



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NUMBER 69 OF 2007**

**BETWEEN**

**KENYA UNION OF DOMESTIC,**

**HOTELS, EDUCATIONAL INSTITUTIONS,**

**AND ALLIED WORKERS [KUDHEIHA].....**  
**CLAIMANT**

**VERSUS**

**LENANA MOUNT HOTEL.....**  
**RESPONDENT**

*Rika J*

**CC. Elizabeth Anyango**

*Mr. Jason Namasake instructed by J.N. Namasake & Company Advocates for the Claimant*

*Mr. Gachuna instructed by Stanley Henry Advocates for the Respondent*

**ISSUE IN DISPUTE: WRONGFUL TERMINATION OF THE CONTRACTS OF EMPLOYMENT OF-**

- i. FENZEZIO OMONDI
- ii. SAMMY MULINGE
- iii. JOHN WAMBUA
- iv. JOSEPH KARIUKI
- v. PETER MAKAU
- vi. MARGARET NJOKI
- vii. TONY SUNGURA
- viii. DOROTHY N. MAKAU
- ix. GEORGE NJOROGE

**AWARD**

1. This Claim was initiated under the repealed Trade Disputes Act Cap 234 the Laws of Kenya. The Notification of Dispute was filed on 22<sup>nd</sup> May 2007 pursuant to Section 14 [7] of the Trade Disputes Act.

The Authority of the Minister for Labour under Section 8, and the Certificate of the Labour Commissioner under Section 14 [9] were filed on the same date. The Court took cognizance of the dispute and gave procedural directions on 27<sup>th</sup> November 2007. The Claimant subsequently filed its Memorandum of Claim and a Supplementary Memorandum of Claim, while the Respondent filed its Memorandum of Reply on 14<sup>th</sup> March 2008. The Claimant had initially given the names of 13 Grievants in the Notification of Dispute, which was amended to the current 9 Grievants shown above.

2. The Parties relied on their pleadings, oral and written submissions, as well as testimonial evidence. The Claimant called three Witnesses - Dorothy Ndunge Makau and George Anthony Njoroge on 8<sup>th</sup> September 2011, and John Wambua on the 9<sup>th</sup> December 2011 when the Claimant closed its case. The Respondent called its General Manager James Mwaniki who gave evidence on 6<sup>th</sup> November 2012, bringing the hearing to a close. The dispute was last mentioned in Court on 2<sup>nd</sup> July 2013 when the Parties confirmed the filing of their Final Submissions and were advised by the Court Award would be read on notice.

3. The Respondent is a Hotel based in Nairobi. The 9 Grievants allege they were employed on diverse dates and in diverse positions by the Respondent. Their contracts of employment were terminated on different dates in the years 2003 and 2004. They felt they were not fairly treated, and through the Claimant reported a Dispute to the Minister for Labour. Upon investigations and conciliation, there was no settlement, and the Dispute was escalated to the adjudication of the Court.

4. The names, designations and dates of termination of the respective Grievants' contracts, are given as follows:-

- Fenzazio Omondi, Cook, termination date- 30<sup>th</sup> November 2003
- Sammy Mulinge, Barman, termination date- 29<sup>th</sup> November 2003
- John Wambua, Chef, termination date- 11<sup>th</sup> November 2003
- Joseph Kariuki, Painter, termination date- 29<sup>th</sup> November 2003
- Peter M. Makau, Barman, termination date 1<sup>st</sup> September 2003
- Margaret Njoki, House- Keeper, termination date 24<sup>th</sup> March 2004
- Tony Sungura, Cook, termination date 23<sup>rd</sup> March 2004
- Dorothy Makau, House –Keeper, termination date 30<sup>th</sup> October 2003
- George Njoroge, Floor Supervisor, termination date 29<sup>th</sup> March 2004

