



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 371 of 2011**

**KENYA HOTLES AND ALLIED WORKERS UNION..... CLAIMANT**

**VERSUS**

**NAIROBI GYMкана CLUB (TRUSTEES) ..... RESPONDENT**

**JUDGMENT**

The Claimant Kenya Hotels and Allied Workers Union filed the memorandum of claim on 16<sup>th</sup> March, 2011 on behalf of their members Alice Njeri (1<sup>st</sup> grievant) and Consolata Gathoni (2<sup>nd</sup> grievant).

The claimant states that at all material times the 1<sup>st</sup> and 2<sup>nd</sup> Grievants were employed by the Respondent from April 1996 and 3<sup>rd</sup> June 1991 respectively, till their termination on 15<sup>th</sup> March 2009 while earning a basic salary of Ksh.9,899/= and house allowance of Ksh.3,000/= each instead of Ksh.11,087 basic salary and Ksh.4,050/= house allowance as per the Collective Agreement. That, the claimant further states, despite invoking the Conciliation machinery under the Labour Relations Act, 2007 the matter was not amicably resolved hence the filing of this cause.

The claimant prays for orders against the Respondent for:

- (a) A mandatory order compelling the Respondent to reinstate the two grievants without loss of benefits for the period they have been out of employment unlawfully and all other accumulating benefits to be paid instantly.
- (b) In alternative, the court do issue a mandatory order compelling the Respondent to pay the grievants all their dues and compensation as follows:

**FOR 1<sup>ST</sup> GRIEVANT**

- (a) 12 days worked in March, 2009 - Ksh. 7,569.00
- (b) Service gratuity 20 days per year - Ksh.125,653.00
- (c) 3 Sundays pending offs - Ksh. 2,017.00
- (d) Prorate annual leave 9 months - Ksh. 7,565.00
- (e) Compensation for uniform in 2008/2009- Ksh. 10,000.00

- (f) Travelling allowance for annual leave - Ksh. 2,600.00
- (g) Arrears for 2009 for 2 months - Ksh. 2,178.00
- (h) Certificate of service
- (i) Total compensation - Ksh.339,226.00

FOR 2<sup>ND</sup> GRIEVANT

- (a) 12 days worked in March, 2009 - Ksh. 7,569.00
- (b) Service gratuity 20 days per year - Ksh. 96,017.00
- (c) 3 Sundays pending offs - Ksh. 2,071.00
- (d) Prorata annual leave 9 months - Ksh. 7,565.00
- (e) Compensation for uniform in 2008/2009- Ksh. 10,000.00
- (f) Travelling allowance for annual leave - Ksh. 2,600.00
- (g) Arrears for 2009 for 2 months - Ksh. 2,178.00
- (h) Maximum compensation - Ksh.181,660.00
- (i) Certificate of Service
- (j) Total - Ksh.309,660.00

The Respondents Nairobi Gymkhana Club (Trustees) filed their memorandum of reply on 6<sup>th</sup> April, 2011 through Nyachoti & Company Advocates. The Respondent pleaded and submitted as follows:

- (a) The Collective Bargaining Agreement 2009/2010 annexed on the memorandum of claim as App. C1 was negotiated between the Respondent and the claimant in 2010 and registered on 24<sup>th</sup> August, 2010, the date it became effective.
- (b) The Respondent admitted that the grievants were its employees as pleaded in the memorandum of claim and they were summarily dismissed for gross misconduct effective 3<sup>rd</sup> March 2009. The Respondent produced two letters addressed to each of the grievants dated 17<sup>th</sup> March 2009. The letters stated as follows:

***“Dear Madam,***

***RE: SUMMARY DISMISSAL***

***It has been brought to my attention that on 13<sup>th</sup> March, 2009 you were caught at the service gate with stolen items belonging to the Club in an attempt to remove the same from the Club’s premises of which you have admitted through your written statement received by the Club on the same date.***

***The management has been left with no option but to summarily dismiss you from duty effective 13<sup>th</sup> March 2009.***

***The following will be your full and final settlement:***

1. **Salary up to 13<sup>th</sup> March, 2009.**
2. **Pro-rata leave pay**
3. **Less salary advance**
4. **Less statutory deductions.**

**Please note that you will not be entitled to any benefits accrued over the years. Please clear with the Accounts Office for the final settlement.**

*Yours faithfully,*

**SIGNED**

**RAVINDRA M. PATEL**

**HON. SECRETARY”**

- (c) That the Respondent agreed to be lenient to the grievants and decided not to make any report of the theft to the police because the grievants were mothers, but then, they were dismissed from employment for gross misconduct.
- (d) The respondent paid the grievants their final dues including Ksh.92,871.00 for 1<sup>st</sup> grievant and Ksh.75,085.00 for the 2<sup>nd</sup> grievant.
- (e) That the Respondent denied that the grievants were entitled to salary scales as provided under the 2009/2010 Collective Bargaining Agreement and that the terms and conditions of employment applicable to the unionisable employees in the service of the Respondent at the date of separation, 24<sup>th</sup> August, 2010, did not apply to the grievants.

Accordingly, the Respondent prayed that the claim be dismissed with costs as it lacked merit.

