



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. E014 OF 2020**

**KENYA ENGINEERING WORKERS UNION.....CLAIMANT**

**VERSUS**

**MOHAN ENGINEERING WORKS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant lodged this claim vide a Memorandum of Claim dated 7<sup>th</sup> October, 2020, and filed in court on 28<sup>th</sup> October, 2020, on behalf of two of her members, namely **Joshua Oloo** and **Kevin Oduor** who were formerly employees of the Respondent.
2. The Claimant seeks payment of salary arrears, pay in lieu of notice, House allowances, and service pay for years worked.
3. The Respondent entered appearance and filed a Response to the claim on 1<sup>st</sup> December, 2021.
4. The Claimant presented **Mr. Joshua Oloo**, one of the grievants in the matter to testify on her behalf and on behalf of his co-grievant. The witness adopted his witness statement as his evidence in chief in the matter. The Respondent did not participate in the hearing and hence did not present any witnesses.
5. The Claimant filed submissions in the matter.

**The Claimant's Case**

6. The Claimant's case is that their member/grievant **Joshua Oloo** worked for the Respondent as a mechanic from October, 2008, earning a monthly salary of Kshs.21,317/- and a house allowance of Kshs. 3,193/-. It is the Claimant's further case that **Kevin Oduor** was engaged in August, 2014, as a spray painter on a monthly salary of Kshs. 10,000/-.
7. It is the Claimant's case that the Respondent for reasons unknown to the Claimant, defaulted in remitting rent for the business premises where the grievants worked, prompting the Landlord to lock the grievants out of their place of work.
8. The Claimant states that most employees of the Respondent had by the time the premises were locked, been paid their terminal dues except the grievants herein.
9. It is the Claimant's case that the Respondent told the grievants in October, 2018, not to report on duty until such time when she is able to acquire alternative business premises.
10. The Claimant states that the grievants waited as instructed but two months later, the Respondent had neither acquired new premises nor informed them of progress or the way forward in the circumstances. The Claimant states that the grievants reported the issue to their Union/Claimant which reported a trade dispute resulting in the Minister appointing a conciliator in the matter.
11. It is the Claimant's case that parties did not agree during the conciliation process leading to the Conciliator issuing a certificate of unresolved issue, and hence this suit.
12. The Claimant states that the Respondent is in breach of the Collective Bargaining Agreement in force between them, Section 41 of the Employment Act, on procedure for termination and Article 41 on fair labour practices.

13. The Claimant prays that this court awards her the prayers in her statement of claim.

**The Respondent’s Case.**

14. The Respondent states that the grievants herein were her employees. She further states that the Claimant was at all material times aware of the going-ons in regard to the Respondent’s business premises including that the Business Premises Rent Tribunal had dismissed the Respondent’s application before it, which allowed the Landlord to lock up the premises, and thereafter sold the Respondent’s equipment leaving her with no option but to close the business.

15. It is the Respondent’s case that she moved to file for insolvency before the High Court at Kisumu. It is the Respondent’s case that contrary to the Claimant’s assertion that she declined to attend the conciliation, that she had in fact obeyed, appeared and explained to the labour officer her predicament.

16. The Respondent states that her business has collapsed.

**Analysis and Determination**

17. I have considered the pleadings by the Claimant, the witness’ oral testimony and the submissions by the Claimant. The issues for determination are:

- i. Whether the Claimant’s members/grievants were terminated and if so, whether the termination was fair
- ii. Whether the Claimant is entitled to the remedies sought.

**Whether the Claimant’s members/grievants were terminated and if so, whether the termination was fair**

18. The Claimant’s case is that the grievants herein were locked out of the business premises where they were employed. The question then become whether this is a termination. The Claimant’s witness who is one of the grievants herein states that they were about 21 employees serving in the employ of the Respondent and who were all terminated. The witness told this court that the Respondent’s business premises were locked by the Landlord for failure of the Respondent to pay rent, leading to the closure of the factory which was their place of work.

19. The Respondent chose not to participate in the suit leaving the court with just the Claimant’s position of the events leading to the separation of the grievants from the Respondent.

20. The case as presented herein, depicts an employer facing financial difficulties and hence the inability to sustain her business. In my opinion, the manner in which the Claimant’s members/grievants left the Respondent’s employ, points more to redundancy than an ordinary termination.

21. The Employment Act, defines redundancy as **“the 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 an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”**

22. The reasons I call this a redundancy, is that the employees were terminated at the initiative of the employer, and for no fault of their own.

23. I find and hold that the Claimant’s member/grievants herein were ‘declared’ redundant.

24. Having held that the grievants were terminated on basis of redundancy, the next question for this court, is whether the redundancy was fair.

25. Employers are obligated to adhere to the provisions of Section 40 of the Employment Act, in the event of a need to declare redundancy. Section 40 states:

**“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) .....**

**(c) .....**

**(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."**

26. The Respondent must have been aware of the financial challenges her business was facing, prior to the Landlord locking up her business premises. She then ought to have foreseen the necessity of properly declaring redundancies instead of waiting for things to happen the way they did. A proper declaration of redundancy would have helped the Respondent mitigate her losses, as they say; a stitch in time saves nine.

27. The question for the court is whether the grievants were fairly terminated. Clearly, none of the steps envisaged under Section 40 of the Employment Act, were even attempted. No notice was given either to the grievants or their union/Claimant herein. In **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** – the Court of Appeal held:

**"... redundancy is a legitimate ground for terminating of a contract of employment provided there is a valid reason based on operational requirements of the employer and the termination is in accordance with a fair procedure."**

28. For reason that the Respondent herein simply told her employees to go home and wait, amounts to a declaration of redundancy, and for failure to adhere to the well laid out redundancy procedures, I find and hold that the termination of the grievants is unfair.

#### **Whether the Claimant is entitled to the remedies sought**

29. The Claimant seeks payment of salary arrears, pay in lieu of notice, House allowances, and service pay for years worked by the grievant.

30. Section 40 of the Employment Act, 2007, entitles employees declared redundant to one month's salary in lieu of notice and severance pay.

#### **Salary Arrears**

31. The Claimant has not told the court how many months the grievants worked without salaries and which months the salary arrears relate to. For this reason, the court is unable to make an award in respect of salary arrears. The claim is dismissed.

#### **Pay In Lieu of Notice**

32. The Claimant's members/grievants were evidently not issues with the notice of termination/redundancy notice. Although the Claimant seeks two months salary in lieu of notice, no evidence was adduced to show that the grievants were entitled to longer notice than that prescribed in Section 35 of the Employment Act. I award each of the grievants one-month salary in lieu of notice.

#### **Service Pay**

33. Having held that the termination of the grievants amounts to a declaration of redundancy, they per Section 40 of the employment Act, are entitled to payment of severance pay, and which is hereby awarded.

34. In conclusion, Judgment is entered for the Claimant as against the Respondent as follows:

- i. Payment of one-month salary in lieu of notice at Kshs. Kshs.21,317/- for Joshua Oloo, and Kshs. 10,000 for Kevin Oduor.
- ii. Severance Pay at Kshs. 212,940 for Joshua Oloo and Kshs.53,760/- for Kevin Oduor.
- iii. Half the costs of the suit as the Respondent did not participate in the hearing.

35. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24<sup>TH</sup> DAY OF MARCH, 2022**

**CHRISTINE N. BAARI**

**JUDGE**

#### **Appearance:**

Mr. Haraka Present for the Claimant

N/A for the Respondent

Christine Omollo- C/A