



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 272 OF 2010**

**PETER OCHIENG SONGA.....CLAIMANT**

**VS**

**JAMBO GRILL LTD.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 10<sup>th</sup> March and filed in Court on 17<sup>th</sup> March 2010, the Claimant sued the Respondent for unfair and unlawful termination of employment. The Respondent filed a Memorandum of Reply on 4<sup>th</sup> June 2010 and the matter was heard on 8<sup>th</sup> May and 16<sup>th</sup> June 2014. The Claimant testified on his own behalf and the Respondent called its Operations Manager, George Ngugi Kariuki as well as two employees Peterson Ongeru and Marion Kanini Gichohi. Both parties then filed written submissions.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a cleaner from August 2004. His monthly salary was Kshs. 7,000. On 30<sup>th</sup> September 2009, the Claimant reported back to work from annual leave. He was then informed by a supervisor, Peter Njoroge that his services were no longer required. The Claimant claims that upon termination of his employment, he was not paid his terminal dues.

3. He therefore claims the following:

- a. A declaration that the termination of his employment was unlawful and unfair
- b. One month's salary in lieu of notice.....Kshs. 7,000
- c. Service pay at 18 days' salary for every completed year.....Kshs 21,000
- d. Overtime compensation for 4 hours per day.....Kshs 229,680
- e. 12 months' salary in compensation for unfair termination.. Kshs .84,000
- f. Costs

**The Respondent's Case**

4. In its Memorandum of Reply, the Respondent admits having employed the Claimant as a cleaner from 6<sup>th</sup> August 2004 initially at a daily rate of Kshs. 150 and subsequently as from June

2007 at a monthly salary of Kshs. 5,200. The Claimant was promoted to the position of steward and later to the position of cook as at September 2009. The Claimant's salary was progressively increased to Kshs. 7,000 as at the time he left the Respondent's employment.

5. The Respondent's business is located along Thika Road and when construction works of the Super Highway began, business was adversely affected forcing the Respondent to suspend the services of majority of its employees. By memo dated 9<sup>th</sup> October 2009, the Respondent notified its employees, including the Claimant that they would be suspended from work. This information was also communicated to the area Labour Officer.

6. With regard to the Claimant's claim for overtime compensation, the Respondent states that during his tenure as a cleaner, the Claimant worked from 8.00 am to 5.00 pm. Further, when he worked as a steward and cook, the Claimant worked in shifts which entitled him to three days off every week to compensate for the overtime of four hours he was on duty. As at the time of suspension of services, the Claimant had exhausted all his leave days and public holidays.

### **Findings and Determination**

7. The issues pending determination before the Court are as follows:
- a. Whether the termination of the Claimant's employment was lawful and fair;
  - b. Whether the Claimant is entitled to the reliefs sought.

### **The Termination**

8. From the evidence on record, the termination of the Claimant's employment was informed by loss of business occasioned by construction works along Thika Super Highway where the Respondent's business is located. This would fall under what is commonly known as 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.”***

9. 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;***
  - b. ***Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
  - c. ***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;***
  - d. ***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;***
  - e. ***the employer has where leave is due to an employee who is declared redundant, paid off the***

*leave in cash;*

- f. *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*
- g. *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.*

10. The Respondent submits that the Claimant's employment was only temporarily discontinued but not terminated and that the prayers sought are therefore not available to the Claimant. The Respondent's witnesses, Peterson Ongeru and Marion Kanini Gichohi told the Court that once business improved, they were recalled. With regard to the Claimant however, there was no evidence that he was recalled alongside his colleagues. Consequently, the Court finds that his employment was actually terminated on grounds of redundancy.

11. That said, the only issue left to the Court is to examine whether in declaring the Claimant redundant, the Respondent observed the conditions set out in Section 40 of the Employment Act. With regard to notice, the Respondent produced an internal memo dated 9<sup>th</sup> October 2009 notifying some eight employees of suspension of their services. The Claimant was however not part of the eight. The only other notification is addressed to the District Labour Office. This notification is however dated 19<sup>th</sup> October 2009 after the declaration of redundancy and cannot pass for notice as required under Section 40 of the Act.

12. It is not in dispute that although the Respondent's business was adversely affected, it did not close down altogether but only scaled down operations. No criteria for selection of the employees to be sent home, such as seniority in time, skill, ability and reliability was presented to the Court. Indeed, the Respondent's Operations Manager, George Ngugi Kariuki told the Court that all employees who were on leave, including the Claimant were sent away.

13. While the law recognises redundancy as a legitimate form of termination of employment, it must be undertaken within the law and as held by this Court in ***Francis Maina Kamau Vs Lee Construction [2014] eKLR*** where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the ensuing termination becomes unfair within the meaning of Section 45 of the Act.

## **Reliefs**

14. Flowing from the foregoing, I find the termination of the Claimant's employment unfair and proceed to award him five months' salary in compensation. I also award him one month's salary in lieu of notice. The Claimant is further entitled to severance pay at the rate of 15 days' pay for every completed year of service in accordance with Section 40(f) of the Employment Act. The claim for overtime compensation was not proved and is dismissed.

15. Ultimately, I make an award in favour of the Claimant in the following terms:

- a. 5 months' salary in compensation for unfair termination.....Kshs. 35,000
- b. 1 month's salary in lieu of notice.....Kshs 7,000
- c. Severance pay for 5 years.....Kshs 17,500

**Total.....Kshs 59,500**

16. The Respondent will meet the costs of this case. The award amount shall attract interest at court rates from the date of the award until payment in full.

Orders accordingly.

**DATED AND SIGNED NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2014**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2014**

**MATHEWS NDERI NDUMA**

**Appearance:**

Mr. Namada for the Claimant

Mr. Khisa for the Respondent