5. The Claimant alleges on termination, the Grievants were not given any reason or reasons in justification. The dispute arose when the Respondent started to interfere with the Grievants' right to join the Claimant Union. In October / November 2003, the Claimant enlisted the Grievants as its Members. The Respondent refused to effect Check- Off Forms and threatened to terminate the contracts of any Employee who joined the Claimant Union. The Respondent systematically or constructively dismissed those Employees who refused to withdraw Membership. The dispute was brought before the Parties Joint Industrial Council [JIC], which recommended the dismissals, be reduced to normal termination, and the Grievants be paid their normal terminal benefits under the CBA. The Respondent dishonoured this, prompting the Respondent to report the dispute to the Minister. The Investigator appointed by the Minister confirmed the 9 Grievants were unfairly dismissed, and recommended they be paid terminal benefits and compensation depending on the years of service worked. Even this was not acceptable to the Respondent, which opened the way for the intervention of the Court. The Claimant prays that the Court grants to the Grievants:-

- a. Maximum compensation the equivalent of 12 months' salary for each Employee
- b. Terminal benefits under the CBA prevailing at the time of termination which included-
  - i. Notice Period
  - ii. Termination Gratuity
  - iii. Underpayment of salaries if any from the date of employment to the date of termination

- iv. House allowance due but not paid
- v. Leave traveling allowance due but not paid
- vi. Service Charge
- vii. Night Shift allowance
- viii. Certificate of service

Although Mr. Namasake mentioned in passing that the Court has power to order reinstatement of the Grievants to their former positions, there was no express prayer in the Memorandum of Claim or its Supplement, for an order or reinstatement. The Court is convinced from the outset that reinstatement would not be a reasonable or practicable remedy, the Grievants having left the Respondent about 10 years back.

6. Dorothy Ndunge testified that she was employed on 1<sup>st</sup> April 1991 as a Linen Keeper. She was promoted in the year 2000 to the position of House-Keeper. On 30<sup>th</sup> October 2003, she was asked by the Manager to return the Hotel key, and not to report on duty the following day. She was instead directed to report to the Respondent's Head Office. She was advised at the Head Office to proceed on 24 days of leave. At the end of the leave days, she was directed to the Managing Director of the Hotel Mr. Nginyo Kariuki. He told her he had come to learn that she had enlisted as a Member of the Claimant Union. She confirmed she had. He informed her he could not continue employing a Member of the Claimant Union. Her contract was terminated. The Respondent refused to pay her terminal dues, including salary for days worked. Nginyo Kariuki asked her to get a salary from the Claimant Union. She left employment without any payment. 9 employees were affected after they enlisted as Claimant's Members. Ndunge stated there was a CBA negotiated between the Hoteliers Association to which the Hotel was a Member, and KUDHEIHA. The Respondent however, was not paying its Employees in accordance with the CBA. The demands by the Claimant that the CBA be implemented, was one of the factors that led the Respondent to terminate its Employees' contracts. She emphasized she does not wish to go back to work, but wishes to be paid terminal dues in accordance with the CBA, and compensation for unfair termination.

7. Answering questions in cross-examination, Ndunge testified that she was asked by the Hotel Manager to report to the Head Office in 2003. The Manager was one Elizabeth. Ndunge enrolled as a Member of the Claimant in 2002. She was paying subscription of Kshs. 150 secretly. She was paid a monthly salary of Kshs. 2,350 on recruitment as an Employee of the Respondent. There were verbal reviews of the salary afterwards. In 2002, she was getting Kshs. 8,000 per month. She stated there were underpayments by the time of termination, but she was not able to say the actual amounts involved. She only went on leave on three occasions throughout her service. The Managing Director asked Ndunge not to return to the Hotel on termination. All the other 9 Grievants were sacked because of their trade union activities. The Witness could recall the names Njoroge, Mulinge and Wambua- not the names of all the 9 Grievants involved. She did not have a meeting with the other Grievants before the Dispute was filed. Almost half of the Hotel Employees were Trade Union Members. Nine out about 70 Employees were sacked for joining the Trade Union. She was told by the Claimant's Officials that the Claimant had a Recognition Agreement with the Respondent. On redirection Ndunge stated she was never advised by the Managing Director that her performance was wanting. She was instead told that her work was good, but the Trade Union was spoiling this good work. She met the other Employees who were victimized by the Respondent at the Trade Union Offices, in the course of the Dispute.

