

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT  
NAIROBI**

**ELRC CAUSE NO E814 OF 2022**

**BAKERY CONFECTIONERY FOOD MANUFACTURING &  
ALLIED WORKERS (K).....**

**.....CLAIMANT**

**VERSUS**

**DEVKAN ENTERPRISES LIMITED.....  
RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant is a trade union that is registered and has operations in Kenya. It has a Recognition Agreement with the Respondent pursuant to which the two entered into the Collective Bargaining Agreement (CBA) dated 19<sup>th</sup> March 2019.
2. The CBA came into force on 1<sup>st</sup> April 2018 and was to remain in force for two years until 31<sup>st</sup> March 2020. However, and by virtue of clause 21 thereof, it remained in force after 31<sup>st</sup> March 2020 until terminated through mutual consent of the parties.
3. There is no suggestion that the parties terminated the CBA or entered into a new CBA to replace it. As such, the CBA remains in force.

4. The Claimant has membership from among the Respondent's workforce including one Timothy Kipyatich and Caren Wakoli (hereafter called the Grievants). The Claimant has instituted these proceedings against the Respondent on behalf of the Grievants.
5. The Claimant avers that the Grievants were employed by the Respondent on diverse dates as security guards. It contends that the Grievants executed their services without blemish until their contracts of service were irregularly terminated on 4<sup>th</sup> October 2021 through a purported redundancy.
6. The Claimant contends that the alleged redundancy was unlawful because the Respondent did not give the Grievants the requisite redundancy notice under section 40 of *the Employment Act*. It further contends that the Respondent did not disclose the procedure it invoked to select the Grievants for release from employment on account of redundancy. Further, it avers that the Respondent did not pay the Grievants their redundancy benefits as per the CBA between the parties.
7. The Claimant avers that following this development, it reported a trade dispute to the Ministry of Labour and Social Protection. It contends that the Ministry appointed a conciliator who rendered her recommendation on the dispute on 29<sup>th</sup> March 2022. However, it (the Claimant) avers that the Respondent did not honour the recommendation thus necessitating this suit.

8. The Claimant prays for various reliefs on behalf of the Grievants including: notice pay; pay for accrued leave days; overtime pay; leave travel allowance; severance pay; unremitted pension dues; and compensation for unfair termination of their contracts.
9. Although the Respondent was given an opportunity to regularize its pleadings in the suit, it failed to do so. It also did not attend court on the trial date despite the date having been taken by consent. As such, the case proceeded in its (the Respondent's) absence.

#### **Issues for Determination**

10. After analyzing the Memorandum of Claim and evidence on record, the court discerns the following issues for determination:-
  - a) Whether the Respondent terminated the contracts of service for the Grievants in accordance with the law.
  - b) Whether the Grievants are entitled to the relief which are sought in the Memorandum of Claim.

#### **Analysis and Determination**

11. It is important to point out that although the suit was instituted by the Claimant on behalf of the two Grievants, only one of them (Caren Wakoli) testified in court. During her testimony, she informed the court that she had the authority of the other Grievant to testify on his behalf. She relied on the letter of authority dated 7<sup>th</sup> November 2022 filed

together with the Memorandum of Claim to support her contention.

12. The court has studied the letter of authority and is satisfied that indeed, Timothy Kipyatich authorized Caren Wakoli to testify on his behalf. As such and on this basis, it accepts her testimony as representing herself and the co-Grievant.
13. The witness adopted her witness statement dated 7<sup>th</sup> November 2022 as her evidence in chief for the two Grievants. She further gave a brief oral account of their case and presented twelve documents as exhibits in support of their case.
14. According to the evidence on record, after the Grievants completed their duties on 30<sup>th</sup> September 2021, their supervisor allocated them work for the following day, 1<sup>st</sup> October 2021. The Grievants contend that immediately after they had been allocated assignments as aforesaid, the supervisor sent them a text message informing them to report to work on 4<sup>th</sup> October 2021 for purposes of handing over the Respondent's belongings.
15. The Grievants assert that on 4<sup>th</sup> October 2021, the Respondent served them with redundancy notices dated the same day. They contend that the notices indicated that their services were no longer required because the Respondent was implementing an action plan to optimize its operational costs. They further aver that the notices intimated that they were to be paid their redundancy exit dues.

