



**REPUBLIC OF KENYA**

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

**CAUSE NO. E403 OF 2021**

***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,  
HOSPITAL AND ALLIED WORKERS (KUDHEIHA).....CLAIMANT**

**VERSUS**

**THE NAIROBI HOSPITAL.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Claimant is a trade union registered under Labour Relations Act (2007). It represents interests of employees employed by the Respondent among other sectors within the scope of Claimant's representation. There is a Collective Bargaining Agreement with the Respondent dated April, 2020.

2. The Claimant address of service is care of **NCHOE JAOKO ADVOCATES** whereas the Respondent is Nairobi Hospital which is a private company registered as a Company limited by guarantee.

**CLAIMANT'S EVIDENCE**

3. The Claimant by a letter dated 30<sup>th</sup> April, 2021 discovered the following employees were being declared redundant: -

I am Noah Omeno (1), Benson Chelimo Tuitoek (2), Jeremiah Muteti Kituku (3), Leakey Okeyo Warwa (4), Michael Omolo Masori (5), Roselyn Anindo Otiato (6), Elphas Mbayi Savara (7), Florence Kamene Mbuti (8), Brian Nyakwaka Odhiambo (9), Lilian Ooyi Onyango (10) and without justification at all and contrary to the law.

4. The Claimant's aver the work which was being performed by the listed employees was not superfluous and still new recruitments were taking place to fill in the positions.

5. The Claimant avers the Respondent is overwhelmed with admissions of COVID 19 patients and so they claim the excuse of shrinking business is just an excuse and is not genuine.

They claim the shrinking business is an excuse Respondent is using to lay off targeted employees and employ persons of their choice.

6. The Claimants avers they undergo yearly performance appraisal and have not been found to be incompetent. They claim their productivity has not been wanting and so hospital's admissions and discharge of patients was overwhelming.

7. Further Claimant avers the selection criteria used by the Respondent was not objective but was based on improper application of section 40 of the Employment Act.

8. They also say they were not consulted by the Respondent before being declared redundant and were not given an opportunity to be heard contrary to the right fair labour practices under Section 41 of the Kenya Constitution 2010 and Labour Relations Act 2007.

9. They aver there was no timeliness given in which the said employees were evaluated.

10. The Claimant pray that the declaration of redundancy against the Claimant's union members be declared unlawful, null and void and two

the said declaration be found to be unfair labour practice.

They pray they be reinstated to their jobs and that none of them should be victimized.

They pray they be paid their benefits till this suit is determined plus costs, interest and any other relief the court may deem fit to grant.

11. The Claimant state that save for cases **ELRC NO.6463 OF 2020 and ELRC NO.273 OF 2021** on staff rationalization they are not otherwise aware of any other pending suit dealing with this same subject matter.

### **RESPONDENTS EVIDENCE**

12. The Respondent by his Memorandum of Response stated that they made a mention of a notice declaring positions held by some members of the Claimant redundant but denies the letters were dated 30<sup>th</sup> April, 2021 and further they deny that the said redundancy was without justification or contrary to the law as alluded.

13. The Claimant avers that Section 40 of Employment Act provide when an employer can terminate the employment of an employee on account of redundancy.

The Respondent says that upon conducting a restructuring process they duly issued termination notices to the named members of the Claimant union stating clear reasons for termination.

The Respondents say they issued notices dated 28<sup>th</sup> April, 2021 and the termination was to take effect on 30<sup>th</sup> April, 2021. They offered to pay the members of the Claimant where applicable as follows:-

- (a) Salary and applicable allowances upto date of termination.
- (b) Severance pay at the rate of one month for every completed year of service in accordance to Section 35 (5) and 40 (1) (9) of Employment Act.
- (c) Pay in lieu of notice as per Collective Bargaining Agreement and in accordance to Section 36, 38 and 40 (1) (9) of Employment Act.
- (d) Accrued annual leave
- (e) Wages for Public holidays earned.
- (f) Provident fund contribution in accordance with Provident Fund Rules.
- (g) In additional, medical cover upto six months post exit as per the policy limit.

14. The Respondent avers that redundancy of positions held by the named members of the Claimant was because of operational requirements which is a valid reason and fair for declaration of redundancy under the Law, and that process of separation was done strictly in conformity in law. The Respondent therefore denies the claim of paragraph 10 of the Claimants claim.

15. The Respondent denies they refused to participate in collective bargaining process and further says the same was not requisite of the commencement of implementation of the redundancy exercise.

16. The Respondent also says redundancy process does not fall under Section 41 of the Employment Act and so avers Section 41 is wrongly pleaded.

