



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

**CAUSE NO 1910 OF 2011**

**ENOCH MARITA.....1ST CLAIMANT**  
**BONIFACE MAINGI MULWA.....2ND CLAIMANT**  
**JAMES WACHIRA.....3RD CLAIMANT**  
**SYLVIA MWEU.....4TH CLAIMANT**

**VS**

**MAGGIES RESTAURANT CO LTD.....1ST RESPONDENT**  
**ROQUE KAMAU NJAU.....2ND RESPONDENT**

**AWARD**

**Introduction**

1. The Claimants' claim brought by way of statement of claim dated 11<sup>th</sup> November and filed in Court on 18<sup>th</sup> November 2011 seeks relief for unlawful redundancy. The Respondent filed a memorandum of reply on 20<sup>th</sup> December 2011 and the matter was heard on diverse dates between 26<sup>th</sup> March 2013 and 17<sup>th</sup> March 2014. The 1<sup>st</sup> Claimant, Enock Marita testified for the Claimants while the 2<sup>nd</sup> Respondent, Roque Kamau Njau testified for the Respondents. In the course of the trial, the 2<sup>nd</sup> Claimant, Boniface Maingi Mulwa abandoned his claim.

**The Claimants' Case**

2. The Claimants were employed by the 1<sup>st</sup> Respondent on diverse dates as follows:
- a. The 1<sup>st</sup> Claimant, Enock Marita was employed on 2<sup>nd</sup> May 2010 in the position of Chef at a monthly salary of Kshs. 11,000. He worked until 30<sup>th</sup> September 2011 when he was declared redundant.
  - b. The 3<sup>rd</sup> Claimant, James Wachira was employed as a Waiter effective 30<sup>th</sup> August 2006 at a monthly salary of Kshs. 7,283. He was declared redundant on 30<sup>th</sup> September 2011.
  - c. The 4<sup>th</sup> Claimant, Sylvia Mweu was employed on 22<sup>nd</sup> August 2008 in the position of Waitress at

a salary of Kshs. 7,500. She was declared redundant on 30<sup>th</sup> September 2011.

3. The Claimants state that there was no valid reason for the declaration of redundancy and that in effecting the redundancies, the Respondents did not comply with Section 40 of the Employment Act, 2007. The Claimants claim notice pay, severance pay, leave pay, overtime compensation, salary underpayment, house allowance and compensation for unfair termination of employment.

### **The Respondent's Case**

4. In their memorandum of reply filed on 20<sup>th</sup> December 2011, the Respondents take issue with joiner of the 2<sup>nd</sup> Respondent stating that there was no employment relationship between the Claimants and the 2<sup>nd</sup> Respondent. On its part, the 1<sup>st</sup> Respondent states that the Claimants were declared redundant in accordance with the law.

5. Specifically, the Claimants and the District Labour Officer, Nairobi were duly notified of the redundancy. All the Claimants were paid their terminal dues and were issued with certificates of service. The Respondents dispute the 3<sup>rd</sup> Claimant's employment date as pleaded in the statement of claim stating that the correct employment date is 20<sup>th</sup> September 2008 and not 30<sup>th</sup> August 2006.

### **Findings and Determination**

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

- a) Whether the 2<sup>nd</sup> Respondent is properly joined in this case;
- b) Whether the declaration of redundancies on account of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants was procedural and lawful;
- c) Whether the Claimants were paid all their terminal dues;
- d) Whether the Claimants are entitled to the reliefs sought.

### **Joiner of the 2nd Respondent**

7. In their memorandum of reply, the Respondents state that no claim lies against the 2<sup>nd</sup> Respondent as there was no employment relationship between him and the Claimants. From the evidence on record, the 2<sup>nd</sup> Respondent is a director of the 1<sup>st</sup> Respondent which is a limited liability company. In the well known case of *Salomon Vs Salomon & Co. [1897] AC 22. H.L* it was held that a company is a separate legal entity separate from its directors.

8. This remains good law and courts have over the years protected the integrity of the corporate veil as far as it is not employed to defeat justice. In the case of *Aviation and Allied Workers Union Vs Kenya Aerotech Limited & Another (Industrial Court Cause No 1494 of 2011)* this Court held that:

***“Only in cases where it has been demonstrated that the corporate veil is being used to defeat the ends of justice, would the Court allow lifting of the veil.”***

9. No evidence was led to show any attempts by the Respondents to use the corporate veil to defeat justice. The Court therefore finds no basis for joiner of the 2<sup>nd</sup> Respondent in these proceedings and proceeds to strike out the Claimants' claim as against him.

## **Declaration of Redundancy**

10. According to the evidence on record, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants' employment with the 1<sup>st</sup> Respondent came to an end on 30<sup>th</sup> September 2011 by way of declaration of redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

***“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”***

11. The 2<sup>nd</sup> Respondent, Roque Kamau Njau testified that in 2011, the restaurant business which he operated together with two other directors began making losses and they therefore decided to close it. This led to inevitable declaration of redundancy of all employees, including the Claimants.

