REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 4434 of 1992

TOBIAS ONG' ANY AUMA& OTHERS..... PLAINTIFF

VERSUS

KENYA AIRWAYS CO-OPERATION..... DEFENDANT

JUDGEMENT

The six named plaintiffs Tobias Ong'any Auma, Aaron MuisyoMwailu, John Otieno Owili, Walter Ojwang' Awich, Fidelis Nlhunthi andHenry Munene Karubiu are all ex-employees of the defendant KenyaAirways Corporation Limited.

In their plaint first filed in court in August, 1992 and subsequentlytwice amended to rest with the further amended plaint filed on 7th October1997, the said six named plaintiffs are said to be "suing on their behalf andon behalf of 900 ex-employees of Kenya Airways".

The brief facts upon which the plaintiffs' cause of action is based areas follows:-

The plaintif had been and were entitled to remain in the Employ of the defendant On or about the 15th day of May, 1990 the defendant purportedly declared the plaintiffs redundant It is the plaintiffs' case that the step taken by the defendant was wrongful and in violation of the provisions dealing with redundancy under the Regulations of Wages and Conditions of Employment Act Cap 226 Laws of Kenya.It was also effected without any proper notice.

The plaintiffs in their pleadings have asked the court to direct the defendant to comply with the law and the normal express or implied terms of agreement for employment which they have set out as follows:-

1 Full redundancy payment.

2 Notice of termination 36 months.

3 Severance pay at the rate of 15 days of each completed year of service.

4 The observance of "last in first out" principles

5 Cash renumeration for accumulated leave and overtime allowancetaking into account wrong computation and payment to include all allowances.

6 Refund of all deductions except statutory deductions.

8 Payments of the deposits retained in the Provident Fund reserve.

9 All payments to include all allowances

10 Loss of service upto age of 55 years.

It is also the plaintiffs' case that as a result of the defendant's breach-of the law and terms of employment they (the plaintiffs) have been deprivedof the benefits they would otherwise have earned and have thereby suffered loss and damage, the particulars of damages are out as follows:.

(a) Loss of service Kshs. 2,365,026,217/-

(b) Notice payments (36 months) Khs. 200.,559,440/-

(c) Severance pay Kshs. 15,529,946/-

(d) Difference on leave not paid Kshs. 4,334,026

(a) Provident fund reserves kshs. 10,000,000

Total Kshs. 2,595,449,629/-

The plaintiffs have also stated that they have been deprived of career advancement and thereby suffered loss and damage.

Based on the foregoing pleadings the plaintiffs claimed:

(a) Payment of all allowances and other remunerations as provided forunder the acts and other orders.

(c) Loss of service.

(d) Special damages as per paragraph 6A above shs. 2,595,449,629.00

(e) Costs of this suit

(f) Interest therefore at court rates.

Following the filing of the further amended plaint, the defendant filed an amended defence on 10th November, 1997 the salient points of which are as follows:-

The defendant was unaware of the plaintiffs' entitlement to remain in the employment of the defendant or at all: the redundancies were carried out in accordance with the terms of series of the plaintiffs and the defendant under the Regulations of the airline. It is the defendants case that it fully complied with the provision of the Employment Act The Regulations of wages and Conditions of Employment act as regards payment and other benefits attached to each plaintiff and the plaintiffs have suffered no damage.

It is further pleaded that the plaintiffs were not deprived of any benefits as they were not entitled to earn any from the defendant. They have therefore not suffered any loss or damage and are not entitled to any of the payments set out above. The claim for loss of service is said to be without legal basis;

there is no statutory or contractual basis for 36 months pay in lieu of notice;

there is no money due from the provident funds claim there oughtto be against the trustees and it is an abuse of the process of the court tomake the claim against the defendant. The defendant also denied that it inanyway hindered the career advancement of the plaintiffs any obligation toensure they advanced in their careers. The defendant therefore asked for thedismissal of the suit.

Before the present counsel took over the defence case, the Hon.Attorney General was on record for the

defendant. There is on recordamended agreed issues field on 26th May, 1993 signed by both counsel.Although pleadings were subsequently amended, no fresh set of issues werefiled. That notwithstanding, having looked at the issues, I believe theyrepresent the positions taken by both sides herein sufficiently.

The said issues are as follows:-

1 Have the plaintiffs herein, a legal right to file a representative suit?

2 Is there any contractual obligation between the plaintiffs and thedefendantts?

3 Is the defendant in breach of the rules relating to redundancy inaccordance with the terms of service between the plaintiff and thedefendant.

4 Is the defendant in, breach' of the provisions of the Employment Actand the Regulations Wages and Conditions of Employment Act?

5 Have the plaintiffs suffered any loss and or damages?

6 Who should be condemned to pay costs hereof?

Both sides have called evidence to support their respective pleadings.Both learned counsel have made their submissions which 1 have on record. Some authorities have also been cited but it may not be necessary to refer to all of them; that however, should not be construed as if they are wanting in substance.

Before considering any other matters in this judgment I have deemedit necessary to address one of the most crucial issues in this litigation. It isalso in relation to the first issue, for determination set out hereinabove.

The defendant has all along pleaded that, the plaintiffs have no rightin law to file a representative suit on behalf of all the unidentified staffaffected by the redundancies due undetermined nature of contractualobligations between them and the defendant.

In submitting that the 6 plaintiffs named in the plaint have no suchright, the learned counsel has extensively analysed the provisions of Order 1 Rule 8 of the Civil Procedure Rules. It is the defendant's case that each common interest; each has a separate remedy (if any) and none is interestedin the damages of the other; separate action should have been filed and ifnecessary a test case/suit under Order 37 should have been tried.

It is true that the cited provision set out an elaborate procedure to becomplied with before a representative suit can be said to be in place.

The record shows that on 12th September. 1994 Shields J. made anorder authorizing the six named plaintiffs in this suit to file suit on their ownbehalf and on behalf of 923 ex-employees of the defendant. Subsequentlythe hearing of the main suit commenced but three years or so after the orderby Shields J., the defendant, moved the court to have the said order reviewed

The reasons upon which the application was made were that (a) eachemployee had a separate contract of employment and they do not have thesame interest (b) the persons named as plaintiffs or claimants do not seekrelieves that are beneficial to all and (c) the mere existence of an allegedcommon wrong was insufficient ground for making the order each personallegedly having suffered an individual wrong, being redundancy, under theterms of his contact and no other.

In dismissing the application, this court had the following to say:-

"It is true that each of the plaintiffs on record andthose joined following the order now being challengedhad different contracts of employment with thedefendant. However, their relief's set out in thepleadings are the same save that at the end of the dayit will be a question of quantum. And so, thedefendant has to show what prejudice if any, it shall suffer by having that order in place. This has not been shown "

By that ruling, I believe that issue was put to rest. There was noappeal against that ruling and to submit on the same at this stage is, withrespect, late in the day. Further the foregoing, the plaint did not make anysecret of the number of the plaintiffs said to have been aggrieved by theaction of the defendant. One of the basic considerations of any pleading is togive sufficient notice to the other party of the nature of the case to expect atthe trial, when the application upon which Shields J. made the said orderwas filed on 16th November, 1992, the names of all ex-employees on whosebehalf the 6 named plaintiffs were suing, were set out in the annexture tothat application, that was sufficient notice of the parties to the suit and noprejudice can be said has be fallen the defendant. In my judgment, therefore,the suit before the court cannot be fauted.

Negotiated Collective Bargaining Agreements with the defendant TheseTrade unions are; Kenya Airline Pilots Association (KALPA), Transport andAllied Workers Union (TAWU) and Kenya Airways staff Association(KASA). -.-.

The Collective Bargaining agreement with TAWU was produced ASPEXT F while that with KASA WAS PEXT E. In all the foregoingagreements, the definition of redundancy was in the same line as that in the Regulation of wages (General) Order.

Before coming to the conditions to be fulfilled before the step can besaid to be satisfied, it is necessary to set out herein below the definition as set.out in The Trade Dispute Act Cap 234 Laws of Kenya. Under section 2thereof redundancy is defined as follows:-

"redundancy" means the loss of employmentoccupation, job or career by involuntary meansthrough no fault of an employee involving terminationemployment at the initiative of the employer wherethe services of an employee are superfluous and thepractices commonly known as abolition of office jobor occupation and loss of employment due to the "

Kenyanisation of a business; but id does not includedany such loss of employment by a domestic servant"

The above definition speaks for itself. Redundancy is an option taken, at the instance of the employer. The loss on the part of the employee is involuntary and the declaration that the services of an employee are superfluous is at the absolute discretion of the employer.

Under the Regulation of Wages and Conditions of Employment act, Cap 229 Law of Kenya, Regulation 15 of The Regulation of Wages (General) Order provides as follows:-

"15. Where the employment of an employee is to be terminated onaccount of redundancy, the following principles shall apply -

(a) the union of which the employee is a member or the LabourOfficer of the area shall be informed of the reasons for andextent of the intended redundancy;

(b) the employer shall have due regard to seniority in time andto the skill, ability and reliability of each employee belongingto a particular category of employees affected by theredundancy;

(c) no employee shall be placed at a disadvantage forbeing or not being a member of a trade union;

(d) any leave due to any employee who is declared redundantshall be paid for in cash;

(e) a redundant employee shall be entitled to one month's noticeor one month's wages in lieu of notice;

(f) an employee declared redundant shall be entitled to severancepay at the rate of ten days' pay for each completed year ofservice."

In one of the cases cited, herein: adjudicated upon by the Industrial Court of Kenya. - Cause NO .94 of 1993 Kenya Airline Pilots Association and Kenya Airways Limited; the Court, faced with the issue whether the Respondent was entitled to declare the grievants redundant set out the definition of redundancy set out hereinabove and proceeded to say:-

"Thus, redundancy means involuntary and permanentloss of employment caused by an excess ofmanpower. The situation can be brought about bymany factors, such as change in the method ofworking, reorganisation and technological changes due to economic conditions, etc. Although redundancy moves are generally made by theemployer, it is a method of determining theemployment contract. However, in many establishments there are agreements on redundancybetween the union and management In the main,agreements stipulate that where redundancy isapprehended in any section of the Employment theemployees have to be informed through the unionrepresentatives, so that those to be affected will betold exactly why they, and not the other employees,are being affected; and in all cases of redundancy, theinitial burden lies upon the management to prove (I)that the grounds of redundancy exist, (ii) that theemployer has acted bonafide, and (iii) that theemployer has followed the golden rule of "last comefirst go" or first in last out."

It is the defendants case that all requirements of law and Collective Bargaining agreements were complied with, all payments due and owing to the plaintiffs were paid and no claim lies against the defendant. This isdisputed by the plaintiffs.

The basic reasons for declaring the plaintiffs redundant were said to be financial constraints and overemployment. It is clear however that the plaintiffs did not contribute to that state of affairs. In fact all fingers point at gross mis management during that particular period. It is significant to note that subsequent years after the then management was shown the door, the defendant established itself as a profitable institution capable of standing on *its* own.

Be that as it may, there is evidence that the redundancy exercise wasdone in a hurry (DW3) Mr. Muhindi). The principle of last come first gowas not accepted. Managers were given a week to provide a list of those tobe declared redundant or else they also go home. In the words of the defence witness.

"The whole exercise was done in a clumsy manner.There are possibilities that some people went awaybut should have remained and vice versa... It is notsurprising that the whole Board was fired due tomismanagement. Now there is proper management.If there was proper management that situations couldnot have arised."

The fore going evidence is very incriminating against the defendant. Itgives credence to the plaintiff's position that if anything all things beingequal, most of them would still be in the employment of the defendant.Looking at Regulation 15 cited above and in particular clauses (a) and (b), and after relating the same to the evidence adduced, 1 find that the redundancy was not only misplaced but illegal. There is no other way todescribe any action that does not comply with the law.

The Industrial Court decision cited above is not finding on this courtbut is persuasive enough for one to agree that the principles of fair play werenot observed in this case.

In view of the foregoing I find that the plaintiffs have suffered loss anddamage.

If I were to find that the redundancies were properly effected, I wouldhave arrived at the conclusion that the plaintiff's were properly compensatedunder the law and terms of agreements executed on their behalf by theirunion representatives. But that is not the case.

The plaintiffs are however duty bound to prove whatever loss and/or damage they have suffered to justify any award.

It is trite law that special; damages must not only be specificallypleaded but must also be strictly proved. And so, it is not enough for a partyto set out figures in the pleadings and tell the court. "This is my claim, can Ihave it?" Evidence must be called and in cases of figures the claim must bejustified by mathematical precision.