17. The Respondent says there was communication to all members of staff, Cabinet Administrative Secretary and District Labour Officer, Director of FKE and branch Secretary of the Claimant dated 10<sup>th</sup> March, 2021 and 24<sup>th</sup> March, 2021 and reasons contained in redundancy notices dated 24<sup>th</sup> April, 2021 in justifying grounds for redundancy.

18. The Respondent states they issued inter office memorandum to all members of staff dated 24<sup>th</sup> March, 2021 as to the determinate timeframe within which employees were evaluated.

19. The Respondent maintains the termination was not unfair and that Section 40, 43, and 45 of the Employment Act 2007 were complied with.

So they conclude that the reliefs claimed by the Claimants are not entitled to them.

### **ISSUES FOR DETERMINATION**

20. 1. Was the declaration of redundancy by the Respondent against some members of Claimants union unlawful?

2. Were the said members of Claimant union therefore unlawfully terminated?

3. Should the terminated members be reinstated to their employment.

4. Are they entitled to the reliefs prayed for.

### **DETERMINATION**

21. The Claimants witness one Ian Noah Omeno said he worked as a kitchen steward for the Respondent and he testified on his behalf and on behalf of the other nine members of the Claimants union.

He said he had worked for the Respondent for 11 years.

22. He states that on 28<sup>th</sup> April, 2021 he got a termination letter and the same was to be effective as from 30<sup>th</sup> April, 2021. This applied to the other nine members as well.

23. The letters given to the Claimants members were headed as “notice of redundancy of your position” and then proceeded to explain that further to the communication on organizational restructuring dated 24<sup>th</sup> March, 2021, the hospital had declared some of positions redundant due to the current financial and strategic direction of the hospital.

The Respondent went further to say the position of the ten Claimant members were among those restructured and declared redundant. Hence they all received their notices and were informed their termination was effective 30<sup>th</sup> April, 2021.

24. They were informed the terminal dues they would be paid. The said terminal dues are set out as well in paragraph 5 of the Respondent’s response to the claim.

25. The termination of the Claimant’s members was therefore by redundancy.

Section 2 of the Employment Act define redundancy as:-

“loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of Employment at the initiative of the employer, where the services of the employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.

26. The first of issue for determination in this case is whether the termination was fair and if not appropriate remedies to be issued. Section 40 of Employment Act outlines essential requirements to be followed by the employer for termination of employment on grounds of redundancy.

The obligations by the employer in declaring redundancy are in summary the following:-

- (1) Give notice to the union or labour office at least a month before the process commences.
- (2) If employee is not a member of trade union the employer should notify the employee personally in writing and the labour officer.
- (3) The employer should demonstrate he used criteria of seniority, ability and reliability to each employee.
- (4) If there is a Collective Bargaining Agreement it should not be used to the disadvantage of an employee.
- (5) Employee to be given one month notice or pay in lieu of notice.
- (6) Severance pay at the rate of not less the 15 days for each completed year of service.

27. In this case the Respondent issued an inter-office memorandum dated 24<sup>th</sup> March, 2021 and informed them of their plan to re-organize their operation. They said in the memorandum that their performance had declined due mainly to Covid 19 pandemic and so advised some positions will be affected by staff rationalization. They said the process will be completed by May, 2021.

28. The Respondent did not give any evidence or avail any documents given to the Claimant’s in person or labour officer responsible in the area advising on the procedure applied in the process.

There was only that general memorandum purported to be issued to all the staff.

29. Of course there was a letter written to the Claimants by the Respondent dated 10<sup>th</sup> March, 2021 referring to staff reduction but once again the Respondent undertook to inform all staff and to use criteria of how each staff fit in the revised organization structure, their skills and experience.

The court did not receive any evidence, oral or documentary to establish what process was followed by the Respondent.

30. Memorandum dated 24<sup>th</sup> March, 2021 was the next document availed to this court. Then what followed were the notices of termination dated 28<sup>th</sup> April, 2021. All in all no evidence was produced in all fairness to demonstrate the process used in declaring these members of the Claimant redundant.

31. It is trite law that employers have prerogative to determine the structures of their businesses and therefore make positions redundant. **Positions** and not **employees** become redundant.

In the case of **JANE I KHALECHI VS OXFORD UNIVERSITY PRESS EA limited (2013) eKLR CAUSE NO. 924 OF 2010** the court well observed that the law applicable to termination of employment by redundancy is clear on what procedure to follow. It is a process that should involve positions and not employees as the subject.

32. The court further observed that Section 40 of the Employment Act gives conditions precedent before one is declared redundant.

These conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affects workers livelihoods and where this must be done by an employer, the same must be put into consideration.

33. In this particular case I have painstakingly considered the pleadings and submissions by all the parties as well as the evidence given in court by both the Claimant's witness and the Respondents witness and have observed that the Respondent did not adhere to the mandatory procedure provided in Section 40 of the Employment Act or at all.