8. George Njoroge told the Court that he was employed in 1991 and confirmed in 1992 by the Respondent. He was a Cleaner, and became a Supervisor in 1994. In 1994, he had tried to join the Claimant at its meeting held at the Serena Hotel. The Employees who joined the Trade Union were marked and dismissed by the Respondent. Those who recanted Membership were reinstated. Njoroge was not reported as having attended the Serena meeting and continued to work. At the time, he was a Supervisor and viewed as part of the Management. In 2003, the Witness came out of the woodwork, and joined the Claimant. The Managing Director called all the Employees to a meeting and directed them to forfeit their Union Membership. He was categorical no Employee would be allowed to continue belonging to the Trade Union, and retain his or her job. About 32 Employees reaffirmed Membership. Their names were forwarded to the Head Office. The Respondent resorted to summoning the Employees individually to the Head Office at Nginyo Towers, threatening them to withdraw Membership or be

sacked. Trade Union Officials Mulinge and Wambua were sacked. Njoroge was summoned individually by the Managing Director. He was asked to withdraw his Membership, and would be rewarded with a higher salary; he refused, and was placed on compulsory leave. He instead opted to resign under duress. He gave the names of the Co-Grievants as part of the Employees who were victimized. All left in similar circumstances. The Witness wishes to be paid the full terminal benefits in accordance with the CBA, and compensation for unfair termination.

9. Cross-examined, Njoroge testified he tendered his resignation in March 2004. He informed Nginyo it was difficult to continue working under the circumstances. He was asked to collect his dues later. When he went to collect his dues, he was made to sign annexure 8, stating he resigned due to personal reasons. There were no personal reasons involved. He merely signed the letter to receive his salary. There were 37 Unionisable Employees and 4 Managers who enlisted as Members in October 2003. 9 Employees in this Dispute were sacked. There were 4 others involved in another Case. The Witness was not able to say if there were Employees who had disciplinary matters. He was being paid Kshs. 7,000 in 2003. He stated in redirection that when he wrote the resignation letter, he did not consult the Trade Union.

10. John Wambua testified he worked for the Respondent for about 10 years. He did not have any disciplinary case, and had his contract terminated for his trade union activity. The Managing Director mentioned to Wambua that he had been informed some Employees had become Trade Union Members. Wambua answered that he indeed was himself a Member. On 11<sup>th</sup> November 2003, the Witness found 4 Security Guards at the entrance of his workplace. They informed him they were advised by Management not to allow Wambua in. He was asked to go to the Head Office. There he found Nginyo who asked him to write a letter resigning from the Claimant. Wambua declined. He was asked to write a letter resigning from work. He declined, and asked Nginyo to issue him a disciplinary letter instead. Wambua was asked to leave the Office and not to go back to work. He later went back to Nginyo's Office in the company of his Trade Union Officials. They were chased away by the Respondent's Officers. Wambua gave the names of the other Grievants as some of the Employees who were victimized by the Respondent on account of trade union activities. He seeks to be paid full terminal benefits and compensation. Cross-examined, Wambua testified he joined the Respondent in 1993. His first salary was Kshs. 10,000. He left on a salary of Kshs. 15,500 per month. He did not have letters showing how his colleagues exited employment. He met his colleagues at the Offices of the Trade Union, where he came to learn of their reasons for leaving. He was not in Management. The Claimant prays for Award in terms of the Claim

11. The Respondent's position is that it has never signed any Recognition Agreement with any Trade Union. It however acknowledges that the Grievants were its Employees. Fenezio Omondi deserted duty on 30<sup>th</sup> November 2003; Sammy Mulinge left of his own accord on 23<sup>rd</sup> March 2002; John Wambua left of his own volition after inciting other Employees; Joseph Kariuki was not in permanent employment; Peter Makau , Margaret Njoki, Dorothy Makau and Tony Sungura all left on their own accord; while George Njoroge resigned voluntarily, citing personal reasons. Having left voluntarily, the Grievants have no justifiable termination Claim. The Claimant has no legal standing to file this Claim, as it does not hold a Recognition Agreement with the Respondent. The Respondent prays the Court to find the Grievants terminated their contracts of employment voluntarily, and dismiss the Claim.

