



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 55 OF 2013
(Originally Nairobi Cause No. 1502 of 2012)

ALFRED KALOKI	1ST CLAIMANT
JULIUS F. KHANDA	2ND CLAIMANT
DOMINIC N. MACHIRA	3RD CLAIMANT
JUMAA N. IHA	4TH CLAIMANT
NAHASHON K. MKOMBOLA	5TH CLAIMANT
MERCELINE R. JONATHAN	6TH CLAIMANT
STEVEN K. MKOMA	7TH CLAIMANT
NICHOLAS M. MUTINDA	8TH CLAIMANT
HASSAN A. SIMBA	9TH CLAIMANT
JUMA K. KATANA	10TH CLAIMANT
CHARLES K. MWERU	11TH CLAIMANT
JOHN K. THOYA	12TH CLAIMANT
ERNEST M. KARANJA	13TH CLAIMANT
SWALEH OMBASA	14TH CLAIMANT

versus

SEAFRONT ENTERTAINMENT LIMITED

RESPONDENT

JUDGMENT

1. The 14 Claimants (acting in person through the 1st Claimant) filed a Statement of Claim against the Respondent in Nairobi on 29 August 2012 on the basis of wrongful dismissal. The Claimants pleaded that they had been employed on different dates by the Respondent under contracts governed by a Collective Bargaining Agreement, but were dismissed without notice or color of right without payment of final dues.
2. The Claimants in the Statement of Claim have outlined various reliefs sought, and these are pay in lieu of notice, service pay, salary arrears, pay in lieu of public holidays worked and leave allowance.
3. The Respondent was served and on 10 October 2012 the Cause was placed before Court. Mr. Mwangi for the Respondent sought and was granted leave to file a Response within 14 days.
4. On 12 February 2013, the Cause was transferred to Mombasa after the request of the Claimants and on the order of Hon Lady Justice Maureen Onyango. On 22 April 2013 the Cause was placed before me and Cause was set for hearing on 15 May 2013.
5. On the scheduled hearing date the Respondent through Mr. Karega sought an adjournment, and a further 7 days to file a Response. The Court rejected the application for adjournment and directed that the Cause proceed to hearing at 10.00 am.
6. At 10.00 am Mr. Mutisya appeared on behalf of Mr. Kithi and renewed the application for adjournment. The adjournment was reluctantly granted and the Respondent directed to file a Response, witness statements and employment records of the Claimants within 7 days. The Court fixed the hearing for 12 June 2013.
7. In effect the Response should have been filed on or before 23 May 2013.
8. On 12 June 2013 when the Cause came up for hearing, Mr. Mwanyale held brief for Ms. Kingi and he informed the Court that though a Response had been filed, it had not been served upon the Claimants and the Respondent was yet to file documents it would rely on. (The Response had been filed on 10 June 2013 way out of time and the employment records were not filed. No application was made to have the Response admitted out of time, though the Court will consider it). The Claimants informed the Court that they were ready to proceed.
9. The Court gave directions that the Cause do proceed to hearing because the Respondent had not complied with the orders given on 15 May 2013. The Respondent's counsel cross examined all the Claimants who testified.
10. Writing and structuring this judgment has not been easy. The Court had thought that the cause of action was the same at the commencement of hearing. It is clear to the Court that save that the Claimants shared an employer, the causes of action were distinct because the Claimants were terminated at different times.
11. Because the Claimants were acting in person and the Cause was filed in 2011 before the current Industrial Court judges were appointed, and to avoid limitation questions, the Court will treat each Claimants case as a separate cause of action and make appropriate determinations thereon.
12. Some common questions arise in respect of the all the Claimants save for the 1st and 9th and these include, whether they were employees of the Respondent and if so, the fairness of the terminations. The termination of the 1st and 9th Claimants will be dealt with when their individual cases are discussed.

