



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR COURT
AT MOMBASA
CAUSE NO. 310 OF 2014

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL,
INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT**
VS
WILD WATERS ENTERTAINMENT PARK.....1ST RESPONDENT

JUDGEMENT

Introduction

1. The claimant brings this suit on behalf of her 36 members herein after referred to as the grievants. The grievants were employed by the respondent on casual, fixed term or permanent in her entertainment park at Mombasa. On 3.7.2014, the respondent wrote to the 17th, 24th and 32nd grievants informing them that their respective fixed term contract had lapsed with effect from 1.7.2014 and due to work exigencies, the contracts would not be renewed. As a result all the grievants staged a sit in to protest the refusal by the respondent to renew the contract for the said 3 grievants. The respondent reported the issue to County Labour office, and parties resolved the dispute by signing a Return to work Formula whereby the parties agreed that the grievants were to resume work immediately and no party was to be intimidated by the other as a result of strike. The agreement was signed by the grievants, claimant, and the respondent and it was witnessed by the Labour Officer's Mr. J.K. Katana and Mrs. Cecilia Ronga.

2. However, when the grievants reported to work on 4.7.2014, they were surprised to find a notice on the Staff gate reading "**THE PARK HAS BEEN CLOSED UNTIL FURTHER NOTICE**". They were therefore barred from entering the work place as per the Return to Work Agreement. As a result, they brought this suit claiming damages for unfair termination through unlawful redundancy.

3. The respondent has denied liability for unfair termination of the grievants' services and averred that the grievants were dismissed for participating in an illegal strike contrary to section 80 of the Labour Relations Act (LRA) and as such the grievants are not entitled to the reliefs sought.

4. The suit was disposed of by written submissions on the basis of the pleadings filed.

Analysis and Determination

5. After carefully considering the pleadings and the submissions filed, the following issues arose for determination:

(a) Whether the grievants were unfairly terminated by the respondent on 4.7.2014.

(b) Whether the grievants are entitled to the reliefs sought herein.

Unfair termination

6. The claimant submitted that she entered into a Recognition Agreement with the respondent on 1.4.2014. That on 3.7.2014, the grievants withdrew their labour demanding explanation from the respondent for her failure to renew the contracts for the said 3 grievants. That the respondent reported the matter to the County Labour office. That two Labour officers rushed to the respondents premises and conciliated over the dispute. That the dispute was resolved on the same day by the parties entering into a Return to Work Formula. That the agreement was signed by the respondent and the union and it was witnessed by the two Labour officers. That the parties agreed to resume duty immediately and that no party would be intimidated by the other as a result of the strike. That when the grievants reported back to work the following day, they were locked out and a notice was placed on the staff gate announcing that the park had been closed down until further notice.

7. The claimant submits that the said lock out amounted to an unlawful redundancy. That under the Regulation of Wages (Hotel and catering Trades) Order, all the grievants had become permanent employees because under Rule 18 (2) of the said Regulations, an employee on temporary or seasonal terms of employment is deemed to have been converted to regular terms of employment on completion of six months continuous service. Consequently, the claimant has submitted that the grievants were unfairly and unlawfully terminated in violation of Section 40, 41 and 45 of the Employment Act (EA) and Rule 18 of the said Regulations.

8. On the other hand, the respondent has submitted that the 17th, 24th and 32nd grievants contracts expired after effluxion of time and she exercised her freedom of contract by not renewing their expired contracts. That the rest of the grievants were lawfully terminated after they engaged in unprotected strike on 3.7.2014 contrary to section 80 of the Labour Relations Act (LRA). That under section 79 (6) of the Labour Relations Act (LRA), an employee who participates in a strike that is not in compliance with the provisions of the Labour Relations Act is liable to disciplinary action. Consequently, according to the respondent the grievants were fairly terminated.

