



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 226 OF 2016

MOGIRE MAGETO JAMES.....1ST CLAIMANT
MARTIN NDICHU MURUGA2ND CLAIMANT
CHARLES MURUCHA OSUMU3RD CLAIMANT
GILBERT MUGIRE OBARA4TH CLAIMANT
HIRAM ALICE WANJIKU5TH CLAIMANT
JOHN G MBUGUA.....6TH CLAIMANT
MOSES MUSEMBI NZIOKA7TH CLAIMANT
ISAAC NJENGA KINUTHIA8TH CLAIMANT
OSCAR LENJANI MUTISYA9TH CLAIMANT
JOSEPH NGILA SILA10TH CLAIMANT
EVANS NYAKWEBA11TH CLAIMANT
STEPHEN MAINGA MUNYAO12TH CLAIMANT
FRANCIS MWANGI MUBIA13TH CLAIMANT

VERSUS

VITAFOAM PRODUCTS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants were employed by the Respondent on diverse dates and engaged in various capacities as drivers, production operators, supervisors and store clerks. They were all members of Kenya Chemical and Allied Workers Union and they aver that they executed duties assigned to them diligently and satisfactorily from the date of employment until their contracts were terminated.
2. They further aver that they were laid off without any prior notice in breach procedure set out in the Collective Bargaining Agreement (CBA) signed between the Respondent and their union on 31st August, 2012. In their view, therefore, the termination was unfair and unlawful.
3. The Claimants also aver during their period of service to the respondent, they were never given annual leave or paid for the accrued leave. They further aver that during the entire period of service, they were grossly underpaid by the Respondent contrary to the Collective Bargaining Agreement and/or Minimum Wage Orders in force at the time.
4. In view of the matters aforesaid, the Claimants filed the Memorandum of Claim dated 17th February, 2016 seeking the following reliefs:

(a) Declare that the Claimants were permanent employees due to fluxion of time and convert their employment from casual to permanent;

(b) Make an award for;

(i) One month pay in lieu of notice (for all the Claimants) = Kshs. 308,916/-

(ii) Annual leave due = Kshs. 2,094,197/-

(iii) Outstanding salaries due to underpayment

= Kshs. 28,115,696/-

(iv) Damages wrongful dismissal = Kshs. 3,706,992/-

TOTAL KSHS. 34, 225,801/-

(v) Certificate of Service

(vi) Costs of the Cause

5. The Respondent filed a Memorandum of Defence dated 29th March, 2017 in which it averred that the 1st - 5th Claimants absconded duty in November, 2014 long before the redundancy took place and were subsequently removed from the payroll. It further averred that the 6th and 7th Claimants were permanent and pensionable employees who left employment on 18th March, 2015 after being dismissed summarily for gross misconduct.

6. The Respondent further stated that on or around April, 2015 it initiated the process of restructuring and reorganizing its operations and as a result the casual employees including the 8th – 13th claimants, were to be managed by a Human Resource Management Company called Robs Investments Limited under an outsourcing agreement.

7. The Respondents further averred that it served a notice of intended redundancy to the National General Secretary of the Kenya Chemical Allied Workers Union and a copy was issued to the District Labour Office. It further averred that the Union challenged the Respondent's intended redundancy vide Industrial Cause No. 737 of 2015 but the suit was settled by a consent agreement dated 8th June, 2015 between the union and itself.

8. It averred that by the said consent, the redundancy was upheld and the terms of the consent have never been varied, reviewed and/or discharged. It further averred that 89 employees out of the 102 employees affected by the redundancy collected their dues which were calculated as per the terms of the prevailing Collective Bargaining Agreement dated 31st August, 2012. The Respondents further averred that the Claimants were paid as per the prevailing wages, given notice and a statement of dues calculated up to the date of termination. Consequently, it averred that the termination was fair and prayed for the suit to be dismissed with costs.

9. The suit went to full hearing where both sides gave evidence and thereafter filed written submissions.

Claimants' case

10. Isaac Njenga Kinuthia the 8th Claimant testified as Cw1 and stated that he had authority to testify on behalf of all the other Claimants. He adopted his written statement dated 17th February, 2016 as his evidence. In brief he testified that he was never given a termination notice before his employment was terminated. He further testified that, during his service, he was neither given leave nor paid in lieu of the same.

11. He testified that on 30th April, 2015 he worked the entire day and in the evening when he went to receive his pay, he found that it was more than the usual pay. He found Kshs. 221,422 yet he was expecting Kshs. 798 that day and upon asking why the big pay, he was informed that his job was over. He declined to collect the money and left since he was not given a breakdown of the money. He testified that the other claimants also declined the money and like him, they are yet to receive their terminal dues.

