



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

Cause No. 16/2013

(Formerly Ksm Hcc No. 43 Of 2003)

(Before Hon. Lady Justice Hellen Wasilwa On 23.1.2014)

1. John Osewe Ogola
2. David Mutati
3. David Onyango
4. Nobert Omondi
5. Charles Akai
6. Samson Were
7. Charles Ongaro
8. George Oduor Owuodha
9. Maurice Adek Omollo
10. Daniel Nyaoke Nabule
11. Japheth Njomo Olenyo
12. Charles Obonyo Omulo
13. Jairus Otiende Andere
14. Peter Makuna Obwela
15. William Matoro Odongo
16. Emmanuel K. Otieno Sirma Mainga
17. Mathew Asangai Omuse
18. Wilfred Radul
19. Samwel Onyango Okore

- 20.Charles Bolvince Opondo
- 21.Patrick Onyango Ayugi
- 22.Charles Odhiambo Apina
- 23.Eliakim Mboya Napali
- 24.Joseck Omunyin Ochudi
- 25.Edward Odero
- 26.Samson Ouche
- 27.Luka Lepell
- 28.Loचना Ladir
- 29.George Apina
- 30.Joseph Omedo
- 31.John Ogondo
- 32.John Okitwi
- 33.Samwel Ouko
- 34.Mary Assumpta Ayitsi
- 35.Linet Ochieng
- 36.James Otindo
- 37.Billy Owuor
- 38.Julius Ouma
- 39.James Ogony
- 40.Steve Warinda
- 41.Dennis Enonda
- 42.Julia Agengo
- 43.Salome Nyamwathi Mwangi
- 44.Milka Atieno Juma
- 45.Bonface Shivoga Makenzi
- 46.Elizabeth Anyango Odhiambo
- 47.Lucy Akoth Sao.....Applicants

Versus

Raghibir Singh Sadhu T/A

Hotel Royale.....Respondents

JUDGMENT

The Claimants herein originally filed Kisumu High Court Civil Case No. 43/2003. This case was heard by several Judges but was not completed in time given the nature of the case involving 47 Claimants. Some of the claimants died along the way necessitating the filing of Application for Grant of Letters of Administration and thereafter substitution of the deceased claimants before hearing could proceed.

Hearing initially commenced on 27.1.2004 but stalled in 2007. By then only eight out of the expected 47 claimants had testified. The case was again revived in October 2012 and transferred to the Industrial Court for disposal in January 2013.

When hearing commenced, this court gave directions that hearing should proceed where it had stalled without delay. Upon commencement of the hearing, it became apparent that the issues being canvassed by the respondents as their defence touched on the legal ownership of Hotel Royale. This Court then directed that the parties call evidence and make submissions on this aspect of ownership of Hotel Royale before further hearing of this case.

The Parties obliged and called their witnesses and also made their written and oral submissions on 25/7/2013, I made a ruling on this aspect with a finding that the respondents herein Raghibir Singh Sandhu T/A Hotel Royale are the ones liable to pay the claimants herein their dues upon establishment by the claimants as what is due and owing. Given the large number of claimants involved, I also invoked my powers under Section 15 of the Industrial Court Act 2011 and referred the Parties to the County Labour Office Kisumu so as to be aided to calculate the amounts payable to each claimant and report back.

The Parties submitted to the County Labour Officer on several occasions. The County labour officer then submitted a report to this court detailing her findings.

According to the report of the County Labour Officer submitted to this Court dated 9.12.2013, the County Labour Officer held a meeting with the Parties on 4.12.13. The meeting was attended by Mr Patrick Karanja Advocate for the respondents, Teddy Omondi, Advocate for Claimants, Tom Owuor COTU area Secretary and William Odongo – Former Manager Hotel Royale. Counsel for respondents raised the issue that they had not been given an opportunity to be heard before the County Labour Officer came up with the calculation for dues payable to complainants hence the need for the Parties to meet again as ordered by the Court.

Mr Karanja for respondents demanded documentary evidence be produced including the claimants payslips and letters of appointments. He also wanted to know whether all the 48 employees were present during the first meeting and if their statements were taken.

Mr Omondi and Tom Owuor for the claimants on the other hand stated that the case had taken too long and that all the documents that the Advocate for respondents was referring to had been submitted to Court and were part of the documents in the file that had disappeared from the Court. They also stated that the issue then to be considered was calculation of the terminal dues payable to the complainants as the issue as to whether complainants had been or had not been employed by Hotel Royale had already been decided by the Court.

