



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

**AT NAIROBI**

**CAUSE NO. 2040 OF 2012**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS HOSPITALS  
AND ALLIED WORKERS UNION**

**(Suing on behalf of its members; list of the**

**Members attached herewith) ..... CLAIMANT**

- 1. OBED MAKINI ONCHANGU**
- 2. ZIPPORAH BOSIBORI OMayio**
- 3. GLADYS NYANG'AU**
- 4. PETER O. ONSARIGO**
- 5. ALEX CAESAR ONCHIEKU**
- 6. JULIET KERUBO ONGUBO**
- 7. LINET NYARANGO**
- 8. SHADRACK MOKUA**
- 9. SIBIA MOKEIRA NAOMI**
- 10. DELVIN ONSERIO**
- 11. VELINA KERUBO ANGASA**
- 12. JACKLINE BONARERI OMBATI**
- 13. LAURENCE OMBETA**
- 14. FANICE KERUBO NYANDEGA**
- 15. PRISCILLA MOKEIRA BASWETI**
- 16. REBECCA KERUBO NYAKUNDI**

17. DAVID O. ONYANGO
18. GRACE OBARA
19. CATHERINE JERUSHA MACHUKI
20. EVERLINE KEMUNTO OMUNDI
21. GLADYS K. MABIRIA
22. MARY K. NYABICHA
23. STELLA K. NYAKOE
24. PAMELA M. ONSOMU
25. DELILAH M. NYANYUKI
26. GLADYS K. NYABENGEYA

**VERSUS**

**GUSII MWALIMU CO-OPERATIVE SAVINGS**

**AND CREDIT SOCIETY LIMITED ..... RESPONDENT**

**Mr. Nyanyuki for Claimant**

**Mr. Mose for the Respondent**

**JUDGMENT**

1. The Claimant union brought this suit on behalf of its members; hereinafter the ‘Grievants’ via a memorandum of claim dated 9<sup>th</sup> October 2012.
2. There are twenty four (24) Grievants whose names are set out in the said memorandum.
3. The issue in dispute as set out in the memorandum of claim is “*Termination on account of redundancy.*”
4. The memorandum was subsequently amended with the leave of Court and the Amended Memorandum of Claim dated 3<sup>rd</sup> July 2013 was filed on 5<sup>th</sup> July 2013.
5. By a memorandum dated 29<sup>th</sup> September 2012, the Respondent notified the Grievants that “Respondent had resulted to discontinue the Hotel business immediately on account of the hotel’s inability to sustain its operations.”
6. It is common cause that all the Grievants worked at the hotel owned by the Respondent situated at Kisii.
7. The Grievants were advised to pick their benefits cheques at the Chief Executive Officers’ office on Friday October 2012 which was to be net of any Society and Government liabilities.
8. The letter of termination on account of redundancy did not specify the terminal benefits payable nor was it copied to the Ministry of Labour.

9. There was no prior notification of the intention to declare the employees redundant prior to this notice.
10. The Claimant has set out the specific claims by each Grievant from page 11 to 71 of the Amended Memorandum of claim.
11. A notice of intention to sue by the Advocate for the Grievants dated 1<sup>st</sup> October 2012 is attached at page 71 of the Memorandum of Claim.
12. The Grievants claim compensation for the alleged unlawful and unfair termination on account of redundancy on the grounds that the same was not done in terms of **Section 40** of the **Employment Act, 2007** in that no notice was given nor was there payment in lieu of notice. There was no justification for the declaration of redundancy and the Ministry of Labour and the Union were not notified of the intended declaration of redundancy.
13. **The Grievants claim;**
- a. Three (3) months' salary in lieu of notice;
  - b. Severance pay based on twenty eight (28) days for every completed year of service; and
  - c. Damages for the unpaid underpayment of salaries and allowances in terms of **Regulation of Wages Order, 2005**.
14. It is common cause that there was no Recognition Agreement between the Claimant union and the Respondent and the dispute was pending in Court at the time this dispute arose. However, the Grievants were members of the Claimant union.

#### **Amended memorandum of Reply**

15. The Respondent filed an Amended memorandum of Response on 22<sup>nd</sup> July 2014.
16. The Respondent admits that it declared the Grievants redundant following the collapse of the Hotel Business where all the Grievants worked.
17. The Respondent submits that it effected the declaration of redundancies in terms of the law as the Respondent could no longer sustain their employment.
18. All the employees in the Hotel were laid-off hence the question of selection criteria did not arise. The only matter arising is whether the Claimant were paid their terminal benefits according to **Section 40** of the **Employment Act, 2007**.
19. The Respondent submits that the Grievants were paid their terminal benefits in excess of the minimum provided under the law comprising of;
- i. 25% of the total salary earned for the entire period worked by each Grievant;
  - ii. Three (3) months' salary in lieu of notice;
  - iii. Severance pay calculated at one month's salary for each completed year of service.
20. The Respondent submits that no compensation is payable since the Redundancies were done for a lawful reason and were effected in terms of a fair procedure.
21. Furthermore, some of the Grievants had already collected their cheques.
22. With respect to the claim for special damages termed underpayments, the Respondent states that none is available to any of the Grievants since there was no specific pleadings in this regard.

Furthermore, the underpayments were not proved by way of oral or documentary evidence.

