



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT MOMBASA**  
**CAUSE NO. 252 OF 2014**

**JOHNSON NGONYO & 8 OTHERS .....CLAIMANTS**

**VERSUS**

**PEPONI HOTEL LIMITED .....RESPONDENTS**

**J U D G M E N T**

**INTRODUCTION**

1. The claimants brought this suit seeking compensation for unfair termination of their employment by the respondent on diverse dates between the year 2010 and 2012. The basis of the suit is that claimants were laid off without following the statutory procedure for declaring workers redundant.
2. When the suit came up for hearing on 9/9/2014 respondent raised a preliminary Objection to the claim by the 6<sup>th</sup> claimant for being statute barred. The 1<sup>st</sup> and 8<sup>th</sup> claimants testified on behalf of the claimants as CW1 and CW2 while the defence called Andrew Stewart Gruselle as RW1.

**CLAIMANT'S CASE**

3. CW1 was employed by the respondent from 1992 as a painter and worked upto December 2011 when he was terminated. He confirmed that all the other claimants herein were employed by the respondent. CW1 was earning ksh.26000 basic salary plus ksh.4000 house allowance totalling to ksh.30000.
4. On 5/12/2011 at 5pm CW1 was told that his employment was over and he was directed to return his uniform the following day. He was terminated together with 2<sup>nd</sup> and 4<sup>th</sup> claimants on the same day. The other claimants were left working until June 2012 when they were also terminated in the same manner.
5. The reason for their termination was that the economy had gone down. No prior notice was given to the claimants or their union. Consequently, according to the CW1, the termination was unfair and they prayed for terminal dues plus compensation for unfair termination.
6. On cross examination by the defence counsel, CW1 confirmed that he was given a termination letter plus a certificate of service. He contended that his salary of ksh.26000 basic and ksh.4000 house allowance was an underpayment under the CBA. He maintained that as a shop steward he knew that his rightful house allowance was ksh.5000 per month. He admitted receipt of ksh.270,880 as terminal dues but contended that no details were provided for the said amount. He also admitted that the 2<sup>nd</sup> and 4<sup>th</sup> claimants were also paid some dues after termination.
7. CW2 was employed by the respondent in 1999 as a waiter. On 25/6/2012 he was terminated alongside 12 other workers including 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, and 9<sup>th</sup> claimants. The termination was verbal

- and the reason cited was that the respondent could no longer afford to employ many workers due to low business. By then CW2 was earning ksh.24000 as basic pay plus ksh.4000 house allowance per month. CW1 contended that salary was an underpayment according to the CBA.
8. CW1 explained that after dismissal they were paid terminal dues by installments. CW1 confirmed receipt of ksh.196,530 but contended that the said sum was less pay in lieu of notice. According to him the CBA provided for 4 months notice period for person who served 10 years and above. He confirmed that only 5<sup>th</sup> and 7<sup>th</sup> claimants served less than 10 years. He further contended that termination of their services was unfair and prayed for the outstanding dues plus compensation for unfair termination.
  9. On cross examination by the defence counsel, CW2 stated that he complained about the underpayment of house allowance to the respondent and his union verbally. He maintained that the reason for dismissal was low business and inability by the respondent to employ a large staff. He confirmed that the terminal dues paid to him was through his bank account was only based on th basic salary it was less pay in lieu of notice. He maintained that he was a member of union and his payslip indicated a deduction of union dues.

## **DEFENCE CASE**

10. RW1 is the manager of the respondent since 2006. He confirmed that the claimants were employed by the respondent but they were discharged due to low business which made it hard for the respondent to sustain a large staff. RW1 maintained that the claimants had been notified verbally and in writing about likely reduction of staff. He contended that all the claimants were issued with termination letter plus certificate of service.
11. According to RW1, the respondent followed the proper procedure for terminating the claimants services and proceeded to pay dues to all the claimants. According to RW1, the redundancy payment to each claimants was fair and in excess. He admitted that the claimants were members of the KUDHEIHA union to which union dues were remitted. He however denied that the respondent had any Recognition Agreement with the said union. He denied that the termination of the claimants employment was unfair, discriminatory and malicious.
12. On cross examination by the claimants' counsel, RW1 admitted that he had no evidence to prove that he was the manager of the respondent. He also could not produce any termination letters for the claimants but contended that they were in his computer.
13. After the close of the hearing the parties filed written submissions of which the court had carefully considered in this judgment.

## **ANALYSIS AND DETERMINATION**

14. It is not in dispute that the claimants were employed by the respondent and that they were discharged in December 2011 and June 2012. It is also not in dispute that the claimants were paid some money after their discharge in the form of terminal dues. It is also undisputed fact that the said payment lacked particulars. It is also not in dispute that the reasons for termination was reduction of staff dues to low business for the respondent. It is also not disputed that the claimants union was not served with any notice of the intended reduction of staff.
15. The issues for determination are whether the termination of the claimants employment was unfair and whether the reliefs sought ought to issue.