9. After careful consideration of the rival submissions, it is clear that the termination of the grievants employment contracts were communicated by letters dated 3.7.2014 and a notice dated 4.7.2014. The former correspondence was to the 17th, 24th and 32nd grievant telling them that their contracts had expired and would not be renewed due to work exigencies. The latter correspondence was to rest of the grievants telling them that the business had been closed until further notice.

10. The court does not therefore agree with the respondent's defence that she dismissed the grievants for participating in an illegal strike. Indeed the dispute surrounding the strike had been mutually resolved between the parties and an agreement made in writing and signed by all the disputants including the claimant union in the presence of the Labour Officers. That the said agreement was voluntary and binding on the respondent under section 69 of the Labour Relations Act (LRA) and as such she could not act against it.

11. Even if she was entitled to discipline the grievants, which she was not, in the circumstances she could only conduct the disciplinary process subject to the statutory safeguards or fairness provided for under section 35, 41 and 45 of the Employment Act (EA). The reason for the foregoing being that, participating in an illegal strike is a misconduct within the meaning of Section 44 of the Employment Act (EA), and the respondent was bound by section 41 of the Act to accord fair hearing to all the grievants before dismissing them.

12. On the other hand, if the respondent had a redundancy issue, she was bound by section 40 of the Employment Act to give notice of atleast one month to the claimant union on behalf of the grievants and the Labour Officer before embarking on the layoffs. The default by the respondent to comply with section

40 and 41 of the Employment Act rendered the dismissal of the grievants unfair within the meaning of section 45 of the Act.

13. The justification given by the respondent in terminating the grievants contract is that they were on fixed term contracts which had expired. It is good to clarify that, 2nd, 7th, 8th, 15th, 29th, 34th and 35th grievants were employed on regular terms otherwise called permanent employment. Their respective contracts of employment was open ended and only terminable by one month notice. The said 7 permanent employees were protected by the said provisions of law against unfair termination and unlawful redundancy. The rest of the grievants were either serving under fixed term contracts which had been renewed regularly for many years or were serving without any written contract of employment. That the grievants were also being paid their salaries on monthly intervals.

14. Under section 63 (2) of the Labour Institutions Act (LIA) the Regulations which were made or issued under the Repealed Regulation of Wages and Conditions of Employment Act were to continue to have effect as if such regulations were made or issued under the Labour Institution Act (LIA). As submitted by the claimant some of the regulations made under the said repealed Act was the Regulation of the Wages (Hotel and Catering Trades) Order which applies to the case herein. Rule 18 of the said Regulations provides that:

"(1) No person shall be employed on temporary or seasonal terms of employment for a period exceeding six months.

(2) An employee on temporary or seasonal terms of employment shall be deemed to have been converted to regular terms of employment on completion of six months' continuous service".

15. In view of the foregoing provision of the law, the court finds that all the grievants herein had become employees on regular terms and did not need renewal of their respective contracts. Their employment contract was the terms provided under the said Regulations. They could only be terminated or laid off fairly as provided for under the law. Erroneously, the respondent regarded the grievants as mere casual or temporary employees who could be dismissed at will or upon expiry of some contracts made by her to serve the purpose of evading the legal obligations towards the employees. Consequently, the court finds and holds that the termination of the grievants employment was unfair and unlawful within the meaning of section 45 read together with section 35 and 40 of the Employment Act. Section 35 provides that termination of a contract whose salary interval is one month to be preceded by a 28 days notice in writing. Section 40 on the other hand provides for the procedure for terminating employees' services through redundancy.

Relief

16. In view of the findings made herein above, the court makes declaration as prayed, that the termination of the grievants' employment contract by the respondent on 3.7.2014 and 4.7.2014 was unjust, unfair and wrongful. Consequently, under section 49 (1) of the Employment Act each grievant is awarded compensation of 3 months gross salary. In making the said award, the court has considered the long service rendered by each grievant and the fact that they all could secure alternative employment of equal status within 3 months if they sought with due diligence. They will also get one month salary in lieu of notice as prayed. Lastly they will also each get 24 days leave as prayed. No leave records were produced by the respondent to prove that the grievants utilized their leave days or they were paid for the same. Under Rule (1) (a) of the said Regulations, leave can only be accumulated with mutual agreement between the employer and the employee. No such agreement was proved by the claimant to warrant the claim for the accumulated leave.