Claimants' cases

1st Claimant- Alfred Kaloki

13. The 1st Claimant testified that he was employed by the Respondent in July 2010 as an Assistant Manager at a salary of Kshs 15,000/- per month but was not issued with an appointment letter but rather a business card (produced).
14. On 23 November 2010 the Respondent issued a memo to all staff informing them that the 1st Claimant was an Assistant Manager (exh. 3) and on 24 November 2010 the 1st Claimant was issued with a job description (exh. 2).
15. According to the 1st Claimant, he requested the Respondent's Managing Director to issue the

- other Claimants with job descriptions but instead they were given name tags (exh 4,5, 6, 7,8, 9 ,10, 11, 13, 14, 15 and 16).
16. On his termination, the 1st Claimant stated that there was a management meeting sometime in October 2011 in which he differed with the Respondent's Managing Director, John Mwandary and he was suspended / dismissed in front of other staff and told to come back the next day for his dues. He also stated because he was alone, he used to work during public holidays.
 17. In the view of the 1st Claimant, the termination was not in accord with the Employment Act because he was not informed in advance. The witness stated he was seeking the relief outlined in the statement of Claim totalling Kshs 111,320/- and compensation.
 18. In cross-examination the 1st Claimant stated that his salary of Kshs 15,000/- was all inclusive, he was a member of the National Social Security Fund, he was entitled to one off day per week, did not desert work and there were three other managers in the meeting where he differed with the Respondent's Managing Director.
 19. Regarding recruitment of new employees, the 1st Claimant stated that he would handle the recruitment together with the Respondent's Managing Director.
 20. The thrust of the Respondent's defence was that this Claimant was paid all his dues on termination and he signed a discharge voucher.
 21. The Respondent did not plead or place any material before Court to demonstrate that it complied with the procedural requirements of section 41 of the Employment Act or prove the reasons for the termination or that the reasons were valid and fair reasons as demanded by sections 43 and 45 of the Act. The termination was unfair.
 22. Because of this Claimant's membership of the National Social Security Fund, by virtue of section 35(6) of the Employment Act he would not be entitled to service pay.

2nd Claimant-Julius Khanda

23. The 2nd Claimant stated that he was employed as a cleaner by the Respondent in August 2009 after being interviewed by one of the Respondent's Managers called Grace. He was on a monthly wage of Kshs 6,000/-.
24. The 2nd Claimant also testified that he did not go on leave and was paid only Kshs 1,000/- as wages in December 2009, leaving a balance of Kshs 5,000/-.
25. On the termination, the 2nd Claimant testified that he was verbally terminated in October 2010 despite having been given leave to attend to his sick wife from the Managing Director. He had also asked for money. It was the 1st Claimant who gave him the information about his termination, and that he should go home and await to be called to collect his dues.
26. The 2nd Claimant seeks service pay, one month pay in lieu of notice, salary arrears for December 2010, 7 public holidays worked in 2009 and leave allowance.
27. The Respondent's case is that this Claimant was not its employee.

3rd Claimant- Dominic N. Machira

28. The 3rd Claimant testified that he was employed as a steward at a monthly salary of Kshs 6,000/- by the Respondent in August 2010 and worked for five months. He was issued with a badge (produced).
29. He further stated that in September 2010 there was a salary balance of Kshs 3,500/- while from October 2010 through to January 2011 he was not paid any wages.
30. On termination, the Claimant stated that he asked the Managing Director for his salary arrears but was told to go home and wait to be called. He seeks the prayers set out in the Statement of Claim.

4th Claimant-Juma N. Iha

31. The 4th Claimant testified that he was employed by the Respondent in July 2010 as a gardener earning Kshs 5,000/- per month. The recruitment was by the 1st Claimant and he was not given a written contract but a job card.