16. The Grievants contend that they reported the matter to the Claimant where-after the Claimant wrote to the Respondent to protest its decision. It is their case that the redundancy was not declared in accordance with the subsisting CBA between the parties.
17. The court has analyzed the aforesaid evidence and it is apparent that the Respondent indeed issued the Grievants with two separate redundancy notices dated 4<sup>th</sup> October 2021. The notices do not state the extent of the purported redundancy. They do not disclose the approximate number of staff that were likely to be affected by the process. To this extent, the notices were not compliant with section 40 of *the Employment Act* which requires a redundancy notice to state the extent of the anticipated redundancy.
18. Although the notices gave the Grievants notice for one month, the Grievants aver that they were required to cease employment on the date the notices were issued (4<sup>th</sup> October 2021). To this extent, the notices failed to give practical meaning to the requirement under section 40 of *the Employment Act* that a redundancy notice should issue at least one month prior to the decision to terminate the affected employee's contract of service.
19. The notices that were issued to the Grievants did not invite them for consultative meetings with the view of obviating the impugned redundancy. As such, it is apparent that Respondent did not provide the Grievants and the Claimant

the opportunity to consult over the redundancy which was contrary to the prevailing jurisprudence on the matter.

20. There is also no evidence to demonstrate the selection procedure which the Respondent adopted to identify the Grievants for release from service on account of redundancy. This was in violation of the requirement on selection as set out under section 40 of *the Employment Act*.
21. Although the Respondent spoke of cost optimization as the justification for the impugned redundancy, there is no evidence that it supplied the Grievants with material to demonstrate what this entailed and how it impacted their employment. Absent this, it cannot be said that the Respondent provided cogent justification for the purported redundancy.
22. Having regard to the foresaid, it is apparent the Respondent's decision to declare the Grievants redundant was flawed for want of justification and for failure to adhere to the procedure for declaring a valid redundancy. It is so declared.
23. The Grievants have sought a plethora of reliefs. They seek to be paid benefits which they would have received under the CBA had the redundancy been procedurally processed. At the same time, they seek compensation for unfair termination of their contracts.
24. The redundancy benefits under the CBA largely mirror the benefits which section 40 of *the Employment Act* provides

for a valid redundancy. Consequently, it is safe to assume that the Grievants' plea for payment of redundancy benefits is also anchored on section 40 of *the Employment Act*.

25. It is critical to note that section 49 *the Employment Act* provides specific reliefs for unlawful termination of an employee's contract of service. On the other hand, section 40 of the Act speaks to the benefits which an employee who has been validly released from employment on account of redundancy ought to receive.
26. In the court's view, it is not possible for an employee to simultaneously pursue benefits under section 40 of *the Employment Act* which presupposes that his release from employment was legitimate and compensation for unlawful termination of his contract under section 49 of the Act. This will be tantamount to seeking double compensation, a matter which the law frowns upon. As such, the employee must make an election either to pursue the benefits that are decreed by section 40 of the Act or section 49 of the Act but not both.
27. The Grievants have claimed for overtime. They allege that they used to work from 6.00 AM to 6.00 PM for the day shift and 6.00 PM to 6.00 AM for the night shift. As such, they aver that they had several overtime hours at the time of termination of their contracts which were not paid.
28. This claim is problematic. The Grievants have not provided data to demonstrate the specific days and times they were

on duty to anchor their claim. They want the court to proceed on the assumption that they were on duty throughout to grant their prayers in this respect which is not possible.

29. At the same time, it is impossible to tell from the preliminary material which was placed before the court whether the overtime claims relate to night shift work or day shift work. Absent these details, the court will be proceeding on conjecture to make any award under this head. As such, the court declines the claims for overtime for want of cogent evidence to support them.
30. The Grievants have also claimed for accrued leave days. They rely on the data supplied in their clearance forms to anchor their accrued leave claims.
31. According to the clearance form relating to Timothy Kipyatich, he had earned 56 accrued leave days at the time his contract was terminated. On the other hand, Caren Wakoli had 72 accrued leave days when she left employment. This data is in tandem with the leave days claimed by the Grievants in the Memorandum of Claim.
32. At the time the Grievants left employment, each one of them was earning Ksh. 22,780.00 per month. Therefore, their daily wage rate was Ksh. 759.00.
33. As such, Timothy Kipyatich is entitled to accrued leave pay in the sum of  $\text{Ksh. } 759 \times 56 = \text{Ksh. } 42,504.00$ . On the other hand, Caren Wakoli is entitled to accrued leave pay in the

sum of Ksh.  $759 \times 72 =$  Ksh. 54,648.00. Accordingly, I enter judgment for the Grievants for the aforesaid amounts.

