



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 201 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA HOTELS & ALLIED WORKERS UNIONCLAIMANT

-Versus-

STANBRADOX BAR & RESTAURANT.....RESPONDENT

J U D G E M E N T

The Claim herein is filed by Kenya Hotels & Allied Workers Union, on behalf of **Harrison Hamisi** (1st Grievant), **Job Elim** (2nd Grievant), **Gerald Obondi** (3rd Grievant), **Abdillahi Onyando** (4th Grievant) and **Joseph Ongoko** the 5th Grievant.

The Claims in respect of each of the Grievants are as follows:-

a) HARRISON HAMISI

1. Month in lieu of Notice	Kshs. 15,000.00
2. 3 Years Leave $15,000/30 \times 63$ days	Kshs. 31,500.00
3. Public Holidays $15,000/30 \times 30$ days	Kshs. 15,000.00
4. 16 days worked Dec. 2014	Kshs. 8,000.00
$15,000/30 \times 16$ days	
5. Salary Arrears for 19 months $5,000 \times 19$ months	Kshs. 95,000.00
TOTAL	<u>Kshs.164,500.00</u>

b) JOB ELIM

1. 1 month in lieu of Notice	Kshs.15,000.00
2. Leave for 2 years	
$15,000/30 \times 42$ days	Kshs.21,000.00
3. Service for 2 Years	

15,000/30 x 15 x 2 Kshs.15,000.00

4. Public Holidays

15,000/30 x 20 days Kshs.10,000.00

TOTAL

Kshs.61,000.00

c) GERALD OBONDO

1. 1 month in lieu of Notice Kshs. 10,564.00

2. Leave for 2 years

10,564/30 x 42 days Kshs. 14,790.00

Prorate Leave

10,564/30 x 1.75 x 6 Kshs. 3,697.00

3. Salary for May 2014 Kshs. 10,564.00

4. 11 days worked June 2014

10,564/30 x 11 days Kshs. 3,873.00

5. Service for 2 years

10,564/30 x 15 x 2 Kshs. 10,564.00

6. Public Holidays

10,564/30 x 28 days Kshs. 9,860.00

7. Underpayment of wages

Dec 2011 - April 2012

(9,422 x 5) - (5,000 x 5)

47,110 - 25,000 Kshs 22,110.00

May 2012 - April 2013

(10,656 x 12) - (9,000 x 11)

127,872 - 99,000 Kshs. 28,872.00

May 2013 - May 2014

(12,149 x 13) - (9,000 x 13)

157,937 - 117,000 Kshs. 40,937.00

TOTAL

Kshs.155,831.00

d) ABDILLAHI ONYANDO

1. 1 month in lieu of Notice	Kshs. 15,000.00
2. Leave for 3 years	
15,000/30 x 63 days	Kshs. 31,500.00
3. Services for 5 years	
15,000/30 x 15 x 5	Kshs. 37,500.00
4. Public Holidays for 3 Years	
15,000/30 x 30 days	
	Kshs. 15,000.00
5. 2 days June 2014	
15,000/30 x 2 days	Kshs. 1,000.00
TOTAL	<u>Kshs.100,000.00</u>

e) JOSEPH ONGUKO

1. 3 Years leave	
16,000/30 x 63 days	Kshs.33,600.00
2. Salary for June	Kshs.16,000.00
3. Public Holidays for 3 years	
16,000/30 x 30 days	Kshs.16,000.00
TOTAL	<u>Kshs.65,600.00</u>

The Respondent filed a response to the Memorandum of Claim through Otieno, Yogo, Ojuro & Company Advocates in which it denied the allegations in the Memorandum of Claim.

At the hearing of the case all Grievants testified. The Respondent called one witness, Martin Minanga, a Manager at the Respondent's establishment. The parties thereafter filed and exchanged written submissions.