### **Unfair termination**

16. There is no doubt that the discharging of the claimants was akin to a declaration of redundancy of their jobs. Redundancy has been defined under Section 2 of the Employment Act 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 service of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”***

Going by the definition above, the claimants in this case were not to blame for the termination. It was all to be blamed on the employer or other factors beyond the claimants' control and as such the termination was intended to be on redundancy.

17. Whereas the employer has the right to lay off employees, that right is subject to the procedure provided for under Section 40 of the employment Act. The said provision provides in mandatory terms that before declaring an employee redundant, the employer must serve at least one month notice in writing to the employee's trade union and the labour officer. In addition, the employer must conduct a fair selection of the staff to be laid off, after which redundancy dues must be paid to the employee. In this case, the basic requirement of service of notice to the claimant's union and the labour officer was not complied with. That procedural default rendered the termination of the claimants employment unfair. Such unfairness could not be cured by payment of dues and issuance of certificate of service. It is now settled in our jurisdiction that when redundancy is done in breach of Section 40 of the Employment Act, it becomes an unfair termination for all purposes.

## RELIEFS

18. Under Section 49 of the Employment Act, an unfairly terminated employee is entitled to salary in lieu of notice, any accrued employment benefits plus compensation for unfair termination. The claimants have pleaded for 4 months notice citing the CBA which provides for such notice period for the staff who served for ten years and above. The defence did not contest that evidence. The court has confirmed from the CBA produced by the claimants that the claimants who served for ten years and above were entitled to a notice of 4 months for salary in lieu. They will all therefore get 4 months salary in lieu for notice except Samwel Ndaa and Ali Shee Athumani Mbwarauli who served for 6 years and 1 ½ years respectively. These two will get 3 months and 2 months salary in lieu of notice respectively.

19. The claimants will also get 10 months gross salary for unfair termination. In awarding 10 months pay, the court has considered the length of the period of service, the possibility of the claimants getting alternative employment and the fact that the respondent grossly breached express provision of the law in discharging the claimants. The 1<sup>st</sup> and 4<sup>th</sup> claimants will also get salary for the 5 days worked in December 2011. The court has however dismissed the claim for underpayment of house allowance for lack of clear proof. The prayer for damages for unfair termination is also declined as it would amount to double benefit to the claimant after receiving compensation for the same unfair termination.

20. The claimants' awards are summarized as follows based on the actual salary they were earning before termination.

### JOSEPH NGONYO

(I)	4 months salary in lieu of notice .....	120,000
(ii)	10 months salary for unfair termination.....	300,000
(iii)	5 days salary for December 2011.....	<u>5,000</u>
		<u>425,000</u>

### MOHAMMED MBUJA

(I)	4 months salary in lieu of notice .....	112,000
(ii)	compensation for unfair termination.....	<u>280,000</u>
		<u>392,000</u>

ALEX PAPA

(I)	4 months salary in lieu of notice .....	113,600
(ii)	10 months salary for unfair termination.....	284,000
(iii)	5 days salary for Dec 2011 .....	<u>4,733.35</u>
		<u>402,333</u>

JOSHUA KARINGU

(I)	4 months salary in lieu of notice .....	91,200
(ii)	10 months compensation for unfair termination.....	228,000
(iii)	5 days salary for December 2011.....	<u>3,800</u>
		<u>323,000</u>

SAMWEL NDAA

(I)	3 months salary in lieu of notice .....	43,800
(ii)	10 months salary for unfair termination.....	<u>146,000</u>
		<u>189,800</u>

ALI SHEE A. MBWARAUSI

(I)	2 months salary in lieu of notice .....	29,600
(ii)	10 months salary for unfair termination.....	<u>148,000</u>
		<u>177,600</u>

JACOB MITSANZE

(I)	4 months salary in lieu of notice .....	202,000
(ii)	10 months salary for unfair termination.....	<u>505,000</u>
		<u>707,000</u>

BENJAMIN MUTISO

(I)	4 months salary in lieu of notice .....	99,200
(ii)	10 months salary for unfair termination.....	<u>248,000</u>
		<u>347,200</u>

The foregoing awards are not inclusive of amounts paid to the claimants by the respondent after their discharge.

**DISPOSITION**

21. For the reasons aforesaid judgment is entered for the said claimants for an aggregate sum of ksh. **2,963,933.36** Plus costs and interest.

Orders accordingly.

**Dated, signed and delivered this 7<sup>th</sup> November 2014.**

**O. N. Makau**

**Judge**