



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
ELRC. CAUSE NO. 767 OF 2015

Alice Ndaani.....1ST CLAIMANT
Zachary Odhiambo.....2ND CLAIMANT
Caroline Congo.....3RD CLAIMANT
Virginia Kimani.....4TH CLAIMANT
John Macharia5TH CLAIMANT
Boniface Muindi.....6TH CLAIMANT

VERSUS

**MWALIMU NATIONAL SAVINGS AND
CREDIT CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT**

JUDGMENT

1. The Claimants were employed by the Respondent in various capacities until November 2014 when their services were terminated on account of redundancy. According to the claimants the termination was discriminatory, unlawful, unfair and unconstitutional and without any justification. In addition, they averred that respondent failed to pay them their terminal dues and instead used the same to offset their outstanding loans prematurely.

2. Aggrieved by the foregoing matters, the claimants brought this suit on 6.5.2015 seeking the following reliefs:

(a) A declaration that the termination of each Claimant's services with the Respondent was wrongful, unconstitutional, unjustifiable, illegal and unfair.

(b) A declaration that any statements agreed to by the Claimants that payments made to them were in full and final settlement of all claims they had against the Respondent were secured through coercion and that there was no consensus ad idem and therefore was null and void.

(c) A declaration that to offset the Claimants loans due against the terminal benefits paid was unconstitutional as it amounted to subjecting the Claimants to servitude was illegal, unjustifiable and unfair.

(d) An order that the amounts of loan liabilities deducted from the Claimant's terminal benefits as more particularly set out under paragraphs 25 of the claim be remitted back and paid to the Claimants as part of their terminal benefits.

(e) An order that the Respondent and the Claimants do enter into negotiations with the aim of agreeing on how the loan liability of the Claimants to the Respondent should be settled and in the event that the parties fail to agree the Claimants should continue to settle their loan liabilities on the same terms and conditions including monthly instalments applicable at the time of their termination of service.

(f) An order for payment in lieu of leave to the undermentioned Claimants made up as follows:

- (i) 1st ClaimantKshs. 94,543/80
- (ii) 2nd ClaimantKshs. 25,988/-
- (iii) 4th ClaimantKshs. 45,350/30
- (iv) 5th ClaimantKshs. 110,578/-
- (v) 6th ClaimantKshs. 241,472/-

(g) An order for payment of dividend to the undermentioned Claimants made up as follows:-

- 4th ClaimantKshs. 118,500/-
- 5th ClaimantKshs. 146,200/-

(h) An order that the Claimants be compensated by payment of the salaries they should have earned between the date of their termination and their respective retirement ages as more particularly calculated at paragraph 28 and specifically fixed as follows:

- 1st ClaimantKshs. 13,515,180/-
- 2nd ClaimantKshs. 23,431,065/-
- 3rd ClaimantKshs. 19,238,889/-
- 4th ClaimantKshs. 11,820,600/-
- 5th ClaimantKshs. 12,821,952/50
- 6th ClaimantKshs. 22,325,677/-

(i) **WITHOUT PREJUDICE TO** (h) above an order for compensation to each Claimant for wrongful termination of service at the statutory rate of 12 months' salary as more particularly calculated below:

- 1st Claimant (183,880 x 12) - Kshs. 2,206,560/-
- 2nd Claimant(220,010x12) - Kshs. 2,640,120/-
- 3rd Claimant(170,055 x 12) - Kshs. 2,040,660/-
- 4th Claimant(164,175 x 12) - Kshs. 1,970,100/-
- 5th Claimant(153,925 x 12) - Kshs. 1,847,100/-
- 6th Claimant(268,230 x 12) - Kshs. 3,218,760/-

- (j) General damages for breach of each Claimant's constitutional right not to be subjected to servitude.
- (k) General damages for breach of each Claimant's constitutional right not to be subjected to unfair labour practice.
- (l) General damages for violation of each Claimant's constitutional right not to be discriminated against.
- (m) Interest on (f),(g),(i) above at the rate of 14% calculated from the date of dismissal until payment in full.
- (n) Costs of the suit.
- (o) Such other and further relief as the Honourable Court would deem justified.

