



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 267 OF 2014

PETER KIMEU MOSE.....1ST CLAIMANT
JOSEPH NTHIWA NZIOKI.....2ND CLAIMANT
ANTHONY KARIUKI GICHOHI.....3RD CLAIMANT
SYLVESTER KYALO MUTIO.....4TH CLAIMANT
ANNE WAMBUI WANYOKIE.....5TH CLAIMANT
CYRUS MWAURA MBUGUA.....6TH CLAIMANT
LILIAN WAMBUI GACHOKA.....7TH CLAIMANT
WILLIAM NTHIANI KITHUKA.....8TH CLAIMANT
STANLEY GITHINJI MWANGI.....9TH CLAIMANT
JAMES ANGULU NDAKALA.....10TH CLAIMANT
MARTIN NZIOKA KITUMBI.....11TH CLAIMANT
JUDY MWERU GATHOGO.....12TH CLAIMANT
FRANCIS MUNYEBI NDONYE.....13TH CLAIMANT
JOSEPH KARIUKI RUGIRI.....14TH CLAIMANT

VS

MANG HOTEL.....1ST RESPONDENT
TIMOTHY KINUTHIA.....2ND RESPONDENT

AWARD

Introduction

1. By a Memorandum of claim dated 24th February and filed in Court on 25th February 2014, the

Claimants brought an action seeking payment of accrued dues. At the time of filing their case, the Claimants were in the 1st Respondent's employment but later left employment under agreed redundancy terms.

2. By the time the case was heard, the parties had reached an agreement on all the other issues except overtime, off days, uniform costs and house allowance. This award therefore relates to these latter issues only and ignores the Claimants' claim for unfair redundancy introduced irregularly in final submissions. Further, by consent of the parties, the 2nd Respondent who is the 1st Respondent's Managing Director was removed from these proceedings.

The Claimants' Case

3. The Claimants were employed by the 1st Respondent on diverse dates in the positions of waiters, barmen and supervisors. The Claimants claim that during their employment by the 1st Respondent, they were treated unfairly. They claim overtime and off days' compensation, refund of uniform costs and house allowance.

The Respondents' Case

4. In the Reply to Statement of Claim dated 28th March 2014 and filed in Court on even date, it is confirmed that the Claimants were employees of the 1st Respondent. The allegation of unfair treatment made by the Claimants is however denied.

5. In response to the Claimants' claim for house allowance, the Respondents state that the claimants were always offered free housing within the 1st Respondent's building/hotel during the entire period of their employment.

6. With regard to the claim for off days, the Respondents plead that all employees were granted a mandatory two (2) off days every week. Further, the Respondents contest the claim for overtime compensation as the 1st Respondent's business, being a night club was regulated under the Alcoholic Drinks Control Act, 2010 which allows the sale of alcoholic drinks between the hours of 7.00 pm and 3.00 am only. It is the Respondents' case therefore that the working hours with respect to the 1st Respondent's business as provided by law was eight (8) hours each day.

7. The Respondents deny the Claimants' claim for refund of monies spent on purchase of uniforms. In this regard, the Respondents state that all employees were, as a mandatory term of employment, required to procure their own uniforms, and the Claimants cannot seek the Court's intervention to renege on the agreed terms of engagement.

Findings and Determination

8. The issues for determination in this case are as follows:

- a. Whether the Claimants have made out a case for overtime compensation;
- b. Whether the Claimants have proved a claim for refund of uniform expenses;
- c. Whether the Claimants are entitled to house allowance.

Overtime Compensation

9. In support of their claim for overtime compensation, the Claimants told the Court that they worked from 7.00 am to 3.00 am. It was their case that they were deployed to work in the restaurant, butchery and bar. Conversely, the Respondents' witness, Timothy Kinuthia testified that the Claimants were deployed at the night club where they worked from 7.00 pm to 3.00 am.

10. To buttress their case the Respondents produced an Alcoholic Drink Licence authorising the 1st Respondent to sell alcoholic drinks from 7.00 pm to 3.00 am. The Court weighed the opposing parties' cases and found no tangible evidence to support the Claimants' assertion that they were deployed to work in the restaurant, bar and butchery and that they worked from 7.00 am to 3.00 am. The Court therefore adopts the Respondents' evidence that the business where the Claimants were deployed was licensed to operate between 7.00 pm to 3.00 am.

11. The Respondent's defence to the Claimants' claim for compensation for working on public holidays is that the Claimants were given two (2) off days per week to compensate them for working on public holidays which was a peak period for the 1st Respondent's business. The 1st Claimant, Peter Kimeu Mose, testifying on his own behalf and on behalf of all the other Claimants confirmed that they were indeed allowed two (2) days off duty every week. The law grants a mandatory one day off duty per week to all employees. The Court therefore finds it reasonable for an employer to grant its employees an extra off day per week as compensation for working on public holidays.