34. The Grievants have also claimed for leave travelling allowance for three years each. As the evidence on record demonstrates, the two had accrued leave days that span over a duration which approximates three years and above. As such and based on clause 15 of the CBA between the Claimant and the Respondent, the Grievants are entitled to leave travel allowance of Ksh. 3,500.00 per year. Consequently, each of the Grievants is awarded a sum of Ksh. 10,500.00 being leave travel allowance for three years.
35. The Grievants have claimed for notice pay. Under clause three (3) of the CBA, an employee who has served for less than five (5) years at the time his contract is terminated is entitled to notice of one month. On the other hand, an employee who has been in service for more than five (5) years is entitled to notice of two months.
36. At the time Caren Wakoli's contract was terminated, she had been in the Respondent's service for more than five (5) years. As such, she was entitled to two months' notice to terminate her employment.
37. This Grievant was earning Ksh. 22,784 when her contract was terminated. As such, she is awarded Ksh. 45,560.00 in lieu of notice to terminate her contract.
38. At the time Timothy Kipyatich's contract was terminated, he had served the Claimant for under five (5) years. As such, he

was entitled to one month's notice to terminate his employment.

39. This Grievant was earning Ksh. 22,780.00 when his contract was terminated. As such, he is awarded Ksh. 22,780.00 in lieu of notice.
40. The Grievants have prayed for compensation for unfair termination of their contracts of service. As has been stated earlier, the Respondent did not adhere to the procedure on redundancy when it terminated the contracts for the Grievants. As such, the Respondent's decision was unlawful with the consequence that the Grievants are entitled to compensation for unfair termination of their contracts.
41. At the time of termination of their contracts, the Grievants had served the Respondent for more than three (3) years which is comparatively long. Further, there is no suggestion that their conduct contributed to the decision to terminate their contracts. As such and in terms of section 49 of *the Employment Act*, the court awards each of the Grievants compensation which is equivalent to their monthly salary for ten (10) months, that is to say, Ksh. 227,800.00 per Grievant.
42. The Grievants have also prayed for severance pay under section 40 of *the Employment Act* as read with the CBA between the Claimant and the Respondent. However, since they have been awarded compensation for unfair termination of their contracts under section 49 of *the*

*Employment Act*, they cannot simultaneously seek to recover severance pay which is paid on the assumption that the redundancy was regular. As such and for this reason, the court declines the plea for severance pay.

43. The Grievants have claimed for unremitted pension funds. They contend that from February 2020, the Respondent did not remit their pension contributions to the administrator of the Pension Fund. They further contend that the Respondent did not remit its share of contribution to the Pension Fund administrator. They presented statements from GA Life Personal Provident Plan to back their claims that the Respondent was not remitting the pension contributions as expected.
44. The pay slips which the Grievants tendered in evidence support their contention that the Respondent was deducting pension contributions from them. The pay slips also show that the Respondent was to contribute to the Pension Fund.
45. The statements from the Pension Fund Administrator suggest that the payments by the Respondent were erratic. As such, the Respondent is ordered to remit to the Pension Administrator the outstanding pension contributions from both the Grievants and itself within 21 days of notification of this decision.
46. The court awards interest on the sums awarded to the Grievants at court rates from the date of this decision.

47. As the cause was prosecuted by counsel, the court awards the Claimant costs of the case.
48. The award rendered herein is subject to the applicable statutory deductions at the time the Grievants' contracts of service were terminated.

### **Summary of Decision**

49. After evaluating the evidence and law on the dispute, the court makes the following findings and attendant orders:-
  - a) The court declares the Respondent's decision to declare the Grievants redundant procedurally flawed and without justification.
  - b) The court declines to grant the claims for overtime pay for want of cogent evidence to support the claims.
  - c) The court enters judgment for the Grievants for accrued leave days' pay as follows:-
    - i) Timothy Kipyatich Ksh. 42,504.00.
    - ii) Caren Wakoli Ksh. 54,648.00.
  - d) The court enters judgment for the Grievants for leave travel allowance as follows:-
    - i) Timothy Kipyatich Ksh. 10,500.00.
    - ii) Caren Wakoli Ksh. 10,500.00.
  - e) The court enters judgment for the Grievants for pay in lieu of notice to terminate their contracts of service in the following terms:-
    - i) Timothy Kipyatich Ksh. 22,780.00.
    - ii) Caren Wakoli Ksh. 45,560.00.

- f) The court awards the Grievants compensation for unfair termination of their contracts of service as follows:-
- i) Timothy Kipyatich Ksh. 227,800.00.
  - ii) Caren Wakoli Ksh. 227,800.00.
- g) The court declines the claim for severance pay.
- h) The court orders the Respondent to remit the outstanding pension contributions for the Grievants (both the Grievants' and its contribution) to the Pension Fund Administrator within 21 days of notification of this judgment.
- i) The court awards the Grievants interest on the amounts awarded at court rates from the date of this decision.
- j) The court awards the Claimant costs of the case.
- k) The award rendered herein is subject to the applicable statutory deductions at the time the Grievants' contracts of service were terminated.

**Dated, signed and delivered on the 19<sup>th</sup> day of February, 2026**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

## **ORDER**

**In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision 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.**

**B. O. M MANANI**