32. The 4th Claimant stated he was dismissed in March 2011 and that the dismissal was brought about when he requested for money and leave to go to see his sick child from the 1st Claimant. The 1st Claimant informed him that the Respondent's Managing Director had directed he should go home and wait for his dues.
33. The 4th Claimant claims one month pay in lieu of notice, salary arrears for December 2010, 5 public holidays between September 2010 to February 2011, all totalling Kshs 22,018/-.
34. The Respondent denied this Claimant was its employee.

5th Claimant- Nahashon K. Mkombola

35. The 1st Claimant informed the Court this Claimant would not testify.

6th Claimant- Mercyline R. Jonathan

36. The 6th Claimant testimony was that she was employed by the Respondent in November 2010 as a waitress at a monthly wage of Kshs 7,000/- and that at some point her mother got sick and she got permission from her immediate Manager, one Anne, for two days and went to see her mother.
37. When she reported back to work she was told another waitress had been employed to replace her.
38. The Claimant seeks the reliefs outlined in the Statement of Claim.
39. The Respondent denied the 6th Claimant was its employee.

7th Claimant- Steven K. Mkoma

40. The 7th Claimant testified that he was employed by the Respondent as a barman on 26 September 2010 at a salary of Kshs 9,000/- but was issued with a name tag (produced) and not a written contract.
41. On the issue of his termination, the Claimant stated that on 10 January 2011, a shortage of Kshs 2,600/- was discovered after the Respondent's Managing Director caused a stock taking to be carried out by the Bar Controller. The shortage was deducted but balance of salary was not paid to him.
42. The Respondent's Managing Director informed him that he should report to work the next day. However he was terminated without notice or previous warnings.
43. The Claimant also stated that he was a member of the National Social Security Fund. He seeks one month pay in lieu of notice, salary arrears for December 2010 and 2 public holidays worked in December 2010 all totalling Kshs 17,590/-.
44. The Respondent's case was that this Claimant was not its employee.

8th Claimant- Nicholas M. Mutinda

45. Mr. Mutinda testified that he was engaged in October 2010 as a cook at a salary of Kshs 9,000/- per month. In November 2010 he was not paid full salary as there was a balance of Kshs 2,500/-. In December 2010, he was not paid his wages and when he asked the Manager for the wages, the Manager informed him that the Managing Director had said he should quit.
46. On 17 January 2011, the Managing Director told her to go home and wait for a call to collect his dues.
47. The Claimant seeks the prayers as set out in the Statement of Claim.
48. According to the Response filed by the Respondent, this Claimant was a stranger to it as he was not its employee.

9th Claimant- Hassan A. Simba

49. This is one of two Claimants whom the Respondent admits was its employee. He testified that he is an Accountant by profession and that the Respondent's Managing Director offered him a job as a Manager on 23 October 2010.

50. The Claimant was issued with a business card.
51. The Claimant stated that the Managing Director terminated his services on 13 February 2011 after he asked for his dues, and directed him to hand over to his Assistant, the 1st Claimant and wait to be called for terminal dues.
52. During cross examination, the 9th Claimant stated that he also did accounts for the Respondent and that a client had paid deposit for a wedding function at the Respondent's venue for which he issued an official receipt but the Managing Director did not like that and informed him the venue had been booked by another client and so he should refund the deposit, which he did at the Dog Unit police station.
53. On the reasons for termination, the Claimant stated that the Respondent's business had slowed down and he had asked for his salary but the Managing Director did not like that and their relationship had broken down.
54. The Claimant stated he was seeking salary arrears for December 2010 and January to 13 February 2011. He also stated he had not gone on leave during the duration of the employment and also used to work during off days.
55. Responding to questions by the Court, the Claimant informed the Court that he knew the other Claimants, and that salaries were paid through a register/muster roll.
56. The Respondent's pleaded defence was that Mr. Simba had deserted duty after stealing a client's money.
57. There was a statutory duty upon the Respondent to prove that this Claimant deserted duty and or stole client's money apart from showing due process was followed. That is the requirement of sections 41, 43 and 45 of the Employment Act.
58. The obligation was not discharged by the Respondent and the Court has to accept the uncontroverted evidence of the Claimant that he was terminated. The termination was therefore unfair both procedurally and substantively.

10th Claimant-Juma K. Katana

59. Juma Katana informed the Court that he was employed by the Respondent as a gardener in January 2011 and was issued with a card and not a written contract. Previously he had been contracted by the Respondent as a casual in December 2010.
60. On the termination, the Claimant testified that he had travelled home and when he returned to work he was informed the Respondent's Managing Director had ordered that he go home and await for a call to collect his dues. This happened in May 2011.
61. He also testified that he had salary arrears for February 2011 and had worked for 4 public holidays and was not paid. He seeks the reliefs set out in the Statement of Claim.
62. The Respondent denies that this Claimant was its employee and suggested in cross examination that he was employed by 1st Claimant without consulting the Respondent's Managing Director.

11th Claimant- Charles K. Mweru

63. Charles Mweru on his part testified that he was employed by the Respondent's Manager, the 1st Claimant as a DJ from October 2010 at a monthly salary of Kshs 7,000/-. Previously he had been performing shows at the Respondent's establishment and that in March 2011 he was informed his services were no longer needed by the 1st Claimant on the orders of the Managing Director who was in the restaurant.
64. He further testified that he was not issued with a letter of appointment but a job identity card (produced) and was not paid full salaries for December 2010, January and February 2011 and never went on weekly off. He seeks the prayers outlined in the Statement of Claim.
65. The Respondent denies this Claimant was its employee.

12th Claimant-John K. Thoya

66. This Claimant testified that he was employed by the Respondent as a cook on 8 March 2010 at a monthly wage of Kshs 9,000/-.

67. The Claimant further stated that his monthly wage was being paid in installments (December 2010 there was a balance of Kshs 8,720/- and January balance of Kshs 4,800/-). As a result the Claimant sought the balances from the Respondent's Managing Director through the 1st Claimant. He was given Kshs 2,000/-. He also stated the Respondent had difficulties paying for utilities such as water.
68. According to the Claimant, the Respondent's Managing Director told him to go home. He is seeking one month pay in lieu of notice, pay in lieu of public holidays worked, salary arrears and off days all totaling Kshs 41,720/-.
69. The Respondent's case is that this Claimant was not its employee.

13th Claimant-Ernest M. Karanja

70. The 13th Claimant also testified. He stated that he was employed by the Respondent in February 2009 as a chef on a monthly wage of Kshs 10,000/- which was increased to Kshs 13,000/- in December 2010, and was issued with a job identity card (produced) but was not given a letter of appointment.
71. He also stated that the salary was being paid in installments and he is owed arrears from February to May 2011 and that he never went on weekly offs, leave and worked double shifts at times.
72. On the termination, the Claimant stated that he complained about the payment of salaries severally to the Respondent's Managing Director but he told him to wait. The 1st Claimant then instructed him to stop working. He seeks the arrears and dues set out in the Statement of Claim.
73. The Respondent's defence was that the 13th Claimant was not its employee.

14th Claimant - Swaleh Ombasa

74. The 14th Claimant also testified and was cross examined. He was employed by the Respondent on 30 October 2010 as a DJ by the Respondent's Managing Director.
75. The agreed remuneration was Kshs 7,000/- per month but was not paid full wages for November and December 2010. He admitted taking some salary advances.
76. On termination, the Claimant testified that the 1st Claimant told him the Managing Director had said he should go home. He seeks the prayers set out in the Statement of Claim.
77. The Respondent case is that the 14th Claimant was not its employee.

Respondent's case

78. When the time for the Respondent came to prosecute its Defence on 17 December 2013, Mr. Gichari holding brief for Ms. Kingi sought an adjournment on the basis that Ms. Kingi was in Nairobi for another matter.
79. Because the date for the Respondent's case was taken in the presence of Ms. Kingi the Court declined the adjournment request and ordered that the case be considered closed.
80. The gravamen of the Respondent's pleaded defence was that Claimants 2 to 8 and 10 to 14 were not its employees. They were strangers.

