



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 128 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

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

**-Versus-**

**SHANGAI BROTHERS ENTERPRISES LTD**

**(ORIENTAL CHINESE RESTAURANT &**

**CHINESE CHENS KITCHEN).....RESPONDENT**

**J U D G E M E N T**

The Claimant Kenya Hotels and Allied Workers Union is registered under the Labour Relations Act to represent unionisable employees in the Hotel Sector. The Claimant filed the dispute herein against the Respondent on behalf of its members JANE NECHESA MWAKA, SULMAN OCHOLLA AYOKO, SANDE GEORGE OCHIENG and BENSON N. MOGINA, the Grievants, alleging that they had been unlawfully and unfairly terminated or declared redundant by the Respondent. It is the Claimants allegation that the Grievants were engaged by the Respondent as follows -

- (a) **Sulman Ocholla** was employed as a waiter on 5th June 2005 at a salary of Kshs.3,000 which was increased to Kshs.4,500, summary dismissal on 4th December, 2009.
- (b) **Jane Nechesa Mwaka** was employed as a waitress on 30th April, 2008 at a salary of Kshs.4,500 rising to Kshs.7,000 and was terminated on 28th January, 2011.
- (c) **George Ochieng Sande** was employed on 4th October, 2008 as a waiter at Kshs.4,500 rising to Kshs.5,600 and was summarily dismissed/declared redundant on 1st October, 2010.
- (d) **Benson Mogina** was employed as a cleaner on 15th May, 2005 at Kshs.3,000 rising to Kshs.5,800 and was terminated/declared redundant on 1st May, 2010.

Through the Amended Memorandum of Claim filed on 19th September, 2013 the Claimant avers that the Respondent operated two Restaurants within Kisumu City namely Oriental Chinese Restaurant located on Oginga Odinga Street and Chinese Chen's Kitchen located at Mega City, off Nairobi Highway. It is pleaded that Chinese Chen's Kitchen where Benson Mogina and George Ochieng Sande were stationed was closed towards the end of 2010 due to lack of business following which they were transferred to Oriental Chinese Restaurant.

The Respondent filed a Response to the Amended Memorandum of Claim on 7th November, 2013 denying the allegations in the Amended Memorandum of Claim. The Respondent avers that Chen's Kitchen was closed down in August 2009 and it was not possible for it to recruit any employees after that date or to implement Gazette Notice dated 4th January, 2010 and 2nd July, 2012. The Respondent however admits that 2 of the employees on the check-off form dated 4th January 2009 were in its employment. Among documents in the Respondent's list of documents dated 11th February, 2015 and filed on the same date are a copy of lease document for Chen's Kitchen for the period 1st October 2005 to 30th September 2010, two warning letters in respect of Jane N. Mwaka dated 12th October, 2010 and 19th December, 2010, and a letter of dismissal for the said Jane Mwaka dated 28th January, 2011.

All the Grievants testified during the hearing while the Respondent opted to close its case without calling any evidence. CW1 JANE NECHESA MWAKA testified that she was employed on 30th April 2008 as a waitress at Chinese Restaurant and was terminated on 28th January, 2011 through a letter of termination of the same date. The grounds of termination was failing to report to work for three days. She testified that she had permission to be away for the 3 days being 26th, 27th and 28th January 2011. Her last salary was Shs.7,000 per month. She was not paid salary for January, 2011.

Her Claim against the Respondent is for salary for 28 days worked in January 2011, notice, annual leave for 2 years and 10 months worked, underpayments.

CW2 testified that BENSON NYANDORO MOGINA testified that he was originally employed as a cleaner on 15th May, 2005 and was later deployed as assistance chef at Mega City. His salary was shs.3,000 per month. He was terminated on 1st October, 2010 because Mega City was closed down. While in employment he did not take leave.

CW3 SULMAN OCHOLLA AYOKO testified that he was employed at Chen's Kitchen on 5th June, 2005 as a waiter and was terminated on 4th December, 2009. He was not paid the salary of November 2009. He never took annual leave. He prayed for annual leave, overtime, Salary not paid, Notice and Underpayments. His last salary was Shs.4,500.

CW4 GEORGE OCHIENG SANDE testified that he was employed at Chen's Kitchen on 4th October, 2008 as a waiter at a salary of Shs.4,500. After one year his salary was increased to Shs.5,600. On 1st October, 2010 he was called with CW2 by the "boss" and told there was no work. When they asked for their terminal benefits the boss said there was none. They then reported to the Union which took up the matter.

He prayed for pay in lieu of notice, Salary for September 2010, Severance Pay, Annual Leave, Underpayments, Compensation and Certificate of Service.

## **Submissions**

The Claimant submitted that all Grievants were terminated verbally on diverse dates without being given reasons for termination and that all machinery under the Labour Relations Act was exhausted before coming to court.

The Claimant submitted that the Respondent did not comply with both procedural fairness as provided under sections 40, 41 and 45 or substantive fairness as provided in section 43 and 45 and the conduct of the Respondent amounted to unfair labour practice.

The Claimant urged the court to find that the Grievants were unprocedurally declared redundant as their termination followed the closure of Chinese Chen's Kitchen.

For the Respondent it was submitted that none of the Grievants produced a letter of appointment or payslip to prove that they were employed by the Respondent. It was submitted for the Respondent that even though it did not subject the Grievants to a hearing Jane Nechesa Mwaka admitted that she was absent on 26th, 27th and 28th January, 2011 that section 44(4) (b) permits an employer to summarily

dismiss an employee for absenteeism. It was further submitted that Ms. Mwaka did not prove her allegation of dismissal due to her involvement in union activities.

