



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 10 OF 2015

KENYA HOTELS AND ALLIED WORKERS UNION..... CLAIMANT

VERSUS

SPORTSMAN ARMS HOTEL NANYUKI..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd October, 2015)

RULING

On 31.07.2015 the court entered judgment for the claimant against the respondent for:

1. The respondent to pay **Kshs.43, 050** as awarded by 1.10.2015 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
2. The declaration that the termination of the grievant's employment by the respondent was unfair.

The claimant filed an application for review of the judgment on 3/08/2015. The application was not admissible in its drafting but the claimant prayed for:

- a. A declaration that the application for review be allowed and be dispensed with expeditiously.
- b. That the ruling (actually the judgment) made by Justice Byram Ongaya on 31.07.2015 be set aside.
- c. That the cost of this application be paid in full to the claimant.

The grounds as far as the court can decipher them from the application are as follows:

- a. There was an error on record because the court found that the claims for underpayments and house allowance were of a continuing nature so that they were time barred under section 90 of the Employment Act, 2007 as the suit was filed after the prescribed 12 months for such actions.
- b. The claimant had complied and exhausted the conciliation process under the Labour Relations Act, 2007 and the court erred in failing to find as much.
- c. The court erred in invoking section 90 whereas the respondent had not pleaded or submitted on the same issue.

The claimant relied on the application and the supporting affidavit of Johnstone Murage Mbogo filed on 31.08.2015 without making any further submissions.

The respondent did not file a replying affidavit or grounds of opposition and did not appear at the date fixed for hearing of the application on 14.10.2015 and the date having been fixed by consent of the parties.

The court has considered the grounds for review as stated for the claimant and makes findings as follows:

1. As much as the respondent did not plead and urge the point on continuing injury, the court found that the claim for underpayment and house allowance as pleaded and urged for the claimant were of a continuing nature and the same were required to be filed in court within 12 months from the date of the cessation of the continuing injury as provided for in section 90 of the Employment Act, 2007. It is the opinion of the court that the court was bound with the provisions of law such as the cited section. The pertinent issue for determination is whether the court erred in the manner the section was invoked in view of the facts and circumstances of the case.
2. It has been urged that the claimant had complied and exhausted the conciliation process under the Labour Relations Act, 2007 and the court erred in failing to find as much. The court has revisited the record. It is shown that the claimant's exhibit JOO8 is the certificate of conciliation and was issued on 12.03.2014 in accordance with section 69(a) of the Labour Relations Act, 2007. The court finds that there is an error on the face of the judgment that the trade dispute resolution process was not taken into account in the judgment. Under section 73(1) of the Labour Relations Act, 2007 the unresolved trade dispute is referred to the court in accordance with the rules of the court. The court finds that the suit filed by the claimant was filed promptly as was a referral under the said section 73(1) of the Act and the court erred in invoking section 90 of the Employment Act, 2007 on time barring as the course of action accrued on the date of the certificate of unresolved dispute being 12.03.2014 and suit filed was on 28.01.2015. The suit was in any event within 12 months and the claims for underpayment, overtime or house allowance were therefore not time barred. While making that finding the court considers that the parties were bound with the recognition agreement, collective agreement and the conciliation process under the Labour Relations Act, 2007 as well as the referral to the court under the Act. The suit before the court was therefore the referred trade dispute and was not time barred. While making that finding the court upholds its opinion in **Kenya Plantation Agricultural Workers Union –Versus- Kisima Farm Limited [2015]eKLR** thus, **“The 2nd issue for determination is whether the time for referring the industrial dispute to the court has since lapsed. Section 73 of the Act provides that if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the court in accordance with the rules of the court. Section 73(3) provides that a trade dispute may only be referred to the court by the authorised representative of an employer, group of employers, employers’ organisation or trade union. For purposes of section 73 of the Act, the court has perused the rules and there is no time of limitation prescribed in the rules for referring the dispute to the court. In absence of a specific prescription, the court holds that the time of limitation for referring the unresolved industrial dispute to this court would generally be 3 years or 12 months based on the nature of the claim in the dispute as per the time of limitation in section 90 of the Employment Act, 2007; the time running from the date the dispute stands as unresolved. Otherwise, a future legislative agenda would be to prescribe the time in the rules as anticipated under section 73 of the Act.”**
3. The court has considered the finding that the claims were not time barred and finds that for the overtime hours claimed, the claimant failed to establish that the hours were worked on specified dates and the claim will fail for want of evidence. The claims for house allowance and underpayments as set out in the statement of claim were based on the minimum wage orders which were filed in court. The court finds that the claimant would be entitled to the pay of wages and house allowance as claimed and as per the wage orders filed. The claim for house allowance is not particularised in terms of the months or period in issue and the claimant did not move evidence in that regard. That claim will therefore fail. As for salary, the court finds that the same was particularised and in absence of any other material, the court finds that the claimant is entitled as prayed. The claimant is awarded **Kshs.115, 613.10** for underpayment as prayed for.
4. The court upholds the award of **Kshs.43, 050.00** in the judgment for costs and for the respondent's failure to follow the redundancy procedure as provided for in section 40 of the Employment Act, 2007.

As the respondent did not oppose the application, each party shall bear own costs of the application for review.

In conclusion, the judgment is reviewed by setting aside the final orders therein and substituting judgment for the claimant against the respondent for:

1. The respondent to pay the grievant **Peter Kagwima Wanjahi Kshs.158, 663.10** by 1.12.2015 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
2. The declaration that the termination of the grievant's employment by the respondent was unfair.

Signed, dated and delivered in court at **Nyeri** this **Friday, 23rd October, 2015.**

BYRAM ONGAYA

JUDGE