17. The claim for public holidays worked has not been properly substantiated. It is therefore dismissed for want of particulars and evidence. Likewise the claim for severance pay is dismissed to avoid double benefit to the grievants. They should not benefit from both compensation for unfair termination caused by wrongful redundancy and again get severance pay for the same. They will therefore have to be contended with the compensation awarded herein above.

18. The award for each grievant is summarised as follows:-

1. Alfred Munga Mwachana

| | |
|----------------------|-------------------------|
| 28 days notice | 13,216.00 |
| Compensation..... | 42,480.00 |
| Leave..... | <u>11,328.00</u> |
| | <u>67,024.00</u> |

2. Antony Kinyua Mugo

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 11,300.00 |
| Compensation..... | 33,900.00 |
| Leave..... | <u>9,040.00</u> |
| | <u>54,240.00</u> |

3. David Mutinda Kavilu

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 14,125.00 |
| Compensation..... | 42,378.00 |
| Leave..... | <u>11,300.80</u> |
| | <u>67,804.80</u> |

4. Enos Kazungu Kahindi

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 11,300.00 |
| Compensation..... | 33,900.00 |
| Leave..... | <u>9,040.00</u> |
| | <u>54,240.00</u> |

5. Erick Machisu Muhindi

| | |
|---------------------|-----------|
| 28 days Notice..... | 14,126.00 |
| Compensation..... | 42,378.00 |

Leave.....11,300.80
67,804.80

6. Eunice Mwenesi Angaiya

28 day Notice.....16,951.00
Compensation.....50,853.00
Leave.....13,560.80
81,364.80

7. Everlyne Muoti Nzelu

28 days Notice.....12,995.00
Compensation.....38,985.00
Leave.....10,396.00
62,276.00

8. Ibrahim Otieno Ishmael

28 days Notice.....14,126.00
Compensation.....42,378.00
Leave.....11,300.80
67,804.80

9. John Ngala Chome

28 days Notice.....15,820.00
Compensation.....47,460.00
Leave.....12,656.00
75,936.00

10. Joseph Amoro Mochere

28 days Notice.....15,820.00

| | |
|-------------------|-------------------------|
| Compensation..... | 47,460.00 |
| Leave..... | <u>12,656.00</u> |
| | <u>75,396.00</u> |

11. Joyce Kazoji Ndaro

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 11,865.00 |
| Compensation..... | 35,595.00 |
| Leave..... | <u>9,492.00</u> |
| | <u>56,952.00</u> |

12. Judith Adhiambo O'lang

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 58,820.00 |
| Compensation..... | 47,460.00 |
| Leave..... | <u>12,656.00</u> |
| | <u>75,396.00</u> |

13. Justus Safari Katana

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 15,820.00 |
| Compensation..... | 47,460.00 |
| Leave..... | <u>12,656.00</u> |
| | <u>75,396.00</u> |

14. Kalama Rungua Chamu

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 14,126.00 |
| Compensation..... | 42,378.00 |
| Leave..... | <u>11,300.80</u> |
| | <u>67,804.80</u> |

15. Katana Kazungu Kambi

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 14,126.00 |
| Compensation..... | 42,378.00 |
| Leave..... | <u>11,300.80</u> |
| | <u>67,804.80</u> |

16. Keffa Gisore Kinaro

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 14,126.00 |
| Compensation..... | 42,378.00 |
| Leave..... | <u>11,300.80</u> |
| | <u>67,804.80</u> |