The Respondent further submitted that the rest of the Grievants were terminated due to closure of business.

### **Determination**

The Respondent did not tender any evidence at the trial in this suit. In the written submissions the Respondent has admitted that JANE NECHESA MWAKA was terminated due to absenteeism without being subjected to a hearing while all the other Grievants were terminated due to closure of business. The admissions mean that JANE NECHESA MWAKA was terminated unprocedurally while all the other Grievants were declared redundant unprocedurally. The Respondent did not comply with section 41 in respect of JANE NECHESA MWAKA or with section 40 in respect to the other three (3) Grievants. I therefore find that JANE NECHESA MWAKA was dismissed unfairly while SULMAN OCHOLLA AYOKO, SANDE GEORGE OCHIENG and BENSON MOGINA were unprocedurally declared redundant.

### **Remedies**

The Claimant prayed for the following in respect of the Grievants.

#### **JANE NECHESA MWAKA**

Notice Pay	Shs. 10,656.20
Last Salary	Shs. 10,656.20
Severance	Shs. 21,312.40
Annual Leave	Shs. 25,574.90
Underpayment	Shs.221,623.20
Compensation	Shs.124,874.40
<b>Total</b>	<b>Shs.414,693.30</b>

#### **SULMAN OCHOLLA AYOKO**

Notice Pay	Shs.10,656.20
Last Salary	Shs. 10,656.20
Severance	Shs. 10,656.20
Annual Leave	Shs. 24,154.00
Underpayment	Shs.116,998.40
Compensation	Shs.127,874.40
<b>Total</b>	<b>Shs.300,995.40</b>

#### **SANDE GEORGE OCHIENG**

Notice Pay	Shs. 10,656.20
Last Salary	Shs. 10,656.20
Severance	Shs. 10,656.20
Annual Leave	Shs. 17,049.90
Underpayment	Shs.121,348.80
Compensation	Shs.127,874.40
<b>Total</b>	<b>Shs.298,241.70</b>

### **BENSON MOGONA**

Notice Pay	Shs. 9,866.80
Last Salary	Shs. 9,866.80
Severance	Shs. 24,667.00
Annual Leave	Shs. 23,680.30
Underpayment	Shs.146,404.80
Compensation	Shs.355,204.80
<b>Total</b>	<b>Shs.569,690.50</b>

The Respondent did not make any submissions in respect of the prayers by the Claimant on behalf of the Grievants. The foregoing being the case the Grievants are entitled and judgement is entered in favour of the Grievants as follows:-

#### **1. JANE MWAKA**

(i) 1 months salary in lieu of notice Shs.8,375.45

(As per General Order 2010 inclusive of house allowance)

(ii) Last Salary Shs.8375.45

(iii) Severance

Jane was not declared redundant and is not entitled to Severance Pay.

(iv) Annual Leave (May 2008 to January 2011) 33 months (57.75 days) at Shs.350.05 per day  
Shs.20,215.40

(v) Underpayments

The Claimant did not state how much she was earning for previous years. She testified that her last salary was Shs.7,000 while her starting salary was shs.4,500.00. The court will assume she earned the last salary for 12 months in which event the underpayments are  $-10,656.20 - 7,000) = (shs.3656.20 \times 12)$ - Shs.43,874.40. I award her Shs.43,874.40 on account of underpayments.

(iv) Compensation

Having worked for about 3 years it is my opinion that compensation equivalent to 3 months salary is reasonable. I therefore award her the same at  $\text{Shs.}8,375.45 \times 3 = \text{Shs.}25,126.35$ .

**2. SULMAN OCHOLA AYOKO**

(i) Notice Shs.8,375.45

(ii) Last Salary Shs.8,375.45

(iii) Severance

He worked for 4 years. I award him Severance pay at 15 days per year being  $\text{Shs.}16,750.90/-$

(iv) Annual leave (54 months) 94 days ( $94 \times 353.05$ )  $\text{Shs.}32,904.70$ .

(v) Underpayments

12 months ( $8375.45 - 4500$ )  $\times 12 = \text{Shs.}46,505.40$ .

(vi) Compensation

Having worked for about 4.5 years, I award him compensation equivalent to 4 months salary in the sum of  $\text{Shs.}33,501.80$ .

**3. SANDE GEORGE OCHIENG**

(i) Notice Shs.8,375.45

(ii) Last Salary Shs.8,375.45

(iii) Severance

The Grievant worked for 2 complete years. He is entitled to 15 days pay per year being  $\text{Shs.}8,375.45$ .

(iv) Annual Leave

He worked for 24 months. He is entitled to 42 days leave at  $\text{Shs.}350.05$  per day. I award him  $\text{Shs.}14,702.10$ .

(v) Underpayments

$(8375.45 - 5600) \times 12 = \text{Shs.}33305.40$

(vi) Compensation

Having worked for 2 years, It is my opinion that 2 months salary will be reasonable compensation and I award him  $\text{Shs.}16,750.90$ .

**4. BENSON MOGINA**

(i) Notice Shs.8375.45

(ii) One months salary Shs.8375.45

(iii) Severance

Benson worked for 5 complete Years I award him Severance pay at 15 days salary for 5 years at Shs.26,253.75

(iv) Compensation

I award him 5 months salary as compensation in the sum of Shs.41,877.25

The Respondent shall in addition issue a certificate of service to each of the grievants.

**Dated, Signed and Delivered this 10th day of November, 2016**

**MAUREEN ONYANGO**

**JUDGE**