12. The law recognises redundancy as a legitimate mode of termination of employment and Section 40 of the Employment Act, 2007 sets the conditions to be met by an employer before terminating an employee's employment on account of redundancy as follows:

- a) ***Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
- a. ***Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
- b. ***the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
- c. ***where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***
- d. ***the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
- e. ***the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***
- f. ***the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

13. It is now established law that where an employer fails to meet any of the conditions set out in Section 40, the redundancy becomes an unfair termination of employment within the meaning of Section 45 of the Act.

14. On 1<sup>st</sup> September 2011, the 1<sup>st</sup> Respondent notified the District Labour Officer, Nairobi of an intended closure of its business and consequent declaration of redundancy effective 30<sup>th</sup> September 2011. In the notification, the 1<sup>st</sup> Respondent undertook to pay all the employees salary up to 30<sup>th</sup> September 2011, prorata leave, one month's salary in lieu of notice and severance pay.

15. The District Labour Officer responded by letter dated 27<sup>th</sup> September 2011 setting out the principles to be adhered to during the intended redundancy. The 2<sup>nd</sup> Respondent, in his capacity as a director of the 1<sup>st</sup> Respondent, wrote to all the employees on the same day notifying them of the imminent closure of the business and inviting them to a meeting on 29<sup>th</sup> September 2011.

16. The purpose of the meeting was to give information to the employees regarding their respective terminal dues. The letter also notified the employees that the terminal dues would be paid on 30<sup>th</sup> September 2011. The 2<sup>nd</sup> Respondent signed off by thanking the employees for the services rendered to the company.

17. From the foregoing correspondence, it would appear that the first time the employees got to know of the intended redundancy was 27<sup>th</sup> September 2011 and their final day of work was 30<sup>th</sup> September 2011, three days later. Redundancy is a unique form of termination of employment and as was held by the Court of Appeal in *Thomas De La Rue (K) Ltd Vs David Opondo Omutelema [2013] eKLR* a one month notification to an employee affected by a redundancy is a legal requirement.

18. Redundancy notice is not to be confused with a termination notice under Section 35 of the Employment Act. In the instant case, the Respondents opted to pay a one month's salary in lieu of notice. In my view, this payment satisfied the termination notice but not the redundancy notice. For this reason, the Court finds that the redundancies flew in the face of Section 40 of the Employment Act and therefore amounted to unfair termination of employment within the meaning of Section 45 of the Act.

### **Terminal Dues**

19. According to salary vouchers dated 30<sup>th</sup> September 2011 the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Claimants were paid basic pay, notice pay, severance pay and leave pay upon their being declared redundant. All the three Claimants claim that they were neither housed nor were they paid house allowance.

20. Section 31(1) and (2) of the Employment Act provides that:

***31.(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.***

***(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).***

21. The Respondents claim that the salaries paid to the Claimants were inclusive of house allowance. However, according to the Claimants' salary vouchers dated 30<sup>th</sup> September 2011 and a copy of the muster roll produced by the Respondents, the Claimants were paid a basic salary with no indication of either a separate figure for house allowance or an all inclusive consolidated salary.

22. The Claimants were not issued with written contracts of employment as required under Section 9 of the Employment Act. This Court has variously held that where an employer fails to document the terms and conditions of employment of an employee, it is left to the Court to interpret these terms. From my analysis of the evidence presented to the Court, I did not find any expressed intention that the Claimants' salaries were inclusive of house allowance.

23. The Claimants' claim for house allowance therefore succeeds and is allowed. The Claimants were paid notice pay, severance pay and leave pay and I therefore find no basis for the claims thereon. The claims for overtime compensation and salary underpayment were not proved and are dismissed.

### **Reliefs**

24. In view of the foregoing findings and conclusions, I make an award in favour of the Claimants as follows:

#### **Enock Marita (1st Claimant)**

- a) House allowance at 15% of basic salary (16 months).....Kshs. 26,400
- b) 3 months' salary compensation for unfair termination.....Kshs. 37,950
- Total.....Kshs. 64,350**

#### **James Wachira (3rd Claimant)**

- a) House allowance at 15% of basic salary (36 months).....Kshs. 39,312
- b) 6 months' salary compensation for unfair termination.....Kshs. 50,250
- Total.....Kshs. 89,562**

#### **Sylvia Mweu (4th Claimant)**

- a) House allowance at 15% of basic salary (37 months).....Kshs. 41,625
- b) 6 months' salary compensation for unfair termination.....Kshs. 51,750
- Total.....Kshs. 93,375**

Each party will bear their own costs.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF JULY 2014.**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nyabena for the Claimants

Mr. Nyamweya for the Respondents