Whether the 2nd -8th and 10th to 14th Claimants were employees of the Respondent

81. These Claimants testified that though they were employed by the Respondent at different times, they were issued not with written contracts but name tags or badges or job identity cards. These documents were produced as exhibits 1, 4 to 16. The documents were inscribed with the names of the Claimants and their designations and name of either Club Sea Front or Sea Front.
82. Under section 9 of the Employment Act it is the responsibility of the employer to cause to be drawn contracts of employment. Section 74 of the Act also obligates employers to keep certain employment records.
83. Based on the evidence presented before the Court, the Court is satisfied that these Claimants were employees of the Respondent.

Whether the terminations were fair

84. The common denominator in all the testimonies is that wages were being paid in installments and not on time or not at all. The Claimants severally approached the Respondent's agents on the issues of salaries but were instructed to go home and wait for further instructions. These instructions were all verbal.
85. Sections 43 and 45 of the Employment Act have placed a burden upon an employer to prove the reasons for termination and that the reasons are valid and fair reasons.
86. The Respondent did not attempt to discharge this burden. It's case was that these Claimants were strangers to it and were never its employees. The Respondent suggested in cross examination that some of these Claimants may have been hired by the 1st Claimant without authority.
87. The Claimants were also entitled to written notice of termination pursuant to section 35(1)(c) of the Employment Act since they were paid by the month.
88. Considering the conclusion reached that these Claimants were employees of the Respondent, the position urged by the Respondent that these Claimants were not its employees has been rejected, it follows that the terminations were unfair. The Respondent did not even suggest in the alternative that a fair procedure as envisaged under section 41 of the Employment Act was followed or plead that it had valid and fair reasons to terminate the services of the Claimants as required by sections 43 and 45 of the Act.

Appropriate relief

89. The Claimants have succeeded in their Claims. They had set out the reliefs which they were seeking and each Claimants final dues were tabulated. These computations were not challenged at all during cross examination.
90. Sections 10(3) and (7), 27, 28, 35 and 74 of the Employment Act regulate what employees are entitled to on termination and the Court have considered these in regard to the award of final dues.
91. Section 49 of the Employment Act has set out the primary remedies where a finding of unfair termination has been reached. One of the remedies is the equivalent of not more than twelve months gross wages as compensation. The remedy is discretionary and subject to any, some or all of the factors mentioned in section 49(4) of the Act.
92. All the Claimants served the Respondent for relatively short periods. The longest served for about two and a half years. Considering the lengths of service, the Court would in addition to the tabulated final dues award each Claimant the equivalent of one month's wages as compensation.
93. The Court therefore finds in favour of the Claimants and awards each of the as indicated herein under.

Alfred Kaloki

a. One month pay in lieu of Notice	Kshs 15,000/-
b. Salary arrears	Kshs 47,820/-
c. Pay in lieu of public holidays worked	Kshs 12,000/-
d. Off days	Kshs 14,000/-
e. Leave allowance	Kshs 15,000/-
f. One month compensation	Kshs 15,000/-

TOTAL

Kshs 118,820/-

Julius F. Khanda

a. One month pay in lieu of Notice	Kshs 6,000/-
b. Salary arrears	Kshs 5,000/-
c. Pay in lieu of public holidays worked	Kshs 2,800/-
d. Service pay	Kshs 3,000/-

e. Leave allowance	Kshs 6,000/-
f. One month compensation	Kshs 6,000/-
TOTAL	Kshs 28,800/-

Dominic N. Machira

a. One month pay in lieu of Notice	Kshs 6,000/-
b. Salary arrears	Kshs 11,200/-
c. Pay in lieu of public holidays worked	Kshs 2,000/-
d. One month compensation	Kshs 6,000/-
TOTAL	Kshs 19,200/-

Juma N. Iha

a. One month pay in lieu of Notice	Kshs 6,000/-
b. Salary arrears	Kshs 14,018/-
c. Pay in lieu of public holidays worked	Kshs 2,000/-
d. One month compensation	Kshs 6,000/-
TOTAL	Kshs 28,018/-

Nahashon K. Mkombola

No award as no evidence was presented.