12. In light of the foregoing, I find no basis for the claims for overtime compensation which therefore fail and are dismissed.

Uniform Expenses

13. On the claims for refund of uniform expenses, the 1st Claimant told the Court that he bought his own uniform twice a year and gave the figures of Kshs.400.00 for a shirt, Kshs.700.00 for a pair of trousers and Kshs.1,000.00 for a pair of shoes. The Respondents admitted that the Claimants were required to buy their own uniform.

14. Where an employee is required to put on uniform while at work, the employer must provide the uniform at its own cost. To require an employee to buy their own uniform amounts to an unfair labour practice which cannot be cured by the employee's acquiescence. The Respondents' defence to these claims is that they were not evidenced by receipts. The Respondents did not however counter the figures provided by the Claimants by providing their own figures for comparison by the Court. The Court therefore rejects the Respondents' defence, allows the Claimants' claims for refund of uniform expenses and adopts the figures provided by the 1st Claimant for purposes of tabulating these claims.

House Allowance

15. The Claimants claim house allowance and the Respondents' defence is that since the Claimants were accommodated within their work premises, they are not entitled to house allowance.

16. Section 31(1) and (2) of the Employment Act provides as follows:

1. An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.*(emphasis added)*

2. This section shall not apply to an employee whose contract of Service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

17. There was divergent evidence on the nature of accommodation offered to the Claimants at the 1st Respondent Hotel. The 1st Claimant testified that two large rooms had been set aside at the rooftop

where the Claimants would sleep until morning after leaving work at 3.00 am. There were four (4) beds in each room and 2-3 employees would share one bed. The 1st Claimant further told the Court that he had rented a house at Kasarani where he lived with his family.

18. For the Respondents, Timothy Kinuthia testified that ten (10) rooms had been set aside for the 1st Respondent's employees while on duty. There would be 2-3 employees in one room. Kinuthia told the Court that some of the employees had rented homes elsewhere.

19. The question then is whether the Claimants were provided with reasonable housing accommodation within the meaning of Section 31(1) of the Employment Act, 2007. Counsel for the Respondents relied on the decision by **Rika J** in **Samuel Gachomo Chege V Jesse Kangethe Karuma and another [2014] eKLR** in which my brother Judge held that a Manager who was accommodated at the pub he managed was not entitled to house allowance.

20. This case is distinguishable from the one before me in two respects; first the Claimant in the **Gachomo Chege case** (supra) was the Manager and not a shop floor employee like the Claimants. It was therefore feasible to set aside a permanent room in the pub for his accommodation. Second, the Claimants in the instant case were not allocated their own room each and were only accommodated while on duty. There was no evidence that they could stay in the hotel rooms when they were off duty.

21. To my mind, what the Respondents provided to the Claimants was not housing accommodation as contemplated under Section 31(1) of the Employment Act but a place to lay their heads after leaving work at an hour they could not safely get to their homes. The Court takes judicial notice that hospitality establishments which close business at odd hours would ordinarily provide own or hired transport to their employees. Having failed to provide the Claimants with such transport, the Respondents cannot be allowed to also deny the employees their house allowance under the guise of non-existent housing accommodation.

22. As held by this Court in **Simiyu Kibengo Godfrey V Private Safaris (E.A) Limited [2013] eKLR** an employee who is accommodated by the employer in a restricted and non-accompanied environment cannot be said to be housed by the employer within the meaning of Section 31(1) of the Employment Act, 2007.

23. The Claimants' claims for house allowance therefore succeed and are allowed.

Final Orders

24. From the foregoing I make the following orders:

- a) The 1st Respondent shall pay to each Claimant the sum of Kshs.3,200.00 being the cost of two (2) shirts, two (2) trousers and one (1) pair of shoes per each year of employment from the date of employment to the date of termination;
- b. The 1st Respondent shall pay to each Claimant house allowance calculated at 15% of the agreed last salary from the date of employment until the date of termination;
- c. The awards under (a) and (b) above shall be tabulated by Counsels for the parties and paid to the Claimants within the next thirty (30) days from the date of this award;
- d. The award amounts shall attract interest at court rates from the date of the award until payment in full;
- e. The 1st Respondent shall meet the costs of this case.

25. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF
JUNE 2015**

LINNET NDOLO

JUDGE

Appearance:

Ms. Ndirangu for the Claimants

Mr. Njoroge for the Respondent