Have addressed the contents of paragraph 6A of the amended plaint and related the same to the evidence adduced on behalf of the plaintiff'sespecially through Pw5 John Wills Otieno Owilli. It is clear from hisevidence in chief and answers on cross examination from the learned counselfor the defendant that, apart from the otherwise impressive compilation ofwhat was perceived to be the plaintiffs' claim, the witness could not conclusively justify the figures therein.

Further to the foregoing, the computation of the claim for leave due but not paid has no economic justification. Ex gratia payments like the termitself suggests is at the discretion of the employer. The claim from theprovident fund reserve is also, with respect, misplaced as the fund was runby Trustees whose operations were independent of those of the defendant. Inany case, whereas evidence adduced shows that different plaintiffs would beentitled to different amounts were such a claim to succeed, we only have blanket figure in the pleadings without any: guide as to how it has beenarrived at.

And so, I must find, as I hereby do, that the plaintiffs have failed toprove their claim as set out under paragraph 6A of the amended plaint.

However, all is not lost. There is evidence that, knowing the plaintiffs claim, having heard some substantial part of the evidence and notwithstanding that the defendant had denied the total claim by the plaintiffs, some cheques in the names of some plaintiffs were forwarded to their advocate for onward transmission to the plaintiffs. This to me appears to be a tacit admission on the part of the defendant that the plaintiffs were entitled to more than was paid out to them when they were declared redundant. There was a spirited objection by the defendant to the production of the said cheques which however was overruled by the court and this is a telling indication of how disorganized the whole exercise was carried out.

In the case of Kenya Airline Pilots Association case cited above, the Industrial Court being mindful of the purported restrictions imposed by contracts of service gave the dispute a human face and declared:

"Old principles of absolute freedom of contract and the doctrine of laisez faire have yielded place to new principles of social welfare and common good, we are no longer living in the age of laissez faire and the contractual rights and obligations are not only subject to the principles of industrial but also subject to theprinciples of social justice which is not based oncontractual relations and is not to be enforced withthe principles of contract of service. It is somethingoutside these principles and is invoked to do justice,without a contract to back it."

The court, termed as untenable and baseless the respondentscontention to base an award of damages on the contract of service. In thatcase the grievant were awarded all their entitlements under the redundancyclause and in addition, each be paid compensation equivalent to one yearsalary, excluding allowances, for loss of employment. With respect I agreewith the line of reasoning adopted by the Industrial Court.

The plaintiffs pleaded Loss of service. The loss was involuntary.Their contracts of service indicate the retirement age. In today's saturatedlabour market, where technology has taken over the functions of the humanhand and mind, such an experience can be traumatic if not devastating. Onedoes not have to look beyond our jurisdiction to know the impact of themuch talked about retrenchment exercise

I believe that any employee should be adequately compensated for.

Involuntary of loss of service for the reminder of the period he would haveworked had all things been equal. In that regard therefore, where the provisions of law are inadequate and/or collective Bargaining agreementsare wanting, and therefore likely to result in injustice, the courts should be ina position to fill

the void.

Yet it is well known that, not all employees may work upto the end oftheir prescribed retirement age. They may leave voluntarily they, may die ofaccident or natural disease. These are only factors that should be taken intoconsideration when computing what an employee should be paid whendeclared redundant illegally.

In view of the foregoing, I find that each of the plaintiffs herein shallbe paid, in addition to what has already been paid by the defendant,compensation equivalent to the remainder of his or her term of service withthe defendant based on the retirement age. The said compensation shall bebased on the net monthly salary as at the month of May, 1990 when the purported redundancy was effected excluding any allowances. Further, thesaid payment shall he discounted by one third *(1/3)* to account for unforeseeneventualities of life.

The said payments shall be computed and paid out within 15 days ofextraction of the decree herein.

The plaintiff said sums from the date of filing the amended plaint, that is, 7th October, 1997 until payment in Ml. They shall also have the costs of this suit.Orders *accordingly.*

Dated and delivered at Nairobi this 23rd day of February 2001

A. MBOGHOLI MSAGHA

JUDGE

Mr. Mundia holding brief for Dr. Khaminwa for the plaintiffsMr. Kiragu for the defendants