



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 394 OF 2018

KENYA HOTELS & ALLIED WORKERS UNION....CLAIMANT

-VERSUS-

OAK PLACE HOTEL LTD.....RESPONDENT

JUDGMENT

1. The Claimant's suit is contained in the Amended Memorandum of Claim filed on 29.7.2019, and it is brought on behalf of 7 former employees of the Respondent (hereinafter called grievants). It is the claimant's case that all the 7 grievants' employment was unfairly terminated on account of redundancy and therefore it seeks the following reliefs:

- a. That the Respondent be compelled to pay the grievants as per the Hotel and Catering trade orders.**
- b. That the Respondent to immediately pay Kshs. 5,44,462/- to the Claimants who are representing themselves in person in a court of law.**
- c. That the costs of this suit be provided for by the Respondent.**
- d. Any other relief the court deem fit to issue.**
- e. That the Respondent do pay the Claimant house allowance at the rate of 15% of the basic salaries of the employees concerned.**

2. The Respondent neither entered appearance nor filed a defence to the claim. Consequently, the matter proceeded for formal proof and was heard by way of written submissions.

3. The facts of the case are that the grievants were employed by the Respondent from 2010 to January 2018 and they were in different sections. From 2.10.2017 most of the grievants were issued with termination letters citing loss of business due to political situation. The letter promised the grievants that they will be paid their terminal dues but nothing was paid thereafter. According to the claimant the rightful terminal benefits based on the Hotels and Catering Trade Order and which the claim herein are tabulated in Annexure COA 1 of the claim.

4. The claimant contended the said redundancies did not comply with the statutory procedure and they were all unfair and unlawful. It contended further that, for a termination on account of redundancy to be fair and lawful, an employer must adhere to the minimum requirements set out in section 40 (1) of the Employment Act unless the parties have entered into an agreement providing for superior terms. It argued that the Respondent never notified it or the labour office of the intended redundancy and therefore rendering the termination letters invalid.

5. She relied on the decision in **Gerrishom Muhkutsi Obayo v Dsv Air and sea Limited [2018] eKLR** where the Court held that for a redundancy to be valid, the employer must prove that at least one month before the redundancy, it notified the labour officer, the employee or the union.

6. With respect to the reliefs sought, the claimant submitted that the grievants are entitled to one month's salary in lieu of notice, accrued leave, public holidays worked, house allowance, service for the years worked and 12 months' salary compensation for wrongful termination.

Issues for determination

7. After considering the pleadings, evidence and submission presented by the claimant, it is clear that all the grievants except Mr.Patrick

Muriithi, were employed by the respondent until their services were terminated on account of redundancy on diverse dates between 30.9.2017 and 1.2.2018. The main issues for determination are:

- a. Whether the termination of the grievants' employment was unfair and unlawful.
- b. Whether the reliefs sought should be granted.

Whether the grievants' termination was unfair and unlawful.

8. The Claimant maintained that the termination was unfair and unlawful because the respondent did not comply with the mandatory requirements of Section 40 of the Employment Act which provides that:

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

- (a) where the employee is a member of a trade union, the employer notifies the union to 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 an 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 to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.**

9. The termination letters were served on grievant either after the effective date of the termination or on the effective date or one day to the effective date. The respondent did not serve any prior written notice of at least one month to the claimant union and the area Labour Officer. The letters did not justify the selection of the grievants for the redundancy and it did not pay the terminal dues contemplated under the above provision. It follows therefore that the claimant has proved on a balance of probability that the respondent did not terminate the grievants' services in accordance with the procedure laid down under section 40 above and as such the same became unfair termination within the meaning of section 45 of the Act.

10. I gather support from **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR** where Onyango J held that:

“For redundancy to be valid, the employer must prove that both the Labour officer and the employee or the employee's union, where there is one, have been notified at least one month before the redundancy takes place.”

11. Again in **Francis Maina Kamau v Lee construction [2014] e KLR**, the court held that:

“Where an employer declares a redundancy, the conditions set out in section 40 of the Employment Act must be observed and where the employer fails to do so, the termination becomes unfair within the meaning of Section 45 of the Employment Act.”

