



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO.286 OF 2013

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

VS

RAFIQ JIVRAJ.....1ST RESPONDENT

MEHDI H. DHALLA.....2ND RESPONDENT

KHATUN M.H. DHALLA.....3RD RESPONDENT

JUDGMENT

Introduction

1. The claimant brought this suit on 10.9.2013 and amended it on 2.12.2015. The suit was brought on behalf of Mr. Alex Omanga, Christopher Osebe, Joseph Mumo, William Nyaundi, David Kimanzi, Lameck Ongeru and Shadrack Mutuku (herein after called “the grievant’s”). The suit seeks to recover terminal dues plus compensation for unfair termination of the grievant’s employment by the respondents through unlawful redundancy when they closed down their hotel business along Moi Avenue Mombasa, on 31st March 2011.

2. The respondents have denied that they terminated the grievant’s employment through redundancy on 31.3.2011 or at all. They averred that they were evicted from her business premises along Moi Avenue in March 2011 and embarked in the process of looking for an alternative premises. They further averred that they continued paying the grievant’s their salary until 31.7.2011 even without any work done. That in August they rented another premises in the Old Town Mombasa and called back all his employees but all grievant’s never reported to work except Shadrack Mutuku. The respondents have therefore accuses the grievant’s of terminating their services without prior notice and counter claimed for two months salary in lieu of notice from them.

3. The suit was heard on 11.5.2016 when Mr. Alex Ogwok Omanga testified on behalf of the claimant and Mr. Rafiq Jivraj testified for the defence as Rw1. Thereafter both parties filed written submissions.

Claimant’s case

4. Cw1 testified that he was employed by the respondent on 9.10.2005 as Restaurant Supervisor earning kshs.6,000 which was later increased to kshs.10,000 per month. That he found all the grievant’s working there except Mr. Lameck Ongeru who joined them on 1.3.2008. That during their services, all the

grievant's including himself never used to go for their annual leave.

5. On 11.3.2011, the grievant's reported to work as normal but they were told to go on leave because the business was closing down. Cw1 explained that none of the grievant's had gone for any annual leave or public holidays before then. Cw1 further stated that they all went for leave and they were paid their salary and allowances during their said leave. That the leave was extended and their salary was also paid but when they waited enough, the grievant's went to see the respondents at their Nyali branch and the Director confirmed that the grievant's were not going to be transferred to the Nyali branch and he offered to pay them separation dues amounting to kshs.30,000 but they refused. They then reported the dispute to the claimant who was their union.

6. The claimant made written correspondences with the respondents and when no settlement was reached the claimant reported a disputed at the Labour office for conciliation. That again the respondents refused to cooperate and only Shadrack Mutuku was employed under new terms in the newly opened branch at the Old Town Mombasa as per the letter dated 24.9.2013 to the Labour officer. That the respondents never notified the grievant's that they had relocated from Moi Avenue to Old town in August 2011.

7. On cross examination Cw1 contended that he joined the union in 2003 when he was working elsewhere but he had no evidence to prove that. On further cross examination he admitted that he joined the claimant in 2010 as member number 006. He did not however produce any evidence to prove that he remitted any union dues to the union. He insisted that he was declared redundant on 31.8.2011 and not 31.3.2011 as pleaded in paragraph 2.3 of the Amended claim. He contended that Rozina Moi Avenue was not relocated elsewhere and maintained that it was closed down. He clarified that the Old Town branch is a new business that was opened 5 months after the close of the Moi Avenue branch. He however admitted that by the letter dated 9.2.2011, the respondents had assured the claimant that they were not closing down the business and did not intent to declare the workers redundant. That the said letter further clarified that relocating business did not mean redundancy to the employees. He confirmed that after the close of the business, all the grievant's went for leave and they continued to receive salaries while on leave.

8. Cw1 further admitted that on 7.9.2011 the respondent wrote the letter dated 7.9.2011 requesting the grievant's to report to work at Nyali branch on Monday 12.9.2011 but they declined except Shadrack Mutuku and other colleagues. He also confirmed that they were never served with any redundancy letter. He admitted further that he went for leave between 18.1.2010 and February 2010 when he lost his mother. He also admitted that he went for leave in August 2009 and that all the other grievant's were also going for their annual leave even before 31.3.2011. Finally, he confirmed that the grievant's never served any notice to the respondents saying that they were not going to report back to work and they never paid them any salary in lieu of notice.

9. On Re-examination, Cw1 stated that the respondents letter dated 12.8.2011 stated that the business had been closed and the grievant's dues calculated. That according to him, the grievant's had been declared redundant and the respondents were making a new offer of employment at Nyali branch.

Defence case

10. Rw1 is the manager of Rozina House Restaurant which is owned by his two parents in law. He has been there for 18 years. He denied that he declared the grievant's employment redundant on 31.3.2011. He explained that in March 2011, the business was evicted from their premises along Moi Avenue Mombasa and started looking for alternative premises with the assistance from their employees. That in the meanwhile he gave leave to all the employees who had leave pending and moved some to the Nyali branch.

11. Rw1 explained further that in February, the claimant had started writing letters to him alleging that the business was closing down but the he responded assuring her that he was not closing down the business but only relocating. He explained that he continued to pay salaries to the grievant's upto July 2011 when he secured another premises at the Old Town and called all the grievant's back to work but first they had to refresh their capacity on the Nyali Branch before reporting to the Old Town branch. However all the

employees including Shadrack Mutuku reported to work except the grievants who ganged up with the union to allege that they had been declared redundant.

12. Rw1 further explained that by letter dated 7.9.2011 he gave notice to the grievants that if they failed to report to work it would mean that they had terminated their employment without notice. That none of the grievants reported except Shadrack Mutuku.

13. Rw1 further explained that the union referred the dispute to the Labour office but the officials walked out of the conciliation meeting. He contended that he continued to pay the grievants salary until they refused to report back to work. That they all went for their leave and proved that by documents. He denied any claim for salary underpayment and maintained that he paid the claimants according to the wage orders. He maintained that Mr. Shadrack Mutuku was never re-employed under new terms and maintained that he is working under the old terms of service. He confirmed that the business has since been relocated from Old Town to Jubilee House along Moi Avenue.

14. Rw1 prayed for the claimant's suit to be dismissed and his counter claim be allowed being two months salary in lieu of notice from each grievants because they terminated their services without serving any prior notice. According to Rw1, the reason why the grievants never reported back to work is because they had secured other jobs.

15. On cross examination, Rw1 explained that their tenancy at the Moi Avenue was terminated without notice after the Land Lord got a better deal. On being shown his letter to the employees dated 10.8.2011, Rw1 admitted that the last sentence stated that their services had been rendered redundant because of the closure of the business. He further admitted that the leave given in March 2011 represented the outstanding leaves for the grievants. He however denied that they closed the business and maintained that they only closed the premises. He confirmed that he gave redundancy letters to Banda and Elizabeth Wairimu because they wanted to retire. He also confirmed that he offered to pay kshs.30,000 as terminal dues to Cw1 after he alleged that he wanted to stop working and relocate to Nairobi. That he calculated normal terminal dues for all the grievants based on Notice and Service after they demanded for redundancy after the alternative business premises delayed. That the discussion was done verbally between him and the grievants.

16. He admitted that he never attended the conciliation meeting and the union protested against his representative at the meeting and they astorned out of the meeting.

17. On Re-examination, Rw1 clarified that he never offered or calculated any dues in favour of the grievants but only talked with them cordially. He maintained that it took him 5 months to relocate to the new premises on the Old town but all through he paid the grievants their salaries.

Analysis and Determination

18. There is no dispute that the grievants were employed by the respondents from diverse dates until 31.3.2011 when the respondents were evicted from their business premises along Moi Avenue Mombasa. There is also no dispute that from that date all the grievants were given paid leave pending relocation of the business to an alternative premises. There is also no dispute that the respondents secured another business premises at Old town Mombasa and called all their employees including the grievants back to work in August 2011. That all the employees reported back to work except the grievants. However it was confirmed that one of the grievants Mr. Shadrack Mutuku also reported back to work. The issues for determination are:-

- a. **Whether the grievants were terminated on redundancy or they deserted work.**
- b. **Whether the redundancy was unlawful and unfair.**
- c. **Whether the grievants are entitled to the reliefs sought in the suit.**

d. Whether the respondent is entitled to the relief sought in the counter claim.

Redundancy vs Desertion

19. The claimant has contended that the respondent declared the claimant's job redundant on 31.3.2011 after they closed down their restaurant business at Moi Avenue. The respondent has contested that contention and demonstrated that what happened was not winding up their business but they were evicted without notice by the Land Lord. That instead of declaring redundancy on their employees, they gave them leave pending relocation to an alternative premises. That they secured another premises at the Old town in July 2011 and called all their employees back to work in August 2011. That some of the employees reported back but some of the grievants demanded that they be paid redundancy dues before getting re-engaged under new terms. They instructed the claimant to advance that position but the respondents maintained that the claimants were to continue under the same contracts they were serving before the relocation and served a notice dated 7.9.2011 or be deemed to have terminated their employment without notice. The grievants never reported to work and the respondents treated them as deserters.

20. The foregoing evidence is supported by documentary evidence which has not been rebutted. In my considered view, the evidence on record overwhelmingly supports the fact that the respondents did not intent to terminate the services of the grievants. If that was not so the respondents could not have retained the grievants in the pay roll between March-July 2011. However, the evidence also clearly shows that the claimant, for some strange reason, managed to drive a wedge between the respondents and the grievants. She led the grievants to deem themselves as having been dismissed through redundancy and therefore agitate for severance pay. Out of pressure the respondents wanted to pay them dues but when she secured an alternative premises they stood their ground that they had not dismissed the grievants. In view of the foregoing observation, I find that the respondent have proved on a balance of probability that it is the grievants who terminated their employment contract without notice on 12.9.2011. On the other hand I find that the claimant has failed to prove on a balance of probability that the grievants were declared redundant by the respondents on 31.3.2011 or at all.

Unfair termination

21. In view of the foregoing, I find that the claimant has not proved on a balance of probability that the grievants employment was unfairly terminated by the respondents. Under section 47 (5) of the Employment Act, the burden of proving unfair termination rests with the employee.

Reliefs

Claims under section 49 of the Employment Act

22. In view of the finding herein above that it is the grievants who terminated their employment, I dismiss their claim for notice and compensation.

Terminal dues

23. Likewise the claim for leave and salary for April-August is dismissed because Cw1 admitted that the grievants were paid salary during the said period which was also treated as leave. Cw1 also admitted that the grievants were all paid the leave travelling allowance before they proceed on leave in March 2011. Consequently, that claim also fails. The particulars of the Public holidays worked have not been pleaded. All what the claimant has pleaded is 27 public holidays for each grievant regardless of how many years they served.

Redundancy dues

24. The claimant has also prayed for severance pay at the rate of 15 days pay for each completed year of service. However, the said claim is dismissed because as already stated above, it is the grievants who

deserted work and thereby terminated their own employment. Severance pay is only payable where, the termination is done by the employer on ground of redundancy.

Certificate of Service

25. The claim for Certificate of Service is granted to all the grievants except Shadrack Mutuku who is still working for the respondent. The right to a certificate of service is guaranteed under section 51 of the Employment Act and as such the respondent must issue the grievants with the same forthwith.

Counter claim

26. In view of the finding herein above that it is the grievants who terminated their services without notice to the respondents, I allow the counter claim as prayed. It is trite that parties are bound by their pleadings and because the respondent did not plead the amount payable as salary in lieu of notice, the court will not make any specific award of money.

Disposition

27. For the reasons stated above the claimants suit is only allowed in respect of the prayer for Certificate of Service. On the other hand the respondents counter claim is allowed but with no monetary award. Each party shall bear her own costs.

Signed, dated and delivered this 18th November 2016.

ONESMUS MAKAU

JUDGE