



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 507 OF 2014**

**BETWEEN**

**KENYA HOTELS AND ALLIED**

**WORKERS UNION .....CLAIMANT**

**VERSUS**

**CARSLAKE NOMINEE LIMITED t/a**

**DIANI SEA RESORT .....RESPONDENT**

[Respondent's name corrected as per order dated 25<sup>th</sup> September 2015]

*Rika J*

*Court Assistant: Benjamin Kombe*

*Mr. John Simiyu, Industrial Relations Officer for the Claimant*

*Kinyua Muyaa & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimant Union filed this Claim on behalf of its Member Jeremiah Ouma Onditi [Grievant], on 17<sup>th</sup> October 2014. The Grievant was employed by the Respondent as a Security Guard on 9<sup>th</sup> July 2000. He was an elected Official of the Claimant Union's South Coast Branch. His contract was terminated by the Respondent on 13<sup>th</sup> May 2013. The Grievant was said to have been among Employees of the Respondent, who forcibly evicted Respondent's General Manager from Office. He was offered 4 months' salary in lieu of notice; salary up to and including 13<sup>th</sup> May 2013; any accumulated public holidays and annual leave days; less any statutory deductions and amounts owed to the Respondent. The Claimant prays the Grievant is granted the following orders:-

a) Reinstatement without loss of benefits.

b) Alternatively, the Grievant is paid all terminal dues and is compensated for unlawful

termination.

c) Costs.

2. The Respondent filed its Statement of Response on 29<sup>th</sup> November 2014. It is conceded the Grievant was employed by the Respondent as a Security Guard, but effective 1<sup>st</sup> October 2002, not 9<sup>th</sup> July 2000. His contract was terminated validly and fairly. He was suspended, the allegations against him were investigated, and he was granted a fair hearing. His terminal dues were computed in accordance with the applicable CBA concluded between KUDHEIHA and the Hoteliers' Association. He refused to collect his dues. The Claim has no merit. The Respondent prays for its dismissal with costs.

3. The Grievant testified on 26<sup>th</sup> September 2016. Kampa Georg, Respondent's Managing Director testified on 9<sup>th</sup> December 2016 and 15<sup>th</sup> March 2017. Security Guards Victor Saka and Dickson Khendi testified for the Respondent on 14<sup>th</sup> July 2017, when hearing closed.

4. The Grievant stated he was employed on 9<sup>th</sup> July 2000 through an oral contract. He was later placed under a written contract. He earned Kshs. 14,353 as of the date of termination, 13<sup>th</sup> May 2013.

5. Employees ejected Respondent's General Manager from his Office. The Grievant explained that he was not involved in ejection of the General Manager.

6. The Grievant was not fairly heard. He found Officials from a rival Trade Union KUDHEIHA, while he belonged to the Claimant, at the disciplinary meeting called by the Respondent. He protested KUDHEIHA's involvement.

7. The Respondent demanded the Grievant writes an apology letter, and desists from trade unionism. He declined to do this. Days later, he was summoned and issued a letter of termination. He appealed against the decision internally. The appeal was disregarded. The Claimant reported the existence of a trade dispute to the Ministry of Labour. Conciliation resulted in recommendation that the Grievant is paid terminal dues and compensation.

8. Cross-examined he explained the date given by the Respondent, as the date of employment, 1<sup>st</sup> October 2002, is the date he was placed under a written contract. He was not present when General Manager Ong'uti was forcibly evicted by Employees from Office. The General Manager was frog-marched.

9. The Shop Steward had issued notice that there would be a meeting when the General Manager was evicted. Employees would not leave work that morning on changing of shift. The Grievant worked on nightshift. The meeting went ahead. The General Manager was new. He had denigrated Employees alleging that Employees were not well-educated. Most Employees were standard 8 graduates. The General Manager wanted to have better educated Employees. He was frog-marched out of his Office.

10. As this happened, there were visitors booked in. The Director tried to calm the situation. A committee, which the Grievant was a Member of, was set up to deliberate on Employees' grievance. The Committee resolved the General Manager had to be sacked, or the Hotel would be burnt down.

11. The Grievant received the notice to show cause, why he should not face disciplinary action, dated 29<sup>th</sup> April 2013. He replied. He did not have evidence that he was victimized for his association with the Claimant, or to enable the Respondent engage a different security firm at the workplace.

12. He was not invited to a disciplinary hearing. He was called by his Supervisor, and told there was a scheduled meeting. He presented himself and found the meeting going on. Claimant was not invited to the meeting; KUDHEIHA was. There was a CBA concluded by KUDHEIHA. The Grievant claims benefits under the KUDHEIHA CBA. Agency fee was deducted from the Grievant's salary. Reasons for termination are stated in the letter of termination. The Grievant was offered terminal dues which he declined.

13. Redirected, the Grievant told the Court his contracts were seasonal. He started working in 2000. He was outside the Hotel, at a nearby supermarket when the General Manager was evicted. Security Report did not implicate the Grievant.