34. In the other cited decision of the Court of Appeal on termination on account of redundancy **KENYA AIRWAYS LIMITED VS AVIATION AND ALLIED WORKERS UNION KENYA AND 3 OTHERS CIVIL APPEAL 46 OF 2013**

The court of Appeal held that loss of employment by redundancy has to be at no fault of the employee and arises where services of an employee are superfluous through the practice commonly known as abolition of job or occupation and loss of employment".

In this particular case the members of Claimant some were stewards in the catering department and some in the front office Assistant Department. There was no evidence produced before this Honourable Court to prove these department were abolished or were no longer in operation.

Indeed there was an advert in the inbox (advert of April, 2021) advertising for positions of Front desk positions.

35. The Respondent is the leading private hospital in the region and had a duty as required in law to prove these positions were rendered redundant and to be very transparent on the whole process.

Regrettably there was no evidence produced to show the same. The fact that there was an advert for front office jobs shows clearly positions were not redundant therefore.

The court in the same case held that it was not the Industrial Court's duty to question Kenya airways strategic intent or to reach a conclusion that the company must be on the verge of collapse or bankruptcy on the face before a decision could be taken to declare redundancy.

In other words the court observed that an employer has a right to declare redundancies to save the same from collapse.

36. Having said so the court notes with approval the English case of **CHEPMAN VS GOONVEAN & JROSTOWRACJ CHINA CLAY LIMITED (1973) ALL ER 1973 in which LORD DENNING M. R.** which held that it is not redundancy where the requirements of business of affected employees continues just the same as before.

37. Further the ILO Convention No.158 of termination of employment 1982 and termination of employment Recommendation No.166 (1982) acknowledge that employers can terminate employment for reason of economic, technological, structural or similar nature. These instruments of international labour standards require that employers notify and engage trade unions and the competent authorities in consultation where employer is contemplating declaring the employee redundant.

38. In the case of **KENYA AIRWAYS LIMITED VS AVIATION & ALLIED WORKERS UNION KENYS (SUPRA).**

The court held that consultation with employee is necessary under Article 13 of Recommendation No.166 of the International Labour Organization Convention No.15 and Termination of Employment Convention 1982.

39. The court therefore observed consultation is aimed at giving parties, one an opportunity to consider measures to be taken to avert or to minimize the termination and secondly measures to mitigate the adverse effects of termination on the workers concerned such as alternative employment.

The court observed consultation must be real not cosmetic. It is not a charade so they warned.

"The consultation must be a two way discussions between employer and the union/employees to be conducted with candor, reasonableness and commitments towards addressing the concerns of both the management and the employees and focused on reaching solutions" as further

observed by the court.

In my very carefully considered opinion there is no evidence before me that such consultation happened and to the indictment of the Respondent.

40. Also for the criteria used by the employer to choosing the affected employees again there was no evidence presented to me to demonstrate the same.

As earlier observed selection should be based on seniority in time skill, reliability and ability of each employee of the particular class of employees affected by redundancy. Seniority in time is often characterlisted as LAST IN FIRST OUT (LIFO) principle.

The same is a guideline not mandatory but in any event the criteria used to declare the redundancy should be well documented. The employer should not merely cite re-organization without basis to identify or to single out an employee for termination. Out of their members declared redundant how many were considered and how many were in that Department, what criteria was applied? There is no evidence on these issues.

41. In conclusion in the **KENYA AIRWAYS CASE** the court held that the appellant failed the threshold of procedure of fairness in implementing redundancy decision. It failed to give notice to the labour officer and adequate and proper notice to the affected employees or their union. It failed to hold meaningful consultation with the affected employees or their union and its selection of affected employees was not based on an objective and open criteria.

42. It is prudent as I summarize my determination to mention there is statement by the Respondent Chief Executive Officer of 3<sup>rd</sup> May, 2021 where he defended the rationalization program and said the Respondent had engaged their staff and their representatives including various unions in the past months. He said they had now exhaustively discussed their rationalization program and is now being implemented.

43. As very clearly determination there is no evidence oral or documentary or at all as to how this process was carried out and in the end the court is still convinced the process was unprocedural and flawed.

44. The Respondent have no letters, minutes of any meetings or any other tangible evidence on how the process was carried out. I would also allude to the submissions by the respective advocates of the respective parties and in particular the fact that the Respondent in his submissions refer to the Collective Bargaining Agreement between the Respondent and the Claimant dated 11<sup>th</sup> May, 2020. The Respondent submits that they relied on provisions of Section 40(1)(c) of Employment Act and Clause 18(11) of Collective Bargaining Agreement. However as I have said before not once but several times I have no tangible evidence on this claim I am afraid.