The Parties then agreed that the County Labour Officer should submit her report to the Court taking into account the sentiments expressed by the Parties.

According to the findings of the County Labour Officer, Hotel Royale and Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) had a valid Collective Bargaining Agreement signed on 1.6.1998 and valid for 2 years. According to that CBA Clause 29 of the said agreement stated that the CBA would continue to be in force thereafter until such a time that it was amended.

According to the report of the County Labour officer, Clause 12 of the CBA on annual leave provided that each employee is entitled to an annual leave of 30 working days. Clause 11 on redundancy on the other hand provided that notice on redundancy would be given as follows:-

1 – 2 years service - 2 Months notice

2 – 5 years service - 3 Months notice

5 years and above - 5 Months notice

Subsection IV of Clause 11 on redundancy provided that severance pay shall be calculated at the rate of 20 days for each completed year of service. The County Labour Officer thereafter calculated the notice pay, leave pay and severance pay based on the Provisions of the CBA. On the issue of dates of appointment, she found that this had been given by the former manager when he gave evidence in Court in 2003. She relied on Section 10(7) of the Employment Act 2007 which states that

“If in any legal proceedings an employer fails to produce a written contract or written particulars prescribed in Subsection (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer”.

and found that one of the terms stipulated in Sub-section (1) was the date of commencement of employment which the employer failed to prove.

The County Labour officer finally made her calculations which she submitted to Court and with them were leave acknowledgement slips in respect of one Stephen W. Otieno and Julius Ouma to confirm they were given leave without pay contrary to Section 28(1) of the Employment Act. She also attached a copy of an NSSF statement to confirm that Julius O. Obonyo was indeed an employee of Hotel Royale.

The Parties made their respective submissions based on this report for consideration by Court. The Claimants submitted that the claimants had been wrongfully terminated as such were entitled to payment of damages based on several cases amongst them ***Cyrus Nyaga Kabute -Vrs- Kirinyaga County Council, Civil Appeal No. 29 of 1985, Rift Valley Textiles Ltd -Vrs- Edward Onyango Ogada, Nakuru Civil Appeal No 27 of 1992 and Kenya Revenue Authority -Vrs- Menginya Salim Mwigari Nairobi Civil Appeal No. 108 of 2010.***

They also submitted that the claimants were dismissed in unclear circumstances and should therefore be paid severance pay calculated at more than five years at its maximum. They also submitted that the claimants be paid loss of salary for 10 years as they were prematurely terminated.

The respondents on the other hand submitted that the process of determining the dues payable to claimants by the Labour Office was faulty in that they were not given a fair hearing and that the claimants never produced any employment records to show when they were employed by the respondents. They asked the Court not to rely on this report and to find that the claimants have failed to prove the dues they allege to be owed and/or due to them. They asked court to seize the process of calculation of the dues and make a judicious determination on the issue.

Upon hearing the submissions of the Parties and upon considering the report of the Labour Officer the issues for determination by this court are as follows:-

1. To what extent this court can rely on a report submitted by the labour officer?

2. ***Whether the report of the Labour Officer considered the sentiments of the Parties?***
3. ***Whether the claimants have proved their case as required by law?***
4. ***Whether the claimants are entitled to any remedies and if so which ones?***

On the first issue, Section 15(1) of the Industrial Court Act states that;

“Nothing in this Act may be construed as precluding the Court from adopting and implementing on its own motion or at the request of the Parties any other appropriate means of dispute resolution including internal methods, conciliation, mediation and traditional dispute resolution mechanism in accordance with Article 59(2)(c) of the Constitution”.

It is on the basis of this section that this court on its own motion referred this dispute to the Labour Officer to calculate what was due and owing to the claimants herein.

It is also worth noting that Under Section 15(5) of the Industrial Court, the Court will not blindly adopt the recommendation of an Alternative Dispute Resolution process as

“In the exercise of its' powers under this Act, the court shall be bound by the national wage guidelines on minimum wages and standards of employment that may be issued from time to time by the Cabinet Secretary for the time being responsible for finance”.

In essence what the above provisions state is that whereas the court may refer the dispute for ADR, proper and reasonable parameters of law need to be considered by the Court as the Court relies on the ADR report. This Court will therefore not blindly adopt the County Labour Officer's report. This is in essence the reason why this Court allowed the Parties to submit on the matter before a judicious decision can be made.