23. **Issues for determination**

1. Was the Redundancy done for a valid reason?
2. Was the Redundancy effected in terms of a fair procedure?
3. Were the terminal benefits computed and paid in terms of the law?

24. **Determination**

It is common cause that the Hotel owned by the Respondent where all the Grievants worked closed down due to financial difficulties. The Respondent could not therefore sustain the employment of the Grievants.

25. The termination of the Grievants was within the contemplation of **Section 40** as read with **Section 2** of the **Employment Act, 2007**.

Redundancy is defined under **Section 2** of the **Act** as follows;

*“ ‘redundancy’ means 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.”*

26. The action by the Respondent of terminating the employment of the Grievants was therefore for a valid reason as contemplated under this provision.

27. **Procedure (issue II)**

The procedure to be followed in effecting termination by reason of redundancy is provided under **Section 40** of the **Act**. There are basically four requirements as follows;

- i. at least one month notice to the employee or payment in lieu thereof;
- ii. at least one month notice to the union (where applicable) and Ministry responsible for Labour;
- iii. where applicable, application of a fair selection criteria;
- iv. payment of severance pay equivalent to at least fifteen (15) days salary for each completed year of service.

28. In the present case, the Respondent complied with the 1<sup>st</sup> and 4<sup>th</sup> requirements by effecting payment of three (3) months' salary in lieu of notice and severance pay equivalent to one month's salary for each completed year of service.

29. With regard to the 2<sup>nd</sup> requirement, the Respondent had no Recognition Agreement with the Claimant union and therefore it was not obliged to notify the union. However, the Respondent erred in failing to notify the Ministry of Labour prior to laying-off the Grievants and closing the Hotel business.

30. Regarding the 3<sup>rd</sup> requirement concerning the selection criteria. This was not applicable in the circumstances of the case as it involved the closure of the entire business and laying-off of all employees.

21. This being the case, it cannot be said that the Respondent's actions prejudiced the Grievants in a material way as to attract monetary awards to the Grievants.

32. Having said that it is imperative for the employees to report declaration of workers redundant to the Ministry responsible for Labour. This information is essential for purposes of national planning and for formulation of policy in the employment sector.

In appropriate cases, the Ministry is called upon to intervene to ensure that the process is finalized in a lawful and fair manner.

33. In this respect, it is the Court's considered view that the Grievants were not materially prejudiced by the Respondent's omission.

To this end, the Court finds that the redundancies were effected in terms of a fair procedure.

34. **Remedy (Issue III)**

It is apparent to the Court that cheques for terminal benefits were written to all retrenched employees including the Grievants. Some employees collected the cheques whereas others did not.

35. The copies of cheques attached to the Respondent's Amended statement of Response dated 4<sup>th</sup> October 2012 provide sufficient evidence of intention to pay the terminal benefits by the Respondent.

36. Annexure A to the statement of Response is the summary of the outstanding staff loans; the payment by the Respondent to the retrenched staff, including the Grievants constitutes net payment after deduction of the outstanding loans.

37. Accordingly, the Court finds that, the Respondent had fully discharged its obligation upon preparation of the payment cheques in respect of each Grievant.

The uncollected cheques have since become stale. The Respondent is directed therefore to make fresh cheques for each of the Grievants as follows;

1. Rebecca Kerubo Nyakundi - Kshs.20,331/=;
2. Gladys Mabiria - Kshs.31,945/=;
3. Mary Kwamboka Nyabicha – Kshs. 246,687/=;
4. Zipporah Bosibori Omayio – Kshs.222,587/=;
5. Fanice Kerubo Nyandega – Kshs.125,326/=;
6. Gladys Nyabengeya Nehemiah – Kshs.111,888/=;
7. Delvin Kemuma Onserio – Kshs.64,912/=;
8. Delilah Moraa Nyanyuki – Kshs.137,451/=;
9. Stellah Kwamboka Nyakoe – Kshs.195,464/=;
10. Obed Makini Onchangu – Kshs.99,067/=;
11. Juliet Kerubo Ongubo – Kshs.228,833/=;
12. Jackline Borareri Ombati – Kshs.253,868/=;
13. Pamelah Maindi Onsomu – Kshs.218,929/=;
14. Valina Kerubo Angasa – Kshs.62,629/=;
15. Catherine Jerusha Machuki – Kshs.34,912/=;
16. Everline Kemunto Omundi – Kshs.45,006/=;
17. Shadrack Mokuu – Kshs.119,570/=;
18. Delvi Kemunya Onserio – Ksh.64,912/=.

The following Grievants took their cheques;

19. Linet Monchai Nyarago – Kshs.154,327/=;
20. Lawrence Mwakoro Ombeta – Kshs.150,480/=;
21. Sibia Mokeira Naomi – Kshs.220,991/=.

38. Since the money has been in the bank since the 15<sup>th</sup> October 2012, the Court directs that the newly written cheques include payment of interest at Court rates from 15<sup>th</sup> October 2012 to date. Payment to be done within thirty (30) days from todate.

39. Each party is to meet their cost of the suit because, even if the Respondent was successful, the Court has found that it had not fully complied with the requirements under **Section 40** of the **Act**, in that it did not notify the Ministry of Labour of the intended closure of the Hotel and subsequent declaration of

redundancies.

**Dated and Delivered at Nairobi this 21<sup>st</sup> day of November 2014**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**