Claimant's Case

Harrison Hamisi testified that he was employed by the Respondent as a waiter on 1st September 2006 at a salary of Shs.7,500/- which was later increased to Shs.10,000/- and finally to Shs.15,000/- in 2012. The salary was however reduced to Shs.10,000/- on grounds that there were many workers and little work. His employment was terminated on 17th December, 2013. He testified that he had a boil on his hand and asked for time off to go for treatment. For the days he was away the Respondent deducted Shs.1000/- per day from his salary. When he asked why the salary was deducted he was accused of being rude and a further Shs.8,000/- was deducted from his salary. An advance of Shs.4,000/- was also added to the Shs.8,000/- and he was sent home to go and look for the money before resuming duty. He was however unable to get the money and after 3 days he went back to work to report that he was unable to get the

money. The Manager asked him to report back after 15 days. When he went back he was told to resign before being paid the deposit of Shs.5,000/- (referred to as float, which every employee had to deposit at the time of employment and was refunded upon leaving employment). The Grievant decided to consult the union who held several meetings with the Respondent but did not come to an agreement. The matter was thereafter reported to the Minister for Labour but no agreement was reached during conciliation following which the Claimant Union filed the present dispute.

Mr. Hamisi testified that he had no warning letter or other disciplinary issues during the period he worked for the Respondent. He was never given annual leave and worked on all Public Holidays. His prayers are for pay in lieu of notice, annual leave for the period worked, pay in lieu of Public Holidays, 15 days suspension and salary arrears arising from reduction of his salary from shs.15,000 to Shs.10,000.

The 2nd Grievant Job Elim testified that he was employed by the Respondent on 8th May 2012 as a waiter on a salary of Shs.10,000/-. The salary was increased to Shs.15,000/-. He earned bonuses and salary increments for his good work performance, and was once sponsored on a tour of Nairobi City by the employer for being the best employee. Mr. Elim testified that on 17th June, 2014 he was called to the office and refunded his float on grounds that there was no work. He denied that he was on suspension.

Upon termination he reported to the Union who took up the issue with his employer but no agreement was reached. The Union then reported a dispute but no agreement was reached during the conciliation at the labour office.

His claim is for payment of compensation, notice, leave, service pay and public holidays as prayed in his claim.

The 3rd Grievant Gerald Obondi testified that he was employed by the Respondent as a chef on 2nd December 2011 and worked until 11th June, 2014. His first salary was shs.5,000/-. The salary was increased to shs.9,000/-. His reason for leaving work was that at the end of May 2014 he was paid salary of only shs.500/-. When he asked the manager why, he was told that the deduction was for rotten onions. He denied that he worked for only 15 days every month.

Mr. Obondi testified that he did not take annual leave. He prayed for payment of compensation, annual leave, salary for May and 11 days worker in June 2014, public holidays and underpayments.

The 4th Grievant Abdilahi Onyando testified that he was employed on 16th November, 2008 as a waiter. He left employment on 2nd June, 2014 without reason. He was called from where he was working to the office upstairs and told to collect his float, then go to the office the following day to discuss. He testified that he did not have any disciplinary issues and was one of the best employees. He denied that he was a drunkard and stated that he is a Muslim and does not take alcohol. He further denied being rude. He also denied that he was suspended from duty and that he asked the Respondent to pay him his terminal dues.

He prayed for payment of Shs.15,000/- in lieu of notice, annual leave for 3 years, public holidays, 2 days worked and not paid, service pay and compensation.

The 5th Grievant Joseph Onguko testified that he was employed on 6th June, 2007 as a cook and resigned on 27th June, 2014 due to sickness. The Respondent agreed to pay his terminal dues, but when he went to collect it he was told the company was not doing well. His claim is for 3 years annual leave, one months' salary and 3 years public holidays. His last salary was shs.16,000 per month.

Respondents Case

Martin Minanga for the Respondent testified that Harrison Hamisi was employed as a waiter for Shs.15,000/-. His salary was reduced to 10,000/- due to accumulation of bills and poor performance. He was not dismissed but was sent on suspension. He was told to bring Shs.12,000/- which he owed but failed to do so and instead went to work for a competitor.

