



REPUBLIC OF KENYA

Industrial Court of Kenya

Civil Suit 69 of 2010

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

VERSUS

**PALACINA HOTEL (THE RESIDENCE AND
SUITES).....RESPONDENT**

JUDGEMENT

The parties in this suit made their opening addressed highlighting the matters in dispute. Mr. Makale, a representative of Claimant on behalf of the employee Mr. John Mumo, made his opening address on 9th November, 2010 while Mr. Simiyu for the respondent made his remarks on 11th November, 2011. The matter was then set for hearing 18th June, 2011. However it would appear from the record that when the parties appeared before Justice Madzayo on 18th June, they agreed to file submissions implying hearing was dispensed with and the Court was left to decide the dispute based on the memorandum of claim and supporting documents and memorandum of response together with supporting documents. By the time I became seized of the matter (18th September, 2012) the claimant had filed his submissions however the respondent had not, prompting me to make an order that the respondent do file submissions in default of which the court would proceed to prepare the judgment based on the material on record. I directed that the matter be mentioned on 25th September, 2012. When the matter came up for mention, the respondent still had not filed his submissions hence I decided that in the interest of time, I should prepare the judgment based on the material on record as I had earlier indicated.

According to Mr. Makale, the issue in dispute was unlawful lock-out of the employee by the Respondent and that the Union had a recognition agreement and a collective bargain agreement with the respondent. These were exhibited in the claimant's bundle as appendix 4.

According to him, the Mr. Mumo was employed on 12th September, 2006 as a waiter at a starting salary of Kshs. 7,650 per month and a house allowance of Kshs. 1,350 per month.

At the conclusion of his probationary period the employee was given a basic salary of Kshs. 9,000/- per month.

On 1st July, 2007, the employee was promoted to be a cashier in the accounts department and his basic salary increased to Kshs. 9,900 per month. However Mr. Makale informed the court that in September, 2008 the employee's salary was reduced to Kshs. 5,900 per month and a house allowance to Kshs. 4000 per month.

Mr. Makale further informed the court that in October, 2008 there were allegations against the employee and his colleagues concerning credit card fraud. Investigations were conducted and the employee's were

discharged yet he was not.

In November, 2008 the employee was called by the resident manager and told to stay away till further communication from the management. However since then the management has never communicated with the employee.

It is for this reason that the employee is claiming reinstatement without loss of service and benefits. In the alternative the employee prays that the actions by the respondent be found to be unprocedural and order the respondent to pay the employee 12 months dues.

Mr. Makale informed the court that after negotiations with the Union, the employee's salary was to be increased by 10% with effect from 2008 and house allowance was to be 15% of the basic salary. It was his submission that the employee's house allowance was withdrawn for 24 months. He further informed the court that the employee's Public Holiday allowance amounting to 22 days was not paid at the time of termination.

Mr. Makale also submitted that the employee was being paid wages below the official minimum wage as stipulated in Gazette No. 69 (Appendix 3(b)) which provided that minimum wage should be Kshs. 13, 833 and a house allowance of 15% of the basic salary. Mr. Makale seeks also notice money as well as unpaid leave days amounting to sixty days.

Mr. Simiyu on the other hand contended that the claimant was employed as a waiter and drew the court's attention to appendix 2 of the respondent's bundle of documents. It was his position that there was no promotion as alleged by the employee and referred the court to annexure 3(a) & 3(b) of the respondent's bundle of documents.

On the allegation that the salary was reduced to Kshs. 5,900 in September, 2008, he submitted that around that time, there was a CBA entered into between the Union and the respondent whereby it was agreed that the salary and house allowance be itemised separately in the payslip. To vouch for this, he referred the court to memo 1 in the respondent's bundle of documents.

Concerning leave, Mr. Simiyu submitted that no leave was left for the employee as he took a total of 72 days leave which was his total leave entitlement for the period. In this regard, he exhibited appendix 2 of the respondent's bundle of documents.

With regard to lockout, the Mr. Simiyu submitted that was put in an acting capacity to handle money as a cashier and during that period there was fraud involving credit card. The claimant was called to record a statement on 4th November, 2008 concerning the fraud and has been on the run thereafter. The respondent therefore urges the Court that the matter be dismissed.

At the onset, the Court would like to observe that although section 73(3) of the Labour Relations Act provides that referral to Industrial Court of trade disputes may only be done by the authorised representative of an employer, group of employers, employers' organisation or trade union, it does not mean that the actual claimant or respondent on whose behalf the suit has been brought is precluded from appearing in Court to adduce evidence for or against the allegations set out in the pleadings. Authorised representative in the Labour Relations Act is the equivalent of the Authorised Agent under the Civil Procedure Act and Rules. Under the Civil Procedure Rules an authorised representative which includes an Advocate merely has a right of audience but has no capacity to adduce evidence on behalf of the person on whose behalf he appears. The rationale behind section 73(3) if looked at from the trade union perspective was to make it easier in cases where a trade dispute involved several unionizable employees. In such a case it was more convenient for the action to be brought by the Union. But even in such cases where the cause of the dispute is common the court has power to receive evidence of a few of the claimants and make a generic determination that would apply to the other employees.

Having said that, the aggrieved party herein is Mr. John Mumo, one individual, no reason has been supplied by the claimant why he was never called to court to testify as to the terms and conditions of his

employment and the circumstance under which he left the respondent's employment. The document's filed together with his memorandum of claim are not supportive enough to make the court reach a just determination of the dispute. The aggrieved parties absence may tend to lend credence to the claim by the respondent that the he has become a fugitive since the occurrence of the alleged events that led to the termination of his employment.

From the foregoing the Court is unable to reach a determination of the claim herein until all the parties especially Mr. John Mumo appears before the Court and gives evidence in support of the claim.

The Court therefore directs that this matter be fixed full hearing at a date convenient to the parties.

It is so ordered.

Dated and Delivered at Nairobi this 26th day of October 2012

Abuodha J

Judge

Delivered in open Court in the presence of for the Claimant and
..... for the respondent.