Now to the second issue, the Labour Officer's report explained how she went about in her investigation to reach her verdict. From the Labour Officer's report, the Court ordered on 28th November 2013 that the Parties meet at the County Labour Office on 4th December 2013 so as to come up with a mutually acceptable calculation of the dues acceptable to the claimants. The respondents contended that the Labour Officer was not in a position to do the work without certain documents being employment letters and payslips of the claimants. It is however important to note that this case started being heard in 2003 before the High Court where several witnesses had already given evidence, and the proceedings are still clear and available. Some of the witnesses who testified are John Osewe Ogolla as PW1 who produced Exhibits Nos.1 to 9. Exhibit No 4 was a master roll for all the staff for January 2002. He was able to point out his name on the said Master roll as No 1. He also produced a schedule containing the names and demands of the claimants showing each claimant's date of employment, year of service, gross pay, gratuity notice, pending leave and public holidays. From this demand, the respondents paid some of the dues. The schedule was produced as Exhibit No 5. The respondent actually deposited 666,094/= at the Labour Office as part payment. The payment certificate was produced as Exhibit No. 6. The Labour Officer had written to the respondents asking for certain information, amongst them were the master rolls and payment sheets for the period 2000-2003. PW1 told court that he had served the respondents for 11 years and at the time his services were terminated his gross pay was 13,133.

In Cross-Examination PW1 was able to tell Court that the master roll produced were for the Months of January, September and October 2002. The Plaintiff- PW1 also produced his letter of appointment dated 30.11.90 as (Exhibit P- 10).

A second witness Aya Agingu also stated that he worked for the respondent for 12 years and his pay was 7,430/=. He told Court that he was paid 46,976/= by respondents after the dismissal leaving a balance of 92,834/= which he now seeks. In cross-examination he indicated that he was not being given a payslip but that his appointment letter got lost.

PW2 told Court that he was never given any letter of appointment but was employed on 1.4.89 as a cook and earned 9,183 per Month when the hotel closed, he was demanding 124,555/= plus costs.

PW4 William Odongo Matoro gave evidence and even produced his appointment letter dated 1.4.89 as Exhibit P11. At the time of termination, his pay was 26,500/=. His total claim was for 725,900/= but he was paid 57,139/= at the Labour Office after the termination leaving a claim of 668,268/= he told court that he was not being issued with a payslip.

PW5 Peter Mukua told court he was employed in May 1995 and was terminated after 7 years when his salary was 9,183/=. He also told court that there was no payslip given to him. He now demands 141,233/= after being paid 20,266/= by 2nd Respondent at Labour Office. He told court he had no appointment letter but PW1 prepared the list of their claim from the information he got from the office.

Other witnesses who were employees were PW7 Charles Obonyo Omundo whose claim was 153,912 and he told Court he was not given any letter of appointment nor payslip.

From the evidence of the previous proceedings, the witnesses testified that they were neither given payslips nor employment letters. That is the reason why the Labour officer had vide his note of 28/1/2003 asked the respondent to produce the Master rolls and pay sheets for the period 2000 – 2003.

Based on these Master roll and pay sheets the labour office made his calculations on the dues each claimant was entitled to then.

The original file in this case got lost and had to be reconstructed.

From the reconstructed file, the documents the Parties are referring to as still available. When respondents submit that the Labour officer had no way of determining the dues payable, this is not true because the documents the respondent wanted to be relied upon i.e. the employment documents i.e. payslips and letters of appointment are supposed to have been produced by the respondent.

The Labour Officer in her report quotes Section -10(7) of the Employment Act 2007 which states that

“If in any legal proceedings an employer fails to produce written contract or written particulars prescribed in Sub-section (1) the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer”.

Sub-section 1 of section 10 of Employment Act 2007 deals with employment particulars which shall be given by the employer not later than two Months after the beginning of the employment.

If the respondents never gave payslips or employment letters why would they now demand that the claimants produce them. It is my finding that the Labour Officer directed her mind properly in the circumstances to rely on what was available as the burden of proving otherwise what was submitted by the claimants lies squarely on the respondents and Section 10(6) of Employment Act states that the employer shall keep these particulars for a period of 5 years after termination. These particulars were requested by the labour officer on 28.1.03 and it was the respondent to produce them and not the claimants.

On issue No 3, have the claimants proved their case as required by law? From my analysis above, several of the witnesses who gave evidence testified that they worked for the respondents and PW1 who was the Manager of the respondent told Court that, all the other claimants worked under him. From the records available in the office he prepared a schedule of their particulars showing the times they were employed, what they earned and what their terminal entitlements were. Other documents produced before Court were NSSF Card of Lilian Aganga and NSSF Card No 547342624 for George Oduor Owuodha, leave approval of one Stephen Otieno and Julius Ouma and an NSSF statement of Julius O. Obonyo. Letter of Appointment however of Mary Mwangi and of Lilian Agugi were availed to Court.

From the analysis carried out by the County Labour Officer and submission made therein by the Parties and their Counsel and the evidence both oral and documentary, I find that the claimants

established their claim. To continue to insist that each claimant testifies and produces documents that do not exist will be tantamount to denying the claimants their rights which were abrogated by the respondents.

What then are the claimants entitled to? I note that some of the claimants have since died, and were substituted by their kin. However going by the schedule prepared by the Labour Officer indicating what respondents part paid, and indicating the balances. I adopt the same in its entirety and enter Judgment for the claimants /or as substituted as per the schedule below:

CLAIMANT	ALREADY PAYMENT ON ACC	BALANCE ON CLAIM
1. JOHN SEWE OGOLA	61,968	240,336
2 LILIAN AYA AGINGU	46,976	92,834
3 MARY WANJILU MWANGI	25,293	114,740
4 GEORGE ODUOR OWUODHA	37,786	124,555
5 MAURICE ADEK OMOLLO	30,489	69,036
6 DANIEL NYAOKE NABULE	32,933	83,686
7 JARED JUMA OWINO	32,933	148,262
8 JAPHETH NJOMO OLENYO	33,733	162,345
9 CHARLES OBONYO OMULO	42,166	153,912
10 JAIRUS OTIENDE ANDERE	22,800	70,313
11 PETER MUKUNA OBWELA	20,266.00	141,233
12 WILLIAM MATORO ODONGO	57,139.00	668,268.00
13 EMMANUEK K. OTIENO SIRIMA	17,733.00	85,932.00
14 MOSES KIZITO SHIASIA SHIVOGO	20,266.00	110,992.00
15 JULIUS ODHIAMBO ABONYO	12,666.00	154,416.00
16 MATHEWS ASANGAI OMUSE	30,489.00	70,846.00
17 WINFRED RADUL	10,133.00	48,497.00
18 SAMWEL ONYANGO OKORE	21,200.00	75,607.00
19 CHARLES BOLVINCE OBONYO	15,200.00	80,946.00
20 PATRICK ONYANGO AYUGI	10,133.00	46,178.00

21	CHARLES ODHIAMBO APINA	9,381.00	31,927.00
22	ELIAKIM MBOYA NAPALI	7,036.00	32,472.00
23	JOSECK OMUNYIN OCHUDI	9,381.00	35,712.00
24	EDWARD ODERO	26,372.00	127,234.00
25	SAMSON OUCHE		98,087.00
26	LUKA LEPELL	-	5,863.00
27	LOCHUKA LODIR	-	5,863.00
28	GEORGE APINA	-	60,087.00
29	JOHN SAO	-	25,404.00
30	JOSEPH OMEDO	-	25,404.00
31	JOHN OGONDO	-	8,395.00
32	JOHN OKITWI		3,768.00
33	JOSECK OCHUDI		48,627.00
34	SAMUEL OUKO		46,596.00
35	MARY ASSUMPTA		36,594.00
36	LINET OCHIENG		36,594.00
37	JAMES OTINDO		36,594.00
38	BILLY OWUOR		1,774.00
39	JULIUS OUMA		26,837.00
40	JAMES OGONY		26,837.00
41	STEVE WARINDA		35,104.00
42	DENNIS ENONDA		37,969.00
43	DAVID MATATI		94,293.00
44	DAVID ONYANGO		110,833.00
45	NOBART OMUDI		58,240.00
46	CHARLES AKOI		58,240.00
47	SAMON WERE		41,600.00
48	CHARLES ONG'ARO		40,000.00

TOTAL

634,472.00

522,925.00

The respondents will also pay costs of this suit.

HELLEN S. WASILWA

JUDGE

23.1.2014

Appearance

Mwamu of Mwamu and Company Advocates for claimants

Mr Karanja of L.G. Menezes Advocates for respondents

C/c- Wamache Sammy