Job Elim was employed as a waiter and initially he was very dedicated but his services started deteriorating. He was sent on suspension for 2 months and refused to report back to work.

Gerald Obondo was employed as an Assistant Cook. His Salary was Shs.9,000/-. Initially his work performance was good. He refused to have Kshs.500/- deducted from his salary for rotten onions and uttered some words which management did not find pleasing prompting his suspension for one month. He refused to report back after suspension.

Abdilahi Onyando was initially employed as a cleaner and was later elevated to a waiter. He was indisciplined and was suspended for 2 weeks but never reported back to work.

Joseph Onguko was employed as a chef and was initially very dedicated. He was transferred to work in another kitchen on health grounds but he considered the transfer as a demotion and incited workers to a go slow. He stopped reporting for work and when asked why, he submitted a letter of resignation.

Mr. Minanga testified that all employees were given annual leave but employees preferred to work during their leave.

Determination

The facts of this case reveal a classical case of unfair labour practice. To start with, the Respondent does not issue letters of appointment. It does not keep any records, and does not comply with the law in terms of minimum terms of employment. The Respondent's witness had a similar narrative in respect of all the Grievants. They were initially very good but their work performance deteriorated. With the exception of Joseph Onguko who resigned, all the employees were suspended on unspecified terms for periods ranging from 2 weeks to 2 months without letters of suspension. All employees were made to pay what was referred to as "float" being a deposit of shs.5,000/- upon employment that was refundable upon termination of employment.

Mr. Minanga did not deny the allegations by the Grievants with the exception of Joseph Onguko, that they were called to the office and paid the "float" which would signify the termination of their employment. He did not deny that the Grievants worked on Public Holidays and were not given time off or payment in lieu. Mr. Minanga confirmed that the employee did not take annual leave though he alleged it was out of choice, but without any proof.

What emerges from the facts of this case is an employer who either does not have any clue about the minimum terms of employment as provided in the various labour legislation on who disobeys the law with impunity.

The County Labour Office, although having the mandate of labour inspection with a view to ensuring that employers are compliant, appears to have abdicated its duties under part V of the Labour Institutions Act on Labour Administration and Inspection. This is a very disturbing situation. It burdens this court with cases which would not arise if the County Labour Officer was carrying out the duties of that office as provided under the Law.

In the circumstances of this case, it is not possible to identify and isolate the issues for determination as everything appears to be against the law right from recruitment to termination of the employment relationship. The Respondent's witness corroborated what the Grievants have alleged against the Respondent. I will therefore decide this case on the basis of the prayers sought which I identify as follows:-

1. Unpaid Salary.
2. Annual Leave.
3. Public Holidays.

4. Pay in Lieu of Notice .
5. Service Pay.
6. Underpayments.
7. Compensation/Reinstatement.
8. Refund of arbitrarily reduced salary.

Having found that the Respondent did not comply with the law the termination of employment of the 1st, 2nd, 3rd and 4th Grievant's whom the Respondent allege to have been suspended was unlawful on grounds that their suspension was without any letter stating the grounds thereof, the period of suspension and the dates on which they were expected to report back to work as well as whether or not they would be entitled to salary during the suspension. The Grievants were under the circumstances entitled to treat the suspensions as fundamental breach of their employment contracts amounting to a presumption of termination of such employment by the Respondent.

The foregoing being the case each of the Grievants with the exception of the 5th grievent who resigned, are entitled to one months' salary in lieu of notice.

The Respondent's witness confirmed that the Grievants never took annual leave. They are therefore all entitled to leave earned during the period of employment.

The Respondent's witness did not deny that the Grievants worked on public holidays and were not either paid or given time off in lieu thereof. The Grievants are therefore each entitled to payment for such public holidays.

Mr. Minango also did not deny that the Grievants were not paid for days worked as claimed by each of them. They are therefore entitled to the same. Further Mr. Minango did not respond to the prayers for service pay, which I award the Grievants as none of them was a member of NSSF.