12. The General Manager James Mwaniki testified that he joined Nginyo Investments Limited, which owns the Hotel, in 2004. He represented the Managing Director who was unwell. The Hotel was a Member of the Hoteliers Association, but left only after 1 year. The Employees were not dismissed because of trade union activities. The Dispute had gone before the Ministry of Labour. The Investigator recommended that the status quo be maintained, and there be no recognition granted to the Trade Union, until it had recruited enough Members. This was in April 2004. The Trade Union was required to recruit 51% of the Respondent's Employees to be granted recognition. Mwaniki asked the Court to uphold the recommendation of the Investigator.

13. He told the Court on cross-examination that he represented the Managing Director Nginyo. He did not have any affidavit on record sworn by Nginyo. The Hotel was listed as Member Number 45 on the list of the Members of the Hoteliers' Association. Mwaniki did not have any document to show the Hotel had ceased its Membership. The Court Records show the Hotel is a Member. The Investigator's Report is

dated 25<sup>th</sup> June 2004; the Employees' contracts were terminated in 2003. He did not know the Grievants as he was based at the Head Office. The circumstances of termination were clear in the Memorandum of Response. Each Employee's contract was terminated on specific grounds. The Owner of the Hotel would know why the contracts were terminated. Mwaniki acknowledged that at the time the Hotel was a Member of the Association, it was bound by the terms and conditions of employment authored by the Trade Union and the Hoteliers Association. He was aware of Check-Off Lists submitted by the Claimant to the Respondent on recruited Employees. He was unsure if the names of the Employees who left employment were in the Check –Off Lists. He is aware Employees have the right of association. To prevent an Employee from exercising this right is unconstitutional, the Witness conceded. He stated on redirection that the Check- Off Lists were not received by the Respondent. The Respondent prays the Court to reject the Claim.

*The Court Finds and Awards-:*

14. This is not a Recognition Dispute. There have been many Recognition Disputes involving KUDHEIHA and Kenya Hotel and Allied Workers Union [KHAWU], such as the Dispute that has repeatedly been referred to by the Respondent in the proceedings, which culminated in the Ministerial Report dated 1<sup>st</sup> September 2004. The Dispute herein is about the termination of the contracts of employment of the 9 Grievants, not about demarcation in representation of Unionisable Employees in the Hotel Industry.

15. The Claimant states it recruited Members from the Respondent, which is a mandatory requirement before the Claimant could seek recognition. In issue is whether the 9 Employees were victimized for enlisting as Members of the Claimant Union; it is not whether the Claimant Union has, or had, a Recognition Agreement with the Respondent.

16. Trade Union Membership and Trade Union Recognition granted to a Trade Union by an Employer, are two different aspects of Industrial Relations. The Membership is between the Employee and his Trade Union. It confers on the Trade Union the right to represent the Employee as an individual, on workplace issues. Trade Union Recognition is between the Trade Union, and the Employer, and binds the Trade Union, the Employer and the Employees covered under the agreement. It confers on the Trade Union the right to act as the sole collective bargaining agent. It is not a Recognition Agreement which grants the Trade Union the right to represent its Members in a Claim filed in Court; rather, it is the contract of Membership, which grants this right.

17. The Claimant Union has the legal standing to represent its Members in Court. Whether it has recruited enough Members, in order to be recognized by the Respondent, is a different matter. The assertion by the Respondent that the Claimant has no legal standing to bring this Claim on behalf of the Grievants is misconceived and is rejected.

18. There is no doubt that the Grievants were variously employed by the Respondent Hotel, and all dismissed in 2003/ 2004. They claim they were dismissed on account of trade union activity, and seek remedy from the Court under Section 15 of the Repealed Trade Disputes Act, Cap 234 the Laws of Kenya, and from the CBA concluded between the Claimant and the Hoteliers Association in force at the time of termination.