14. Kampa Haraed Gerhard Fredrich Georg, confirmed the Grievant was employed by the Respondent as a Security Guard. He was on seasonal contracts, mostly for periods of 6 months. He signed a letter after he was converted to regular terms. There was no date of expiry in his last contract.

15. On 13<sup>th</sup> February 2013, General Manager was forcibly evicted by Employees from his Office. These Employees were mainly from the security department in which the Grievant served. Georg calmed the situation as there were about 250 guests booked in the Hotel at the time. The Hotel was due for closure in April 2013 for renovations. Georg wanted to keep his cool, investigate the incident to the end of April 2013.

16. Security Officer John Chitayi prepared investigation report which mentioned the Grievant adversely. Chitayi recorded statements from other Employees.

17. Georg testified the Grievant was granted 7 days to respond to the notice to show cause, why disciplinary action should not be taken against him. The notice was received by the Grievant on 30<sup>th</sup> April 2013. Response was made on 3<sup>rd</sup> May 2013. He was not victimized. The Respondent knew he was a member of the Claimant Union, even when the Respondent converted his seasonal employment to regular employment.

18. Hearing took place after 3<sup>rd</sup> May 2013. The Claimant Union was notified but did not attend hearing. The Grievant attended, and denied involvement in General Manager's eviction. He alleged to have been away, condoling with the family of a bereaved colleague. Georg ascertained that the Grievant was at the Hotel when eviction took place. Colleagues of the Grievant such as Musyomi and Kassim recorded statements implicating the Grievant. Termination took place on 13<sup>th</sup> May 2013. The decision was not a summary dismissal.

19. The Grievant was paid terminal dues in accordance with KUDHEIHA CBA applicable to Employees of the Respondent. The Grievant's gross monthly salary was Kshs. 21,301. He did not collect his dues. He was offered notice pay, which should not be included in his prayers before the Court. No annual leave days were pending. The Grievant was compensated for public holidays worked. Gratuity under CBA was payable at 15 days' basic salary and house allowance.

20. Georg was aware there was a Conciliation Report made. He did not agree with its contents. It was wrong to conclude the Grievant was summarily dismissed. The Report was not balanced. The Respondent cannot pay additional money to the Grievant.

21. Georg told the Court on cross-examination that the Grievant was initially employed in the year 2000. He went on working continuously. The Managing Director did not have prior knowledge that Employees intended to evict General Manager Ong'uti. The Report prepared by Chitayi implicated several Employees. 21 Employees were suspended. Chitayi himself was later implicated and his contract terminated. CBA states gratuity is payable. The Grievant worked for 10 years. Gratuity is payable.

22. The Grievant was an Official of the Claimant Union. He should have gone to the disciplinary hearing in the company of a Representative of that Union. He did not mention he needed another Witness. He appealed termination decision internally. The Respondent did not reply to his appeal.

23. Redirected, the Witness told the Court Chitayi was also investigated. He was taken through the same process as the other Employees. His contract was later terminated. The Respondent was not aware of his involvement by the time he prepared the Report. The Respondent trusted Chitayi at the time he prepared the Report. There were Officers from KUDHEIHA during the disciplinary hearing. They sat throughout.

24. Victor Saka stated he had at the time of giving evidence, worked for 11 years. The Grievant was the Secretary of Claimant's South Coast Branch. Saka recorded his statement voluntarily, recollecting the eviction of General Manager Ong'uti.

25. Employees and Shop Stewards held a meeting. They decided the General Manager had to be evicted. They alleged the General Manager intended to terminate Employees' contracts, and replace Employees with persons of his own choice. Ong'uti was to outsource security services. These allegations against the General Manager were untrue. The Grievant was involved in eviction of the General Manager. Saka witnessed the Grievant frog-marching the General Manager.

26. Saka told the Court on cross-examination that he could not restrain his Colleagues from evicting the General Manager. Saka did not know whether the Claimant participated in the disciplinary proceedings. He knew KUDHEIHA was involved in the disciplinary process.

27. Dickson Khendi was employed in 2000. The Guards had been instructed by their Shop Steward to congregate at the supermarket next to the Hotel. Once the General Manager entered the Hotel, the Guards followed him. Ong'uti was surrounded by Employees and escorted out. Khendi was suspended for his role. He was later invited for a disciplinary hearing. He wrote a letter of apology and was returned to work 3 days later. Some involved Employees' contracts had expired; they were not renewed. Other Employees were heard and returned to work. Cross-examined, Khendi stated that the Employees did not cause chaos. They escorted the General Manager out peacefully.

### **The Court Finds:-**

28. The Grievant was first employed by the Respondent as a Security Guard in the year 2000. The Respondent gave a different date of employment in its Statement of Response. It is however clear from the evidence of the Grievant and that of the Managing Director Georg, that the Grievant was employed in the year 2000. 1<sup>st</sup> October 2002, is the date he was placed on a written contract, the initial appointment having been made by word of mouth.