12. On cross examination he testified that he was not told that he had been declared redundant rather that his job was over and that he should sign a contract with the people who were paying them. He told the Court that the people paying them were strangers.

13. He admitted that he was a member of the said trade union, but denied that he was aware that the union had filed a suit in court. He also denied that he instructed the union to file a suit on his behalf and on behalf of the other Claimants.

14. He reiterated that he had declined to collect the Kshs. 221,422 that was offered to him because he was not supplied with sufficient detail. He told the Court that he did not know whether the money offered included leave and severance pay. He maintained that he was underpaid during his employment.

15. On re-examination CW-1 stated that he never received a redundancy notice and that the case filed by the union was for other people.

16. Alice Wanjiku Hiram testified as CW-2. She also adopted her written statement dated 17th February, 2016 as her evidence. She told the Court that on 20th November, 2014 she was told that work had reduced and asked to go home without prior notice. She was not paid any money upon the termination.

17. On cross examination she stated that she was employed by the Respondent as a machine operator (casual worker) and that her job ended on 20th November, 2014. She told the Court that she did not know why her job ended and it was not true that she did not attend work in November, 2014. She said that she was dismissed along the 1st - 4th Claimants on 30th November, 2014 who were also casual workers.

18. On re-examination she stated that she was never issued with a termination letter and a statement of her final dues.

19. Oscar Lenjani Mutisya testified as CW-3. He also adopted his written statement dated 17th February, 2016 as his evidence. He stated that he was on duty on 30th April, 2015 and worked till evening when he went to collect his pay but was surprised to find Kshs. 86,000 instead of the expected usual weekly wage of Kshs. 6,000. He further testified that he was told to sign for the money and a new contract but declined. He stated that he was yet to receive his pay.

20. On cross examination he stated that he did not ask about the contract because he did not have prior notice that he was going to sign a new contract. He admitted that he was a member of the Chemical Workers Union and that he was aware the union had authority to represent workers. However, he denied knowing whether the union had filed a case in court. He also denied ever seeing any consent recorded by the union and the Respondent and that he was not aware about the alleged settlement.

Respondent's case

21. Nicodemus Kimei Mukule, an accountant with the Respondent since 1st May, 1991, testified as RW-1. He also adopted his written statement dated 10th June, 2017 as evidence in chief. He also produced as exhibits the list of documents dated 29th February, 2017 and 12th June, 2019.

22. In brief, he stated that the 1st – 5th Claimant were employees of the respondent from 2005 to 2014, when they the deserted work and the Respondent removed them from the payroll. He further stated that the 6th and 7th Claimants were permanent employees who were summarily dismissed on 18th March 2015 for gross misconduct and their terminal dues paid. Therefore he contended that the 1st - 7th claimants left the company before the redundancy notice.

23. However, he testified that the 8th - 13th Claimants were declared redundant and their dues were computed and paid according to the terms of the collective bargaining agreement that was in force at the time. He testified further that the union and the labour offices were involved in the redundancy exercise which was done in order to transfer the casuals to an outsourced contractor, Rob Investment Limited, through whom the terminal dues were to be paid. He contended that the terminal dues included notice and accrued leave.

24. He told the Court that the claim for underpayment was not valid since the claimants' salary was paid as per the collective bargaining agreement. He further testified that the claim for gratuity by 1st – 5th claimants must fail because they deserted work without prior notice. He further contended that the 6th and 7th Claimant are not entitled to gratuity because they were summarily dismissed, and such they were not entitled to notice, leave and gratuity. He told the court that severance pay was paid to the 8th – 13th Claimant because they exited through the redundancy.

25. On cross examination he stated that the 1st- 5th Claimant absconded work and were nowhere to be found in order to be served with notice to show cause or termination letters. He contended that the P9 forms for 2014 show the computation of their dues which shows that the Claimant left work without notice and disappeared. He further stated that the Respondents were recording work attendance for the Claimants but contended, he could not produce the said records because they were lost in a fire incident. He admitted that the incident was not reported to the police but he produced photos as exhibits.

26. He reiterated that the 6th and 7th Claimants were summarily dismissed on 18th March, 2015 and he had computed their final dues. He told the Court that the dismissals were done verbally by the CEO. He reiterated that the records of their final dues as they were lost during the fire incidence.

