



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 226 OF 2014

(ORIGINALLY NAIROBI CAUSE NO. 1673 OF 2011)

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS &
ALLIED WORKERS..... CLAIMANT**

V

GENERAL MANAGER, SIRIKWA

HOTEL..... RESPONDENT

JUDGMENT

1. The Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (the Union) commenced legal proceedings against the General Manager, Sirikwa Hotel (Respondent) on 3 December 2011 before the then Industrial Court in Nairobi and the issue in dispute was stated as *unfair termination of Mr. Zachareous Ondongi (Grievant)*.
2. The Respondent filed a Response on 19 March 2013 and on 6 June 2013 the file was transferred to Nakuru for hearing and determination.
3. The Cause was heard on 17 November 2015 when the Grievant testified. The Respondent informed the Court that it would not call any witnesses but would rely on the record after its attempt to secure an adjournment after the close of the Union's case was declined.
4. The Union filed its submissions on 15 December 2015 while the Respondent's submissions were to be filed before 17 January 2016 but were not on file.
5. The Court has considered the pleadings, evidence and submissions and identified the issues as, *whether the Grievant was still on probation at time of separation, whether the termination of the Grievants employment was unfair and if so, appropriate remedies*.
6. Before examining and analyzing the issues in dispute, the Court notes that the Union reported a trade dispute to the Cabinet Secretary for Labour who appointed a conciliator.
7. The parties could not agree during the conciliation and the Concilator certified the dispute as unresolved through a certificate dated 24 February 2011.

Background

8. The Grievant was offered employment by the Respondent initially as a casual cook from 1997 to 1999 and as a cook through a letter dated 1 March 2010.
9. According to clause 3 of the letter of appointment, the Grievant was to be on probation for 2 months during which the contract could be terminated by either party giving 1 month's notice or pay in lieu of notice.
10. On 19 May 2010, the Respondent informed the Grievant that the probation was being extended for a further 2 month's to enable the Grievant improve on weak areas. The probation was extended to June 2010.

11. The Respondent through a letter dated 12 July 2010 informed the Grievant that because he had not performed satisfactorily during the probation period, his services were being terminated with effect from 13 July 2010.
12. This is what prompted the present dispute.

Whether Grievant was still on probation at time of separation

13. The letter of appointment did not provide for extension of probation but the appointment was subject to the collective bargaining agreement reached with the Union.
14. The Union and the Union of Kenya Hotelkeepers and Caterers Association had a collective bargaining agreement which was placed before Court and its terms and conditions were incorporated into the contract with the Grievant at clause 3 of the letter of appointment.
15. Part I of the agreement expressly limited the probation period to 2 months but in cases of employees who had been employed in the industry for at least a year, the probation period was limited to 1 month.
16. Considering the contractual agreement, the purported extension of the Grievant's probation period lacked mutual agreement and the Grievant therefore was deemed to have been confirmed.

Termination of confirmed employees

17. Having reached the conclusion that the Respondent had no contractual authority to extend the probation, the Respondent cannot seek protection under section 42 of the Employment Act, 2007.
18. The Respondent therefore ought to have complied with the peremptory requirements as to a hearing by virtue of section 41 of the Employment Act, 2007.
19. In the view of the Court, by failing to bring the contract to an end for unsatisfactory performance at the end of the initial probation, the Grievant was automatically absorbed and it was not open to the Respondent to bring the contract to an end under and pursuant to the separation clause on account of probation.
20. There is nothing on record to suggest that the Grievant was accorded an opportunity to make representations before the decision to bring the contract to an end was taken as envisaged by section 41 of the Employment Act, 2007.
21. On this ground, the Court reaches the conclusion that the action of the Respondent was procedurally unfair.
22. On contractual footing, the Respondent ought to have complied with the provisions of clause 9 of the collective bargaining agreement.
23. Moreover, whereas the provision does not expressly contemplate a hearing, such termination of employment pursuant to contractual agreement would still be subject to the statutory minimum protection given to employees by section 41 of the Employment Act, 2007.
24. Before concluding on this issue the Court observes that though the Respondent denied in its Response that it was a party to the collective bargaining agreement, it expressly, through the appointment letter subjected the relationship to any agreements reached between the Union and KAHC which is generally known to in the labour sector to refer to Union of Kenya Hotelkeepers and Caterers Association.
25. Further, although the Union challenged the practice of employing staff within the hotel industry on seasonal/temporary contracts, there is no need to venture into that aspect of the dispute as the Grievant had a written contract of an indefinite period.

Appropriate remedies *Reinstatement*

26. Although reinstatement is one of the primary remedies where the Court reaches a finding of unfair termination of employment, this would not be an appropriate remedy in the circumstances of this case considering the dynamics of the hotel industry and time lapse, and the injunction in section 49(4)(b) of the Employment Act, 2007 against ordering specific performance in contracts of service.
27. In lieu of reinstatement, the Court would award the equivalent of 2 months gross wages as compensation which were proved as Kshs 12,680/- (considering the length of service).

Dues

- 28.The Union did not lead any evidence as to the dues it was seeking and the Court cannot second guess what dues were being sought.
- 29.The attempt by the Union to introduce the dues through the submissions is a practice which the Court ought not to allow or accept. Submissions should not be used as an avenue to sneak in evidence which was always available to a party.
- 30.The Respondent had in paragraph 13 of the Response admitted that it had prepared dues totalling Kshs 59,047/-, but the Grievant had declined to collect the same.
- 31.The best the Court can do in the circumstances and in the interest of fairness is to find that the Grievant is entitled to the dues as computed by the Respondent.

Conclusion and Orders

32.The Court finds and holds that termination of the employment of the Grievant was unfair and that he is entitled to

- a. the dues as computed by the Respondent Kshs 50,047/-
- b. Compensation Kshs 25,360/-
- | | |
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| TOTAL | Kshs 75,407/- |
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33.Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 11th day of March 2016.

Radido Stephen

Judge

Appearances

For Union Mr. Onwonga, Industrial Relations Officer, KUDHEIHA

For Respondent Mr. Mathai instructed by Gicheru & Co. Advocates

Court Assistant Nixon