29. His contract was terminated with effect from 13<sup>th</sup> May 2013 by the Respondent. He was not summarily dismissed. The letter of termination dated 13<sup>th</sup> May 2013, indicates the Grievant's contract was terminated upon his being found to have participated in the forcible eviction of General Manager Ong'uti from Office. He was offered terminal dues consisting 4 months' salary in lieu of notice; salary for days worked up to and including 13<sup>th</sup> May 2013; any public holidays and annual leave days pending; less salary deductions and amounts owed the Respondent.

30. There is adequate proof that the Respondent had valid ground in terminating the Grievant's contract, as required under Section 43 and 45 of the Employment Act 2007. He was seen by his Colleague Victor Saka in the group which ejected Ong'uti. He was similarly indicted in the recollections of Colleagues Khendi and Kassim. It is clear from the evidence of Grievant's Colleagues that the Grievant was at the heart of the insurrection against the General Manager. There is evidence the forcible eviction of General Manager Ong'uti, was preplanned by the Employees, led by their Shop Stewards. They had grievances against the General Manager saying he denigrated them; alleging they were ill-educated; and would be replaced with better educated Employees. They alleged Ong'uti wanted to replace the Employees with his own people.

31. As a Security Guard and Trade Union Official, it is not likely that the Grievant knew nothing about the preplanning. He did nothing to alert Management, and avert the ugly occurrence. If he did not participate at all, what did he do in his capacity as a Trade Union Official, and Security Guard, to protect the General Manager? What did he do to protect industrial peace and stability?

32. There was a meeting held in a Committee formed to deliberate on the grievance, after Ong'uti was evicted. The Grievant sat in the Committee. This Committee's position was that the General Manager had to be sacked, or the Hotel burnt down.

33. It was a very illogical position taken by the Employees. Employees do not appoint General Managers, or determine who is to be appointed. This is entirely a prerogative of the Management. It is a managerial prerogative which is not shared with the Employees.

34. If the Employees had any grievances against the General Manager, they should have followed the grievance procedure available to them at the workplace. The Industrial Relations Charter does not sanction violence of any form in resolving any workplace grievances.

35. There was valid reason in terminating Grievant's contract of employment.

36. Procedure by and large conformed to the standards of fair hearing under Section 41 and 45 of the Employment Act 2007.

37. The eviction of the General Manager was thoroughly investigated over a period of 1 month. There were statements taken. The Grievant alongside other insurrectionists was suspended. He was subsequently heard. A decision was made to terminate his contract, and pay him his benefits, rather than summarily dismiss him.

38. There were certain procedural defects nonetheless. The first defect is that the Grievant was not accompanied to the hearing by a Trade Union Representative or Workmate, of his choice as contemplated under Section 41 of the Employment Act 2007.

39. The Trade Unionists present at the hearing were from KUDHEIHA. The Grievant did not belong to KUDHEIHA, but to the rival KHAWU, Claimant herein. Those present were not Trade Union Representatives of his choice. They were strangers to the Grievant, and present owing to their association with the Respondent.

38. Secondly, the Grievant lodged an appeal against the decision to terminate his contract. This was not heard. There was no response. The Grievant was denied his right to be heard on appeal.

40. Termination to this extent was unfair. ***The Grievant is granted 3 months' salary in compensation for unfair termination at Kshs. 63,903.***

41. He prays for terminal dues which are not detailed in the Statement of Claim. However the Court notes he was offered terminal benefits which included notice pay, upon conciliation. ***The Court orders the Grievant is paid terminal dues offered at conciliation.***

42. In addition, it was the evidence of the Managing Director Georg, that the Grievant was entitled to gratuity under the CBA. This was not included in the offer.

43. The applicable CBA as stated by the Managing Director is that concluded between KUDHEIHA and Hoteliers' Association. It is the CBA relied on by the Respondent in offering the Grievant 4 months' salary in lieu of notice. It is the applicable CBA, although the Grievant did not belong to KUDHEIHA. It is the relevant CBA, adopted by the Respondent. It applied to the contracts of all Unionisable Employees.

44. Clause 27 [a] [ii] of the CBA grants Employees with over 10 years of service, 24 days' basic salary, and 24 days' house allowance. The Claimant worked from 9<sup>th</sup> July 2000 to 13<sup>th</sup> May 2013. There was a clear 12 years completed in service.

45. ***The Grievant is allowed gratuity under the above clause. This works out as follows: Monthly gross salary of Kshs. 21,301 divide by 26 working days = Kshs.819.26 x 24 days = Kshs. 19,662 x 12 years = Kshs. 235,946.***

46. The prayer for reinstatement, considering the gravity of the Grievant's misconduct in evicting General Manager Ong'uti; considering the number of years gone by since termination; and considering

termination was faulty only on procedure; is not an appropriate, reasonable, practicable or legally sustainable remedy.

IN SUM, IT IS ORDERED:-

*a) Termination was based on valid ground, but faulty procedure.*

*b) The Respondent shall pay to the Grievant through the Claimant, 3 months' gross salary in compensation at Kshs. 63,903; terminal dues as offered by the Respondent; and gratuity under the CBA at Kshs. 235,946.*

*c) No order on the costs.*

**Dated and delivered at Mombasa this 24<sup>th</sup> day of November 2017**

**James Rika**

**Judge**