27. He stated that the 8th – 13th Claimants were not served with redundancy notices personally but through their union. He contended that the redundancy was to transfer the casual workers to an outsourced company and that the redundancy was necessitated by the restructuring and reorganization of the company's operations.

28. He reiterated that following the redundancy notice the union filed industrial cause no 737 of 2015 and maintained that the union was representing its members including the Claimants. He further told the Court that the consent agreement dated 8th June, 2015 referred to 89 employees who collected their terminal dues but he did not know whether the Claimants were part of the 89. He admitted that some employees who were to be reinstated by the Respondent as per the consent agreement but maintained that terminal dues were paid to employees who exited.

29. On re-examination he reiterated that the terminal dues for exiting employees were computed and paid by the Respondent.

Claimants' submissions

30. The Claimants reiterated that they were engaged by the Respondent on diverse periods of employment on a casual basis over several years as such they were entitled to conversion of terms from casual to permanent employees as stipulated in section 37 of the Employment Act, 2007 which provides for conversion of casual employment to permanent or a fixed contractual term. They relied on the case of **Nanyuki Water & Sewerage Company Limited vs. Benson Mwiti Ntiritu & 4 Others** whereby the Court of Appeal held that casual employees who had worked continuously for more than a month and the job could not be completed within three (3) months had converted to permanent staff by dint of section 37 of the Employment Act, 2007. They also relied on the case of **Charles Onchoke vs. Kisii University [2018] eKLR** where it was held that the casual employment of the claimant had converted to permanent employment because he worked continuously on average of 27 days per month inclusive of rest days and public holidays.

31. The Claimants further submitted that their termination was abrupt and unfair because they were not issued with termination notices. Consequently they prayed for the sum of Kshs. 308,916, being the aggregate one month salary in lieu of notice be awarded.

32. The Claimants also submitted that during the time they were employed they neither went on leave nor were they paid for the leave days not taken and therefore they prayed cash sought in the claim. They contended that the Respondent as the custodian of the employment records did not refute this claim by leave records but is using the fire incident as an excuse to defeat the claim.

33. The Claimants maintained that they were underpaid contrary to collective bargaining agreement dated 31st August, 2012 and proceeded to lay out specific instances of the underpayment.

34. They Claimants allege that the redundancy notice period was insufficient, the redundancy notice was dated 22nd April, 2015 and CW1 and CW2 testified that that they were terminated on 30th April, 2015 therefore the redundancy notice did not meet the statutory period of not less than one month as provided for in section 40 (1) of the Employment Act, 2007. The Claimants further submitted that they were not consulted and that the selection of those affected was not done objectively and in an open criteria. The Claimants relied on the case of **Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where the Court of Appeal held that for redundancies to be lawful the employer must ensure it meets the two fundamental requirements of substantive justification and procedural fairness. The Claimants further stated that the redundancy notice was upheld on the basis of Industrial Cause No. 737 of 2015 and yet the Claimants were not party to the suit and as such they were not bound by the consent agreement dated 8th June, 2015.

35. The Claimants submitted that during cross examination RW1 admitted that he did not pay the Claimants their terminal dues and neither was he aware if the same were paid to the Claimants. The Claimants submitted that their evidence that they did not receive any terminal dues and they were entitled to their terminal dues was not rebutted.

36. The Claimants submitted that the termination of their services was unfair hence they were entitled to maximum compensation for unlawful termination. They relied on section 49 of the Employment Act, 2007 and prayed that the Court award maximum damages of twelve (12) months.

37. The Claimants submitted that RW1 was not right when he testified that 1st to 5th Claimants left employment without giving notice and relied to the testimony of CW2 (5th Claimant) that she worked for the Respondent until 20th November, 2014 when she was dismissed with the 1st to 4th Claimants. Therefore it was submitted that the termination of the 1st to 5th Claimants was unfair and that they were entitled to damages sought.

38. Further, it was submitted the the 6th and 7th Claimants' summary dismissal was unfair and they entitled to the damages sought since the Respondent has failed to present proof that their terminal dues were paid.

39. Finally, the Claimants submitted that they have ably demonstrated the merits of their claim against the Respondents and urged for the reliefs sought plus costs.

Respondent's submissions

40. The respondent submitted that the claim by the claimants was bereft of merits and should be dismissed with costs. It structured its submissions into two levels, first with respect to the 1st -7th claimants and then 8th – 13th claimants.