3. The Respondent admitted that the claimants were its employees until they were discharged from service after a structural review and job evaluation by a Consultant in October 2014 and the Report prepared in November 2014. The Respondent averred that the said Report led to a decision to restructure and reorganize itself as advised by the Consultant. The restructuring and reorganization led to merging and restructuring of some job descriptions and thereby the claimants were affected. The Respondent further averred that the claimants were notified of the restructuring in advance both verbally and in writing. According to it, the restructuring was justifiable in order to enhance efficiency and productivity.

4. As regards the issue of terminal dues and the reliefs sought, the respondent averred that the off setting of the claimants loans using her terminal dues was lawful and in accordance with its internal rules which provide for settlement of all outstanding liabilities of exiting members of staff. It therefore, prayed for the suit to be dismissed with costs because it lacks merits and no violation of the claimant's rights was done.

5. The suit went to full hearing and all the parties gave evidence and thereafter filed written submissions.

SUMMARY OF EVIDENCE

6. All the six Claimants testified in this suit. In brief they told the court that they served the respondent in various capacities starting as junior staff but in due course, they all rose to managerial positions. They all served for along period and were aged 50 years and above in November 2013.

7. They further testified in October 2014 the respondent did a restructuring and job evaluation which lead to redundancy in November 2014 the respondent's CEO verbally told them that their services were no longer required and as such they should hand over immediately. The claimants were unanimous that the termination was done without any prior notice to hem and without any hearing. They also viewed the termination as discriminatory and in breach of the law because only those aged 50 years and above were discharged and the principal of "**first in last out**" was not followed. They also argued that they were treated differently from the CEO who also exited with them in respect of terminal benefits. They contended that the CEO was paid salary until the age of retirement.

8. The Claimants further testified that after the verbal termination the Respondent computed terminal dues and promised to credit their salary accounts but after they signed the termination letters, the money was never credited to their accounts bust instead it was used to offset their SACCO loans demurely. According to their SACCO loans were given to them as SACCO members and not as employees and as such the Respondent had no authority to recall their loans prematurely.They contended that the said action amounted to unfair labour practices and subjecting them to servitude contrary to the constitution.

9. As regards the signing to accept payment for the net terminal dues, the claimant contended that the signing was not done voluntarily but through inducement and coercion. They stated that they signed after being threatened that they would not be paid anything if they failed to sign. They also signed after being promised that the money would be credited to their accounts and that they would be given employment in future. They, therefore prayed for the reliefs sought in the suit contending that the net terminal dues did not include damages accruing from violation of their rights under the statute and the constitution.

10. The Respondent called Mr. Robinson Otieno, its HR Manager as its witness. He testified that the Respondent engaged Okunya & Associates as a consultant to review and do job evaluation on its establishment with intention to undertake organizational structure and job alignment. As a result the Claimants become redundant but they were allowed to apply for the new jobs that emerged. He further testified that the Claimants were paid all their dues after the discharge.

11. He admitted that the Claimants and the Labour Officer were not served with one month redundancy notice before the discharge. He further admitted that he was not present when the Claimants signed the discharge letter. He confirmed that only said Claimants were laid off and all were above 50 years old. He further confirmed that employees below 50 years were not declared redundant. He admitted that the Claimants served for over 20 years and people employed after them were not laid off. He admitted further that the principle of "**first in last out**" was not followed.

12. He confirmed that the loan agreements did not provide that the loans for Claimants will be recovered from their terminal dues upon exit. He admitted that the loans were given to the Claimants as SACCO members not as employees. He further admitted that the loan policy does not require that loans shall be recovered from terminal dues. He confirmed that the Claimant's terminal dues were used to off set their SACCO loans.

13. He confirmed that he was familiar with the procedure for redundancies and admitted that the process for declaring redundancies was not followed in respect of the Claimants. However, he denied that the Claimants were treated differently from the CEO Mr. Ojallo contending that the CEO was not laid off but he retired voluntarily and negotiated his package.

SUBMISSIONS

14. The Claimants submitted that their termination of their employment amounted to redundancy. They further submitted that the redundancy was done without following the mandatory procedure laid down under section 40 of the Employment Act and through discrimination on account of age. Consequently they prayed for compensation of 12 months salary each for unfair and unlawful termination.

15. In addition they submitted that further to the discrimination on account of age, they were treated differently from their CEO Mr. Ojallo who was given an early retirement and received salary upto his normal retirement age. The foregoing plus the fact that all the dues computed for the Claimants were used to off set outstanding loans, the Claimants submitted that they were subjected to unfair labour practices and servitude by the Respondent. Therefore, they prayed for damages for violation of their rights to fair labour practices and freedom from discrimination and servitude totalling to Kshs.10,000,000 each.

16. The urged the court to award the reliefs sought despite the fact that they signed the termination letter accepting the computed terminal dues as full and final.They maintained that they did not sign voluntarily but through inducement and coercion.

17. They relied on **Thomas De La Rue v David Opondo Omutelenia [2013] eKLR** to urge that a discharge voucher per se cannot absolve an employer from statutory obligation and it cannot preclude this court from enquiring into the fairness of a termination, but in each case the court can make a determination on whether the discharge voucher was willingly signed.

18. They further relied on **Ol Pejeta Ranching Limited v. David Wanjau Muhoro [2017] eKL** where the Court of Appeal held that damages for discrimination should be based on a global figure.

19. The Respondent submitted that the Claimants employment was terminated on account of redundancy and the same was done in compliance with Section 40(i) of the Employment Act. It contended that the Claimants were informed in good time that they would be declared redundant; that the reason for the redundancy was valid because it was necessitated by the Report on Strategic Plan for 2014-2018 that required reconstructing of operations. Consequently, the Respondent urged that the redundancy was procedurally and substantively fair and relied on **Water Ogal Amuro v. Teachers Service Commission[2013]eKLR** for emphasis.

19. As regards the off setting of outstanding loans using terminal dues, the Respondent submitted that the same was justified because it was within the internal rules and regulations. However, it conceded that loan agreement is a distinct legal obligation which is independent from employment as was held in **Jane Kennedy Kiriro v. Equity Bank (K) Ltd [2019]eKLR**.

20. As regards the claim for discrimination, the Respondent maintained that there was no discrimination and that it was entitled to undertake restructuring and reorganization. She urged that the CEO was retired while the Claimants exited on redundancy. Finally, it contended that the Claimants were not unfairly discharged and such they are not entitled to the reliefs sought therefore it prayed for the suit to be dismissed with costs.

ISSUES FOR DETERMINATION

21. There is no dispute that the Claimants were employed by the Respondent and that they were declared redundant. There is also no dispute that their terminal dues were computed and used to offset their outstanding loans. The issues for determination are:

- (a) Whether the redundancy was procedurally and substantively fair and lawful.
- (b) Whether the Claimants were the subject of discrimination and unfair labour practices.
- (c) Whether the Claimants are entitled to the reliefs sought.

Whether the redundancy was unfair and unlawful

22. For termination on account of redundancy to be fair, it must be done in accordance with the procedures laid down under section 40(1) of the Employment Act. First the employer must serve at least one month notice to the employee or (his union where the employee is in a union) and the area Labour Office. Secondly, the employer must undertake a fair selection process having regard to the principle of “**first in last out**” among other considerations. Thirdly, the employer must pay to the selected employees all leave days outstanding, salary in lieu of notice and severance pay.

23. In this case RW1 admitted that the procedure laid down under section 40(1) of the Act was not followed before laying off the Claimants. He admitted that the Claimants and the Labour Officer were never served with notice of the intended redundancy at least one month before the termination. The Claimants were also not involved in the selection process and the criteria used, according to them, was being over 50 years old. As such the court finds that the Claimants have proved by evidence that the redundancy was done abruptly and without regard to the mandatory procedure set out by the said statute. Consequently it is this court’s holding that the redundancy of the Claimants amounted to an unfair and unlawful termination within the meaning of section 45 of the Act.

DISCRIMINATION AND UNFAIR LABOUR PRACTICES.

24. The Claimants contended that they were subjected to discrimination and unfair labour practices through the unlawful redundancy, unequal treatment from their CEO, and the use of all their terminal dues to off set their outstanding loans prematurely. Starting with the issue of discrimination, RW1 admitted that all the Claimants were over 50 years when they were laid off and no employee below 50 years was laid off. RW1 also admitted that all the Claimants joined the Respondent before the other officers who were not laid off. The Respondent never adduced any evidence to prove that the criteria used was different from age. In particular, it never adduced any evidence to prove that those who were left behind possessed expertise which the Claimants lacked. Therefore I agree with the claimants that the Respondent discriminated them by disregarding the principle of “**first in last out**”, without any justification.

25. As regards discrimination on the basis of unequal treatment from their CEO Mr. Ogallo, I agree with the Respondent that the Claimants were not discriminated since they exited through redundancy while the CEO exited through early retirement with a negotiated package.

26. On the other hand, I agree with the Claimants that the action by the Respondent to off set their outstanding loans using all their terminal dues amounted to a violation of their right to fair labour practices, and freedom from inhuman treatment and servitude. The Claimants worked for the Respondent for many years.

27. RW1 admitted that there was no loan policy requiring that loans be recalled prematurely and off set using terminal benefits of an exiting employee. It is common ground that the loan agreements did not provide for the said off setting of premature loans using terminal dues. As rightly submitted by the Respondent, loan agreements are distinct and independent from employment contracts. The Claimants rightly contended that they obtained the loans as members and shareholders of the SACCO and as employees.

28. It is my view that, recalling SACCO loans prematurely and offsetting the same using employment terminal dues amounts so breaching obligations under employment contract by an employer. It is violating employees right to a fair labour practice under Article 41 of the

Constitution. It is also a violation of freedom from inhuman retirement and servitude because the employee is denied his/her financial benefits, which accrued from his labour to the employer. He is forced to go home empty handed, and possibly with loan obligations around his neck, not because he caused the separation, but because of the employer's own initiative and the zeal to remain at the top.

29. In my view, unless there is clear agreement or policy to the effect that outstanding loans of exiting employees are to be offset from terminal dues, the employer must never withhold such terminal dues from the exiting employee. The outstanding loans of an exiting employee must be recovered strictly under the loans agreement and any guarantee agreement.

RELIEFS

30. In view of the finding that the redundancy of the Claimants was not done in compliance with the statutory procedure set out under section 40 of the Employment Act and that it was done in violation of their right to fair labour practices and freedom from discrimination and servitude, I make declaration that the termination was wrongful, unconstitutional and unfair

31. As regards the contested settlement agreement, it is now trite law that such agreements constitute binding contracts between the parties thereto unless it is established by the disputing party that the agreement is actuated by vitiating factors that negate contract. As per the **Thomas De Le Rue Case** the court is to consider each case on its own merits.

32. In the instant case the termination letters stated as follows:-

“ . . . Accordingly, your final dues have been computed as follows:

Gross pay . . .

Less Tax . . .

Net pay . . .

Your staff account will be credited with the net pay on or before 22nd November, 2014.

. . .

Yours Sincerely,

CHIEF EXECUTIVE OFFICER

Iholder of ID NO.acknowledge receipt of Kshs..... as full and final settlement of my final dues.

Signed.....Date.....

cc: Labour Office”

33. Having considered the said letter and the settlement agreement, it is clear that it was drawn by the Respondent and presented to the Claimants just to sign; that the money was to be credited to the Claimant's staff account and not used to offset their outstanding SACCO loans; and finally the agreement does not state that the Claimants waived all other claims arising from their employment and the termination.

34. It follows that the purported settlement agreement, in my view was only limited to the employment benefits and did not amount discharge of the employer from other claims that arise from breach of statutory and constitutional obligations including undertaking lawful redundancies and not violating Claimants rights to fair labour practices and freedom from discrimination and servitude.

35. The foregoing observations notwithstanding, this courts is of the view that the Claimant have not placed before this court any evidence that they were coerced to sign the settlement agreements. I therefore decline to declare the settlement agreement null and void.

36. Having made a finding of fact, that the settlement agreements signed by the Claimants did not authorise the respondent to offset their outstanding SACCO loan with the agreed terminal benefits, I make declaration that offsetting Claimant's SACCO loans from their terminal benefits was unconstitutional, illegal, unjustifiable and unfair as it amounted to subjecting the Claimants to servitude.

37. The Claimants pray that the terminal dues unlawfully withheld be remitted to them. The Respondent has not tendered any evidence in the form of offer letter, loan agreement, or policy guide lines to justify its act of offsetting Claimants SACCO loans from their redundancy benefits. I therefore allow the prayer to have the net terminal dues set out in the settlement agreements remitted to the Claimants because the parties bound themselves to that.

38. The Claimants have also prayed for an order that the parties herein do enter into negotiations on the terms of repayment of the SACCO loans but since it is common ground that the loans were given to the Claimants as SACCO members and not as employees, it is obvious that this court lacks jurisdiction to grant such orders. The parties may have to seek such relief before the relevant Tribunal.

39. The Claim for dividends by 4th and 5th Claimants is also declined for lack of jurisdiction.

40. The Claimant for leave is dismissed because the Claimants bound themselves to the settlement agreement they signed upon the separation. Likewise, the claim for salary till age of retirement is dismissed for lack of any contractable or legal basis.

41. However, having found that the purported redundancy of the Claimants amounted to unfair termination contrary to section 40 and 45 of the Employment Act, it is my holding that the Claimants are entitled to compensation for unfair termination of their employment contract. Considering that they served for long periods and that they did not cause the termination through misconduct, and that the employer offered to pay them severance pay, I award each of them 10 months gross salary as compensation for unfair termination.

42. Finally, I award each Claimant Kshs. 1,000,000 as general damages for violation of their constitutional right to fair labour practices, freedom from discrimination and freedom from servitude.

CONCLUSION AND DISPOSITION

43. I have found that the Claimants employment was terminated without following the mandatory procedure set out under section 40(1) of the Employment Act and as such, the termination was unfair and unlawful within the meaning of section 45 of the Act.

44. I have also found that the Claimants right to fair labour practices and freedom from discrimination was violated by the Respondent when they were laid off because they were over 50 years. I further found that the Claimants rights to fair labour practices and freedom from servitude was violated when the Respondent offset their outstanding SACCO loans from their employment terminal dues without their consent or any lawful justification.

45. I have also found that the settlement agreements between the Claimants and the Respondent are valid but they did not discharge the Respondent from further claims by the Claimant in relations to any statutory and Constitutional breaches against the Claimants rights.

46. Finally, I have found that the Claimants are entitled to some of the reliefs sought in the suit. Consequently, I enter judgment for the Claimants in the following terms:

1st Claimant (Alice Ndaani)

Compensation.....Kshs. $183,880.00 \times 10 = 1,838,800$

General damagesKshs. 1,000.000

Net terminal duesKshs. 2,604,449.76

TotalKshs. 5,443,246.76

2nd Claimant (Zachari Odhiambo)

CompensationKshs. $220010 \times 10 = 2,200,100$

General damagesKshs. 100,000.00

Net terminal duesKshs. 2,710,621.33

TotalKshs. 5,910,721.33

3rd Claimant (Caroline Congo)

Compensation.....Kshs. $170,055 \times 10 = 1,700,550$

General damagesKshs. 100,000.00

Net terminal duesKshs. 295,564.88

TotalKshs. 5,652,114.68

4th Claimant (Virginia Kimani)

CompensationKshs. $164,175 \times 10 = 1,641,750$

General damagesKshs. 100,000.00

Net terminal duesKshs. 2,289,493.31

TotalKshs. 4,931,243.31

5th Claimant (John Macharia)

Compensation.....Kshs. $153,925 \times 10 = 1,539,250$

General damagesKshs. 100,000.00

Net terminal duesKshs. 1,649,621.39

TotalKshs. 4,188,871.39

6th Claimant (Boniface Muindi)

Compensation ...Kshs. $268,230 \times 10 = 2,682,300$

General damagesKshs. 1,000.000

Net terminal duesKshs. 4,427,911.94

TotalKshs. 8,110,211.94

47. The award of compensation and general damages are subject to statutory deductions but they will earn interest at court rates from the date hereof. However, the award of the net terminal dues will earn interest from the date of filing this suit. The Claimants will also have costs plus interest. Orders accordingly.

Dated, signed and delivered at Nairobi this 22nd day of January 2021.

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