Although the Claimant prayed for reinstatement of the Grievants, the circumstances of this case would not favour such an order. The court will therefore opt for the award of compensation for unfair termination of employment in respect of the 1st, 2nd, 3rd and 4th Grievants. The 5th Grievant is however not entitled to compensation as he resigned from employment on grounds of ill-health.

Gerald Obondo prayed for underpayments which Mr. Minango did not deny. He did not even as much as make any reference to the underpayments. Mr. Obondo is therefore entitled to the underpayments as prayed. Mr. Minango further confirmed the reduction of salaries which was arbitrary and unlawful.

For the foregoing I make the following orders:-

1. I find the termination of the 1st, 2nd, 3rd and 4th Grievants unfair.
2. I award the following to the Grievants;

(i) Harrison Hamisi

- | | | |
|----|---------------------------------------|-----------------|
| 1. | One Months' salary in lieu of Notice | Kshs. 15,000.00 |
| 2. | 3 Years Leave <u>15,000</u> x 63 days | Kshs. 31,500.00 |
| 3. | Public Holidays (15,000/30) x 30 days | Kshs. 15,000.00 |

4.	16 days worked Dec. 2014	Kshs. 8,000.00
	(15,000/30) x 16 days	
5.	Salary Arrears for 19 months	
	5,000 x 19 months	Kshs. 95,000.00
	TOTAL	<u>Kshs.164,500.00</u>

(ii) Job Elim

1.	1 month in lieu of Notice	Kshs.15,000.00
2.	Leave for 2 years	
	(15,000/30) x 42 days	Kshs.21,000.00
3.	Service for 2 Years	
	(15,000/30) x 15 x 2	Kshs.15,000.00
4.	Public Holidays	
	(15,000/30) x 20 days	Kshs.10,000.00
	TOTAL	Kshs.61,000.00

(iii) Gerald Obondo

1.	1 month in lieu of Notice	Kshs. 10,564.00
2.	Leave for 2 years	
	(10,564/30)x 42 days	Kshs. 14,790.00
3.	Prorate Leave	
	(10,564/30) x 1.75 x 6	Kshs. 3,697.00
3.	Salary for May 2014	Kshs. 10,564.00
4.	11 days worked June 2014	
	(10,564/30) x 11 days	Kshs. 3,873.00
5.	Service for 2 years	
	(10,564/30)x 15 x 2	Kshs. 10,564.00
6.	Public Holidays	
	(10,564/30) x 28 days	Kshs. 9,860.00
7.	Underpayment of wages	

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Kshs. 28,872.00

May 2013 - May 2014

$(12,149 \times 13) - (9,000 \times 13)$

157,937 - 117,000

Kshs. 40,937.00

TOTAL

Kshs.155,831.00

(iv) Abdilahi Onyando

1. month in lieu of Notice

Kshs. 15,000.00

2. Leave for 3 years

$(15,000/30) \times 63$ days

Kshs. 31,500.00

3. Services for 5 years

$(15,000/30) \times 15 \times 5$

Kshs. 37,500.00

4. Public Holidays for 3 Years

$(15,000/30) \times 30$ days

Kshs. 15,000.00

5. 2 days June 2014

$(15,000/30) \times 2$ days

Kshs. 1,000.00

TOTAL

Kshs.100,000.00

(v) Joseph Onguko

1. 3 Years leave

$(16,000/30) \times 63$ days

Kshs.33,600.00

2. Salary for June

Kshs.16,000.00

3. Public Holidays for 3 years

$(16,000/30) \times 30$ days

Kshs.16,000.00

TOTAL

Kshs.65,600.00

In addition I award compensation to the 1st, 2nd, 3rd and 4th Grievants as follows:-

Harrison Hamisi - 8 months' Salary at Shs.120,000/-.

Job Elim -3 months' Salary Shs. 45,000/-

Gerald Obondo -3 months' Salary at Shs. 31,692/-

Abdilahi Onyando -6 months' Salary at Shs. 90,000/-

Ruling dated, signed and delivered this 27th day of October, 2016.

MAUREEN ONYANGO

JUDGE