41. Regarding the 1st - 7th claimants, the respondent submits that they all had left the company employment before 22.4.2015 when the redundancy notice was issued. It contends that the 1st – 5th claimant deserted employment in November 2014 and they never reported back to work. Consequently they were removed from the Pay Roll. On the other hand it contends that the 6th and 7th claimants were dismissed for misconduct on 18.3.2015 and their dues were paid. The respondent produced documentary evidence to support that allegation including statutory Form P9, final dues statements, among others.

42. As regards the 8th – 13th claimants, the respondent submits that their redundancy was justified and procedurally fair. It argued that, under section 40 of the Employment Act, employer has the right to declare redundancy provided it is justified and the procedure followed is consistent with section 40 of the Act.

43. It submitted that the reason for the redundancy was restructuring and reorganization of management systems in order to attain optimal efficiency; that it did so by opting to outsource the casual labour from a contractor, Robs Investment Limited; and that outsourcing was a valid and justifiable reason for declaring redundancy. For emphasis, it cited the case of **Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**.

44. As regards the procedure followed, the respondent submitted that it fully complied with section 40 of the Act by serving a Notice

detailing the reasons and the extent of the intended redundancy; by mitigating the effects of the redundancy to the affected employees by requesting the contractor to absorb all the casual staff including the 8th -13th claimants; and by computing the terminal dues payable to the affected employees as agreed between it and the trade union in a consent settlement in Cause number 737 of 2015.

45. It contended that the 8th – 13th claimants were members of the Kenya Chemical & Allied Workers Union, which filed the above suit to challenge the redundancy but an amicable settlement was negotiated by the union on behalf of the affected employees, including the 8th – 13th claimants and formalized vide the consent order dated 8.6.2015. The effect of the said settlement according to the respondent was that the redundancy was accepted and validated and the affected employees discharged upon receipt of their terminal dues. It is further the respondent's view that the 8th to 13th claimants are bound by the said consent because they were members of the union which negotiated the settlement.

Issues for determination and analysis

46. I have carefully considered the pleadings, evidence and the submissions. The issues for determination in this suit are:-

- (i) *Whether 1st -7th claimants were affected by the redundancy notice issued on 22.4.2015.*
- (ii) *Whether the claim by the 8th – 13th claimants is res judicata.*
- (iii) *Depending on (i) and (ii) above, whether the redundancy was justified.*
- (iv) *Whether the redundancy was done in accordance with the procedure set out under section 40 of the Employment Act.*
- (v) *Whether the Claimants are entitled to the reliefs sought*

Were the 1st -7th claimants affected by the Redundancy Notice?

47. The respondent contended that the 1st – 7th claimants left employment before the redundancy notice was issued on 22.4.2015. Cw2 who is also the 5th claimant confirmed that 1st - 5th claimant left employment on 20.11.2014. According to the respondent, the claimants deserted employment never to report back until the redundancy was declared. Cw2 contends that they were stopped from attending work by the respondent who promised to call them back after the normal business operations resume. The said claimants never raised any complaint and matter ended there. Having considered the above matters, I agree with the respondent that, whichever way, the said 5 claimants had left employment in November 2014 way before the impugned redundancy in April 2015.

48. On the other hand, the respondent maintains that the 6th and 7th claimants were dismissed from employment on 18.3.2015 even before the declaration of redundancy. In addition to the Cash Register for casual employees for April 2015, the respondent produced Computation of Terminal dues for the two claimants as evidence that they exited the company before the impugned redundancy. The said claimants did not adduce any documentary evidence or call witnesses to prove that they were in employment until the impugned redundancy was declared in April 2015. Consequently, I also find that the two claimants also were left employment before the impugned redundancy.

Whether 8th -13th claimant's claim is res judicata.

49. The respondent contends that after serving the claimant's union with the notice of the redundancy, the union filed suit to stop the intended redundancy, being cause number 737 of 2015 before this court. The respondent maintains that the claimants were members of the union and therefore they were bound by the outcome of the suit.

50. However, the claimants deny that they are bound by the outcome of the suit and maintains that they never instructed the union to file said suit on their behalf.

51. The question that arises from the foregoing arguments is, what is the effect of an employee's membership to a trade union which has recognition agreement with the employer? In my opinion, the purpose of joining a union is to attain collective bargaining power to face the omnipotent employer. On the other hand, when a trade union executes a recognition agreement with the employer it signifies that any negotiated agreement between the employer and the trade union binds the employees who are members of the union.