17. Kennedy Otieno Ogul

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 12,500.00 |
| Compensation..... | 37,500.00 |
| Leave..... | <u>10,000.00</u> |
| | <u>60,000.00</u> |

18. Kitogo Idris Mussa

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 15,820.00 |
| Compensation..... | 47,460.00 |
| Leave..... | <u>12,656.00</u> |
| | <u>75,396.00</u> |

19. Levis Changawa Kaingu

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 11,300.00 |
| Compensation..... | 44,070.00 |
| Leave..... | <u>11,752.00</u> |
| | <u>54,240.00</u> |

20. Maurice Olulu Ouma

| | |
|---------------------|-----------|
| 28 days Notice..... | 14,690.00 |
| Compensation..... | 44,070.00 |

Leave.....11,752.00
70,512.00

21. Milton Shunza Machera

28 days Notice.....14,126.00
Compensation.....42,378.00
Leave.....11,300.80
67,804.80

22. Mirriam Jelegat

28 days Notice.....15,820.00
Compensation.....47,460.00
Leave.....12,656.00
75,396.00

23. Monicah Shali Charo

28 days Notice.....14,126.00
Compensation.....42,378.00
Leave.....11,300.80
67,804.80

24. Mwalimu Kenga Kaingu

28 days Notice.....11,620.00
Compensation.....37,350.00
Leave.....9,960.00
58,930.00

25. Pauline Wanjiku Githaiga

28 days Notice.....13,250.00
Compensation.....39,750.00
Leave.....10,600.00
63,600.00

26. Pole Tunje Lenox

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 14,126.00 |
| Compensation..... | 42,378.00 |
| Leave..... | <u>11,300.80</u> |
| | <u>67,804.80</u> |

27. Rhophus Kazungu Ushuru

| | |
|-------------------|-------------------------|
| Notice..... | 11,300.00 |
| Compensation..... | 33,900.00 |
| Leave..... | <u>9,040.00</u> |
| | <u>54,240.00</u> |

28. Said Juma Chigonda

| | |
|---------------------|--------------------------|
| 28 days Notice..... | 22,600.00 |
| Compensation..... | 67,800.00 |
| Leave..... | <u>18,080.00</u> |
| | <u>108,480.00</u> |

29. Shaibu Bakari

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 11,865.00 |
| Compensation..... | 35,595.00 |
| Leave..... | <u>9,492.00</u> |
| | <u>56,952.00</u> |

30. Sharon Sidi Henry

| | |
|---------------------|------------------|
| 28 days Notice..... | 14,126.00 |
| Compensation..... | 42,378.00 |
| Leave..... | <u>11,300.80</u> |

67,804.80

31. Simon Khamadi Vigambo

28 days Notice.....12,995.00

Compensation.....38,985.00

Leave.....10,396.00

62,276.00

32. Stephen Mwoka Musyoka

28 days Notice.....12,838.00

Compensation.....38,514.00

Leave.....10,270.40

61,622.40

33. Susan Wakesho Kiteria

28 days Notice.....14,126.00

Compensation.....42,378.00

Leave.....11,300.80

67,804.80

34. Titus Musyimi Milavi

28 days Notice.....34,500.00

Compensation.....103,500.00

Leave.....27,600.00

165,600.00

35. Wilson Kimanzi Mutinda

28 days Notice..... 11,865.00

Compensation.....35,595.00

Leave.....9,492.00

56,952.00

36. Ann Wambui Njau

| | |
|---------------------|-------------------------|
| 28 days Notice..... | 15,000.00 |
| Compensation..... | 45,000.00 |
| Leave..... | <u>12,000.00</u> |
| | <u>72,000.00</u> |

Disposition

19. For the reasons stated above, judgment is entered for the claimant declaring the termination of the grievants employment contract unfair and awarding them an aggregate sum of **kshs. 2,520,270.00/=** plus costs and interest.

Signed, dated and delivered at Mombasa this 19th February, 2016.

ONESMUS MAKAU

J U D G E