45. The Respondent claims they sent a notice to the Claimant union and invited them for a discussion. The letter to Albert Njeru – Secretary General of KUDHEIHA of 10<sup>th</sup> March, 2021 was general letter to notify him the hospital was to embark on restructuring process. It was not an individual notice of specific invitation to consult on the various grounds of termination.

46. Also the Respondent in its submissions says that they also apart from depending on Section 40 of the Act it should be read together with Sections 43, 45 and the Employment Act. They then embark on showing that the Law in Section 45 (2) (b) of the Act provide termination on operational requirements of the employer. The court has already noted from various authorities that any employer has prerogative to declare redundancies so long as they follow the procedure as laid down in Section 40 of the Act.

47. Section 43 of the Act where employer is required to give a valid reason for termination. The Respondent says they have given a valid reason being operational requirements. The court has still not seen any tangible grounds of the operational gaps or shrinking business or even declaration of the Claimant's positions redundant.

48. Section 47(5) as cited refer to the burden of proof of unfair termination which rests on the employee while burden of justifying the grounds of termination of employment or wrongful dismissal shall rest on the employer. The Respondent submit they have discharged the burden of proof. I find from the evidence otherwise.

## **CONCLUSION**

49. In conclusion and as earlier observed, I considered all the evidence carefully and painstakingly as well as submissions and authorities by the respective parties and all in all.

50. Also the Respondent referred to the earlier filed case of stoppage of rationalization of the Respondent organization being case No.E273 of 2021. The Ruling by my sister Lady Justice Monica Mbaru made it clear the said case was not sub judice to this particular case.

51. I am persuaded that the Respondent in this particular case failed in all fronts to comply with the requirements of rendering redundancy as stipulated in Section 40 of the Employment Act by: -

- a. Failing to give notices to the Claimants.
- b. Failing to hold meaningful consultancy with the Claimants.
- c. Failing to demonstrate how its selection criteria of affected employees was based on an objective or open criteria.

Subsequently the court is of the considered view that the decision taken by the Respondent to terminate the employment of the Claimants members was procedurally unfair and was not based on reasonable grounds.

Judgment is entered in favour of the Claimants.

**RELIEFS AWARDED**

52. (a) The Claimants main prayer is reinstatement of all employees being their members thereof who were affected by restructuring by the Nairobi Hospital.

(b) Also that no employee be victimized as a result of this suit.

(c) costs of this suit.

(d) interest on costs.

(e) Any other relief this Honourable Court may deem just and fit to award.

53. The Employment Act Section 49 3(2) provide for reinstatement of an employee and treat the employee in all respects as if the employees' employment had not been terminated and of course there are considerations in reinstating as provided in subsection 4 of the said

Section 49.

The remedy for reinstatement is not an automatic right to an employee whose employment is terminated unlawfully. It is indeed a discretionary remedy and depends on the special merits of each case and the guiding principles are as set out in the said Section 49 of the Employment Act.

54. As observed in the case of **KENYA AIRWAYS LIMITED VS AVIATION & ALLIED WORKERS UNION KENYA (SUPRA)** reinstatement depend on practicability of the relief and practicability include reasonableness which invoked broad inquiry into equities of the parties cases; such considerations would include the prospective effects of the order of reinstatement, not only upon the individual employer and employee, but also other affected employees and third parties.

The court also considered that the Claimants did not tender evidence on practicability or otherwise of the order of the reinstatement.

55. It is about ten months since the Claimants left the Respondent's employment and even as testified by the Claimant witness other employees have already taken those positions. The positions are no longer open and there is no point of making orders that will be difficult or impractical to implement.

The court also addressed the general principle that courts will not force parties to a personal relationship against the will of any one of them. That will breed friction which is not conducive for business. I therefore decline to reinstate the Claimants members.

56. I however will grant the Claimants members equivalent of 12 months' salary based on their gross monthly wage for each of them.

57. I will also grant them interest at court rates till payment in full.

58. Costs follow the event and so I will award the Claimant's costs.

59. The Respondents claimed to have paid the Claimants terminal benefits as provided in the Employment Act and in their Collective bargaining Agreement but if any of the Claimants have not received the same they can inform the court accordingly for further orders.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 20TH DAY OF JANUARY 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

The court did not see the actual gross salary of the Claimants members.

The Claimants are ordered to present their accounts for the 12 months' salary to this court by 28<sup>th</sup> February, 2022 in order to give final directions. Mention on 28<sup>th</sup> February, 2022. The Respondent also to produce documents to prove payment of the Claimant's dues according to the law.

Delivered, dated and signed in Nairobi this .....day of .....2022.

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**