52. In addition, I am of the view that a trade union does not require prior consent or instructions before filling suit in its name on behalf of its members. By joining the union, an employee permits the union to represent him and to institute trade disputes against the employer. The agency relationship between an employee and his/her trade union is underscored by section 40(a) of the Employment Act which provides that where an employee is a member of a trade union, notice of redundancy shall be served on the union and not the employee.

53. The claimants have admitted that they were members of the Kenya Chemical and Allied Workers Union. The union was served with the redundancy notice and filed a suit to stop the redundancy. However, before the suit was heard, the employer paid all the affected employees with terminal dues except the 8th to 13 claimants who refused the pay for want of particulars. Thereafter, the employer and the union negotiated a settlement of the said suit and filed a consent order dated 8.6.2015.

54. The terms of the consent agreement were:

“1. Those employees who refused to collect their redundancy dues be reinstated forthwith as permanent employees to their previous positions without losing any benefits.

2. The redundancies of 89 employees who collected all their terminal benefits be upheld.

3. The union is free to confirm whether the terminal dues were calculated as per the Collective Bargaining Agreement for those who collected them.

4. The case be herewith marked as settled.”

55. My interpretation of the above consent is that the 8th-13th claimants were reinstated in their former positions as permanent staff while the other affected employees were discharged. The only outstanding issue was for the union to verify whether the terminal dues paid and received by the discharged 89 employee was in accordance with the CBA. Consequently, I find that the issue of whether or not the redundancy was lawful was resolved in Cause number 737 of 2015 between the trade union and the employer and therefore it is now *res judicata*.

56. The reason why the 8th – 13th claimants refused to take their terminal dues on 30.4.2015 was because they were not given the particulars of their dues. They never reported back to work after the consent settlement on 8.6.2015, which means that they preferred to receive the redundancy package and leave employment. They should therefore restrict themselves to the redundancy package and stop reviving disputes already settled before a competent court of law.

Whether the claimants merit the reliefs sought.

57. I will not make declaration that the redundancy was unlawful because as earlier observed that issue was resolved in Cause number 737 of 2015. Again, having found herein above that the 1st-7th claimants left employment way before the employer declared redundancy on 22.4.2015, I must now hold that they do not merit the reliefs sought in this suit. With due respect, I hold the view that their claim is just an afterthought.

58. However, the 8th – 13th claimants are entitled to the redundancy package under the CBA. As observed above, the reason why they refused to collect the amount offered was that no particulars were given. The consent agreement in Cause 737 of 2015 left room for verification as to whether the amount offered to exiting employee was in accordance with the CBA.

59. Under the CBA, employees declared redundant were entitled to normal notice or pay in lieu of notice, payment of wages, overtime and any other remuneration due upto the date of exit, severance pay at the rate of half a month’s pay for each completed year of service, and pro-rata leave and leave travelling allowance.

60. The respondent did not give the particulars of the amounts it offered to pay the affected claimants as terminal dues in its pleadings. However it produced as exhibits Cash Register and a schedule of payment (exhibit VP-2) which details the particulars of the items used to compute the terminal dues. The schedule indicates the items paid as wages for the days worked in the last month, overtime, leave, notice and severance pay. The said items are in accordance with the CBA and also section 40 of the Employment Act and consequently, the 8th – 13th claimants are awarded the same as computed under exhibit VP-2 in the respondent’s bundle of documents.

61. The claimants have also prayed for salary arrears occasioned by underpayment of salary. They have tabulated the amount owed in the schedule attached to the claim. However the respondent maintains that it paid the claimants their rightful wages under the CBA. I have carefully considered the evidence by both sides and I find that the claim for underpaid salary is also not proved and also an afterthought. The claimant and their union did not raise that claim before the employment ended. The salary paid to the claimants was in accordance with the CBA.

62. In conclusion I enter judgment in favour of the 8th – 13th claimants as follows:-

ISAAC NJENGA KINUTHIA (8TH CLAIMANT)Kshs. 221,422

OSCAR LENJANI MUTISYA (9TH CLAIMANT)Kshs. 83, 753

JOSEPH NGILA SILA (10TH CLAIMANT)Kshs. 2, 071

EVANS NYAKWEBA (11TH CLAIMANT)Kshs. 113,451

STEPHEN MAINGA MUNYAO (12TH CLAIMANT) ...Kshs. 49385

FRANCIS MWANGI MUBIA (13TH CLAIMANT).....Kshs. 117,287

63. Since the respondent failed to provide particulars of the above payment to the claimants before filing this suit, I award them costs of the suit plus interest on the respective awards at court rates from the date of filing the suit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF JANUARY 2022.

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

JUDGE