19. The evidence of the three Claimant's Witnesses was clear the decision by the Respondent to terminate its Employees' contracts, was in reaction to the Employees' choice to enlist as Members of KUDHEIHA. The Respondent had been warding off the prospect of a unionized labour force from as early as 1994. The evidence of George Njoroge was graphic. Employees met the Claimant at a recruitment meeting at the Serena Hotel in 1994. The Respondent came to learn of the meeting and responded by sacking those who has enlisted, and reinstating those who recanted Membership. According to the Witness the Employees were emboldened by the President of Kenya in 2003, when he encouraged Employees to join Trade Unions. The Employees of the Respondent came out and enlisted with KUDHEIHA. The Managing Director Nginyo Kariuki would accept none of this. He called Employees individually, coaxed them to stay away from the Trade Union or recant Membership if already enlisted. He used a carrot and stick

policy, promising Njoroge for instance, that he would get a higher salary if he withdrew from the Union, but lose his job if he stayed in the Union. Njoroge was compelled to resign under duress, which in the view of the Court amounted to constructive dismissal on account of trade union activity.

20. All the 9 Employees were therefore unfairly and unlawfully dismissed on account of their trade union membership. The Employees' right to belong to KUDHEIHA was protected under Section 80 of the retired Constitution of Kenya which stated,

*“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons, and in particular to form or belong to a trade union or other association for the protection of his interest.”*

The Respondent violated the Employees' Constitutional right under Section 80. The Managing Director, in his carrot and stick policy at the workplace, hindered the Employees in their exercise of freedom of association. The Court is satisfied that the Respondent similarly disregarded the core Instruments of the International Labour Organization on freedom of association.

21. The Preamble to the ILO Constitution declares recognition of the principles of freedom of association to be a means of improving conditions of labour and establishing peace. The Declaration of Philadelphia reaffirms that freedom of expression and association are essential to sustained progress. ILO Convention 87 on Freedom of Association and Protection of the Right to Organize [1948], permits workers and employers to join organizations of their choosing without prior authorization. It was not for the Managing Director to authorize his Employees to join the Claimant Union. ILO Convention 98 on the Right to Organize and Collective Bargaining [1949] is emphatic on freedom of association at the workplace. Article 1 states that, workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Such protection shall apply more particularly to acts calculated to:-

- a. Make the employment of a worker subject to the condition that he shall not join a union, or shall relinquish trade union membership;
- b. Cause the dismissal of, or otherwise prejudice a worker by reason of union membership, or because of participation in union activities outside working hours, or with the consent of the employer, within working hours.

Lenana Mount Hotel and its Managing Director Nginyo Kariuki acted in contravention of these universally accepted labour standards, by terminating the contracts of employment of the 9 Employees, on account of their Membership of KUDHEIHA.

23. Termination of employment in all the 9 cases was wrongful within the meaning of Section 15 of the repealed Trade Disputes Act. The Grievants are entitled to, and the Court grants each of them the equivalent of 12 months' gross salary, at the rates applicable on the date of termination, in compensation for wrongful termination under Section 15 of the Trade Disputes Act. The Claimant has demonstrated that the Respondent was a Member of the Kenya Hoteliers' Association at the time of termination. No evidence was given to confirm that the Respondent had revoked its Membership at the time the Employees' contracts were terminated. There is ample evidence the Claimant and the Association had concluded a CBA which bound all the Member Hotels, including the Respondent. The Respondent should thus have applied the terms and conditions of employment negotiated on its behalf with the Claimant by the Association. This should have been the case during employment and on termination. The Grievants are entitled to any benefits arising under the CBA, and to terminal benefits payable in accordance with the CBA in place on the date of termination. The Respondent should not have disregarded the findings of the Joint Industrial Council, and those of the Minister. Considerable time has been lost defending a Claim which has no reasonable defence. *IT IS ORDERED:-*

***[a] Termination of the Grievants' contracts of employment was wrongful under Section 15 of the repealed Trade Disputes Act Cap 234 the Laws of Kenya;***

***[b] The Respondent shall pay to each of the Grievants the equivalent of 12 months' gross salary, at the***

***rates applicable on the date of termination;***

***[c] The Respondent shall pay to the Grievants terminal benefits due under the CBA applicable on the date of termination, in accordance with paragraph 24 [b] of the Supplementary Submission filed by the Claimant on 9<sup>th</sup> July 2008.***

***[d] The Respondent to supply each Grievant with their Certificate of Service.***

***[e] The Nairobi Provincial/Regional Labour Officer to compute the terminal benefits above, and ensure the Award is implemented in full within 45 days of its delivery.***

Dated and delivered at Nairobi this 22<sup>nd</sup> day of January 2014

James Rika

Judge