The issues for determination in this case are:

- (a) Whether the termination was fair;
- (b) Whether the provisions of the Collective bargaining agreement 2009/2010 apply to the claimants' prayers; and
- (c) Whether the grievants are entitled to the remedies as prayed for.

The reason for termination in this case as submitted by the Respondent was theft by the claimant. The court has carefully examined the material on record and finds that the grievants have not disputed the ground for termination save for the action of invoking the dispute resolution mechanisms under the Labour Relations Act. The court finds that the reason for termination in this case was valid and the Respondent has proved the same on a balance of probabilities. Accordingly, the court finds that the termination of the claimant's contracts of service by the Respondent was fair.

As to whether the Collective Agreement of 2009/2010 applied to the Claimant, the Respondent has submitted that it did not apply because the agreement was registered and came into effect on 24<sup>th</sup> August, 2010 long after the termination of the grievants' employment on 13<sup>th</sup> March, 2009. The claimant has submitted that the grievants are entitled to full benefits of the Collective Agreement because Clause 30 of the same agreement provided that,

**“All unionisable employees in service at 31<sup>st</sup> December 2008 were to get salary increment”.**

The court has considered the provisions of the Collective Agreement in issue. Clause 1 (a) provides that the agreement commenced on 1<sup>st</sup> January, 2009 and was to remain in force for a period of two (2) years, to expire on 31<sup>st</sup> December, 2010. Clause 34 on basic wage or salary provided that the basic minimum

wage or salary (entry point) for every unionisable employee as from 1<sup>st</sup> January 2009 shall be as stipulated in appendix A. Clause 30 on General Wage increase provided,

***“all the Unionisable employees in the service as at 31<sup>st</sup> December, 2008 shall be awarded a General Wage Increment of Twelve per cent (12%) for the first year period (2009) and another increment of eleven per cent (11%) for the second year period (2010). The table is available on page 16 Appendix A”.***

The court finds that in so far as the grievants worked up to 13<sup>th</sup> March, 2009, the agreement applied to them up to the date. The agreement, by its own provisions applied retroactively and the parties are bound.

The final issue for determination is whether the grievants are entitled to the remedies as prayed for by the claimant. The court makes the following finds on this issue.

- (a) The Respondent terminated the services of the grievants fairly. The claim for reinstatement is not justified. The same is not granted.
- (b) The grievants are entitled to be paid the 12 days worked in March, 2009 and prorata leave pay as admitted by the Respondent in the termination letter. The same is granted.
- (c) The claimants prayed for service gratuity of 20 days per year. The Collective Agreement applicable for January 2009 to December 2010 provided in Clause 23 that with effect from 1<sup>st</sup> January, 2009 all employees who were in the respondent's service and who had completed five years or more would get a one off payment for long service as per the stipulated scales. The 1<sup>st</sup> Grievant had worked from April 1996 to March 2009 making a total of 12 completed years of service therefore entitled to Ksh.3,320.00 payment under the agreement. The 2<sup>nd</sup> grievant had worked from 3<sup>rd</sup> June 1991 to March 2009 making a total of 18 years completed years therefore entitled to Ksh.4,980.00 as a long service award. These are granted as agreed and the claim for service gratuity of 20 days per year is not justified and the same fails.
- (d) The Collective agreement provided that if the Respondent failed to provide uniforms then, for unionized employees, the Respondent would compensate with cash equivalent to the current market price. The grievants claimed Ksh.10,000.00 for the year 2008/2009 for such compensation as other staff were paid. The court finds, on a balance of probabilities, the claimants are entitled as prayed and the same is awarded.
- (e) The court finds that the grievants were entrusted to the prorata annual leave for 9 months, travelling allowance for prorata leave but the arrears for the year 2009 for two months is not justified as the same is not proved. The 3 Sundays pending offs are also not proved.
- (f) The court finds that since the grievants were fairly terminated, the claim for maximum compensation for unfair termination is not justified.
- (g) The grievants are entitled to the certificates of service.

Accordingly, judgment is entered for the claimant against the respondent for:

**(a) to pay 1<sup>st</sup> grievant:**

(i) 12 days worked in March, 2009	-	Ksh.569.00
(ii) long service award	-	Ksh.3,320.00
(iii) Prorata annual leave	-	Ksh.7,565.00
(iv) Compensation for uniforms	-	Ksh.10,000.00
(v) Travelling allowance for leave	-	Ksh.2,600.00
<b>Total</b>	<b>-</b>	<b>Ksh.31,054/=</b>

**(b) to pay the 2<sup>nd</sup> grievant:**

- (i) 12 days worked in March, 2009 - Ksh. 7,569.00
- (ii) long service award - Ksh. 4,980.00
- (iii) Prorata annual leave - Ksh. 7,565.00
- (iv) Compensation for uniforms - Ksh.10,000.00
- (v) Travelling allowance for leave - Ksh. 2,600.00

**Total - Ksh.32,714/=**

- (c) interest at court rates on (a) and (b) above from the date of this judgment till full payment;
- (d) to pay 50% of the costs of the cause; and
- (e) to issue the claimants' certificate of service.

Signed, dated and delivered this 26<sup>th</sup> day of October, 2012.

**BYRAM ONGAYA  
JUDGE**