Mercyline R. Jonathan

a. One month pay in lieu of Notice	Kshs 7,000/-
b. Salary arrears	Kshs 10,102/-
c. Pay in lieu of public holidays worked	Kshs 4,194/-
d. One month compensation	Kshs 7,000/-
TOTAL	Kshs 28,296/-

Steven K. Mkoma

a. One month pay in lieu of Notice	Kshs 9,000/-
b. Salary arrears	Kshs 7,390/-
c. Pay in lieu of public holidays worked	Kshs 1,200/-
d. One month compensation	Kshs 7,000/-
TOTAL	Kshs 24,590/-

Nicholas M. Mutinda

a. One month pay in lieu of Notice	Kshs 9,000/-
b. Salary arrears	Kshs 16,680/-
c. Pay in lieu of public holidays worked	Kshs 3,000/-
d. One month compensation	Kshs 9,000/-
TOTAL	Kshs 37,680/-

Hassan A. Simba

a. One month pay in lieu of Notice	Kshs 20,000/-
b. Salary arrears	Kshs 42,222/-
c. Pay in lieu of public holidays worked	Kshs 6,152/-
d. Off days	Kshs 15,384/-
e. One month compensation	Kshs 20,000/-
TOTAL	Kshs 103,758/-

Juma K. Katana

a. One month pay in lieu of Notice	Kshs 6,000/-
b. Salary arrears	Kshs 5,000/-
c. Pay in lieu of public holidays worked	Kshs 1,600/-
d. Off days	Kshs 4,000/-
e. One month compensation	Kshs 6,000/-
TOTAL	Kshs 22,600/-

Charles K. Mweru

a. One month pay in lieu of Notice	Kshs 7,000/-
b. Salary arrears	Kshs 13,952/-
c. Pay in lieu of public holidays worked	Kshs 2,796/-
d. Off days	Kshs 4,660/-
e. One month compensation	Kshs 7,000/-
TOTAL	Kshs 35,408/-

John K. Thoya

a. One month pay in lieu of Notice	Kshs 9,000/-
b. Salary arrears	Kshs 13,520/-
c. Pay in lieu of public holidays worked	Kshs 6,000/-
d. Off days	Kshs 13,200/-
e. One month compensation	Kshs 9,000/-
TOTAL	Kshs 50,720/-

Ernest M. Karanja

a. One month pay in lieu of Notice	Kshs 13,000/-
b. Salary arrears	Kshs 29,057/-
c. Pay in lieu of public holidays worked	Kshs 20,784/-
d. Off days	Kshs 41,564/-
e. Service pay	Kshs 13,000/-
f. Leave allowance	Kshs 26,000/-
g. One month compensation	Kshs 13,000/-
TOTAL	Kshs 156,405/-

Swaleh Ombasa

a. One month pay in lieu of Notice	Kshs 7,000/-
b. Salary arrears	Kshs 11,280/-
c. Pay in lieu of public holidays worked	Kshs 1,398/-
d. One month compensation	Kshs 7,000/-

TOTAL

Kshs 26,678/-

94. Section 51 of the Employment Act also obliges an employer to issue a Certificate of Service to an employee. The Respondent is ordered to issue the Claimants with Certificates of Service.

95. Each party to bear its own costs.

Delivered, dated and signed in open Court in Mombasa on this 4th day of April 2014.

Radido Stephen

Judge

Appearances

Claimants acted in person and through 1st Claimant

Ms. Kingi instructed by Kithi & Co. Advocates Respondent