondent unfair.

Remedies

Section 49(1) of the Act provides for remedies for unfair termination as follows:

49. Remedies for wrongful dismissal and unfair termination

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

Having found the termination of the Grievants unfair they are entitled to notice. They are also entitled to compensation.

The Grievants also prayed for rest days, public holidays, annual leave, underpayments and overtime. The Respondents stated that the Grievants were not entitled to any remedy but did not produce any evidence to prove that the Grievants were paid the same. Section 26 of the Employment Act and section 48 of the Labour Institutions Act provide that no employer may offer an employee terms inferior to those minimum terms provided for under the law. The sections provide as follows:

Employment Act section 26

26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.

Wages Order to constitute minimum terms of conditions of employment.

48.(1) Notwithstanding anything contained in this Act or any other written law?

(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.

The foregoing being the case the Grievants are entitled to payment according to the prescribed minimum terms and the court is obliged by law to read into their contracts those minimum prescribed terms.

Under section 28 of the Employment Act each employee is entitled to a minimum of 21 days leave for

each year worked. The evidence of the Respondent that casuals are not entitled to annual leave is a misapprehension of the law as the law applies to all employees with no distinction as to whether one is or is not a casual or permanent employee. Indeed as I have stated in other cases, the law does not refer to "permanent" employment as no "permanent" employment is contemplated by the law hence the provision for termination notice at section 35 which is implied in every contract of employment. Any contract that does not allow either party the option of termination would be unconstitutional as it would subject the parties to servitude. This is also the reason why the law contemplated and provided for the procedure and grounds for fair termination.

For these reasons the Grievants are entitled to the following:

VERONICA OYUGA

1. 1 months' pay in lieu of notice

Having been a laundry operator the Claimant's minimum wage was supposed to be **Kshs. 8724** excluding 15% house allowance. Her consolidated wage according to the Minimum wages for 2010 is therefore **Kshs.10032.60** which I award her.

2. Rest days

The Respondent conceded that the Grievant were not given paid rest days. The Grievant prayed for rest days for 3 years which I award at **Kshs. 52,560** as prayed.

3. Public Holidays

RW1 did not deny that the Grievant were not paid for work performed on Public Holidays. I award the Grievant as prayed in the sum of **Kshs. 12,045**.

4. Annual leave

I award the Grievant annual leave for 3 years at **Kshs. 22,995**.

5. Underpayments

The Respondent did not deny underpaying the Grievant as prayed and I award her the same at **Kshs. 15,420**.

6. Overtime

The Grievant did not prove working overtime, having conceded that they were sometimes released at 3 pm when there were few guests at the hotel. The Claim is dismissed.

7. Compensation

Having found the termination unfair and taking into account the Grievant's length of service I award him 6 months gross salary based on the consolidated statutory minimum rate of Kshs. 10032.60 at amounting to **Kshs. 60,195.60**.

2. MOSES OCHIENG, 2ND GRIEVANT

Moses was a cook and his statutory basic minimum wage as at December 2010 was Kshs. 7283.00 excluding 15% house allowance which brings it to **Kshs. 8375.45**. I therefore award him the following-

1. Notice

1 months' pay in lieu of notice **Kshs. 8,375.45.**

2. Rest days

The Respondent conceded that the Grievant were not given paid rest days. The Grievant prayed for rest days for 3 years which I award at **Kshs. 46,656** as prayed.

3. Public Holidays

RW1 did not deny that the Grievant were not paid for work performed on Public Holidays. I award the Grievant as prayed in the sum of **Kshs. 10,692.**

4. Annual leave

I award the Grievant annual leave for 3 years at **Kshs. 20,412.**

5. Underpayments

The Respondent did not deny underpaying the Grievant as prayed and I award her the same at **Kshs. 8,640.**

6. Overtime

The Grievant did not prove working overtime, having conceded that they were sometimes released at 3 pm when there were few guests at the hotel. The Claim is dismissed.

7. Compensation.

Having found the termination unfair and taking into account the Grievant's length of service of 11 years I award him 12 months gross salary based on the consolidated statutory minimum rate of Kshs.8375.45 amounting to **Kshs. 100,504.80.**

Conclusion

In conclusion, I find that the termination of Veronica Oyuga and Moses Ochieng Were unfair and award them the following:-

Veronica Oyuga Kshs.173,247.6

Moses Ochieng Kshs.195,280.25

There shall be no orders for costs.

Dated, Signed and Delivered this 20th day of July, 2017

MAUREEN ONYANGO

JUDGE