12. As already observed herein above, no evidence was adduced to prove that Mr. Patrick Muriithi was employed by the respondent and that he was terminated on account of redundancy like the other grievants herein. Having perused through the record it is notable that the termination letters produced by the Claimant were only for 6 grievants excluding Mr. Patrick Muriithi. I therefore exclude him from the above finding that the claimant has proved that the termination of the grievants' employment on account of the redundancy was unfair and unlawful.

Whether the Claimant is entitled to the reliefs sought

13. The Claimant urged the court to award the terminal dues set out in the schedule annexed to the Memorandum of Claim and marked “COA1” and includes accrued leave, public holidays, service, notice and compensation. The salary for each grievant is stated in their respective written witness statements and it is reflected under the claim for notice. Kennedy Kidake Anganya's salary was kshs.15000,

Carolyne Kagendo Manene kshs. 16,500, Nelson Amadi Azenga's kshs. 18,500, Tecla Musimbi Mativa's kshs. 19,000, Margaret Evaline Achieng's Kshs. 26,000 and Hannah Wanjiru Mburu's Kshs. 21,500.

14. Having found that the said six grievants were unfairly and unlawfully dismissed contrary to section 40 and 45 of the Employment Act, I award each one months' salary in lieu of notice, plus ten months' salary as compensation for unfair termination of their employment contracts. In awarding the said damages I have considered that the grievants did not contribute to the termination through misconduct, and also that they had served the respondent for 6 years on average.

15. I further find that the claimants are entitled to service pay at the rate of 15 days' pay per year of service. However, the claim for leave and public holidays is dismissed for lack of particulars and evidence. I gather support from **Karugi & another v Kabiya & 3 others [1983] eKLR** where the Court of Appeal held that:

“I agree with the trial judge that, on the available material, it was they who should have been sued. Neither can I agree with Mr. Waweru that the burden of proof is in any way lessened because the case is heard by way of formal proof. The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge.”

16. Again in **Shamakame Adam Mbui v Kyoga Hauliers (K) Ltd [2013] eKLR** Radido J held:

“The Claimant had the benefit of legal representation. His case was not properly pleaded nor sufficient evidence laid before the Court to enable it reach a conclusion that the dismissal was wrongful.

The cause was prosecuted in a most dilatory way. Causes are determined on the basis of pleadings and evidence placed before the Court. This applies even in undefended Causes and the parties should not assume that because a Cause is undefended the obligation to discharge the statutory obligation upon the party is lowered.”

17. Having found that the claimant has proved on a balance of probability that the termination of the grievants' employment was unfair and unlawful and that they are entitled to some of the reliefs sought, I now enter judgment for the claimant as follows: -

KENNEDY KIDAKE ANGANYA

Notice	kshs. 15,000
Compensation	kshs. 150,000
Service pay	<u>kshs. 45,000</u>

Kshs. 210,000

CAROLINE KAGENDO MANENE

Notice	kshs. 16,500
Compensation	kshs. 165,000
Service pay	<u>kshs. 57,750</u>

Kshs. 239,250

NELSON AMADI AZENGA

Notice	kshs. 18,500
Compensation	kshs. 185,000
Service pay	<u>kshs. 46,250</u>

Kshs.249,750

TECLA MUSIMBI MATIVA

Notice	kshs. 19,000
Compensation	kshs. 190,000

Service pay kshs. 66,500

Kshs. 275,500

MARGARET EVALINE ACHIENG

Notice kshs. 26,000

Compensation kshs. 260,000

Service pay kshs. 52,000

Kshs. 338,000

HANNAH WANJIRU MBURU

Notice kshs. 21,500

Compensation kshs. 215000

Service pay kshs. 64,500

Kshs. 301,000

18. The above awards are subject to statutory deductions. The claimant is awarded costs plus interest at Court rates from the date hereof.

Dated, signed and delivered this 5th day of February, 2021.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGES