



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 491 OF 2018 CONSOLIDATED WITH CAUSE NO 492 OF 2018

GEORGE BARASA F. MABACHI.....1ST CLAIMANT

PETER OPONDO OKOTH.....2ND CLAIMANT

VS

UNIGROUP TRANSPORTERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This judgment dispenses with Causes No 491 of 2018 and 492 of 2018, which were consolidated by consent of the parties, on 8th April 2019.

2. At the trial, the 1st Claimant, George Barasa F. Mabachi testified on his own behalf and on behalf of the 2nd Claimant, Peter Opondo Okoth. The Respondent called Nelly Atieno Arunga. The parties also filed written submissions.

The Claimants' Case

3. In his Memorandum of Claim dated and filed in court on 16th October 2018, the 1st Claimant, George Barasa F. Mabachi states that he was employed by the Respondent as a Mechanic from January 2015 until 30th June 2018, when he was declared redundant. At the time of leaving employment, Mabachi earned a monthly salary of Kshs. 89,500.

4. Mabachi states that on 30th June 2018, he was issued with a termination letter, by the Human Resources Manager, informing him that his position would become redundant due to low turnover in company business.

5. Mabachi avers that he was not given prior notice regarding the redundancy. He therefore claims that the termination of his employment on account of redundancy was unfair and cites the following particulars in this regard:

- a) The Respondent failed and/or neglected to issue requisite notices for the intended redundancy as contemplated under Section 40(1)(a) and (f) of the Employment Act;
- b) The Respondent failed to inform the Claimant of the selection criteria adopted to declare him redundant and there was no regard to seniority in time, skill, ability and reliability as contemplated under Section 40(1)(c) of the Employment Act;
- c) The Respondent failed to pay the Claimant all his terminal and contractual dues prior to termination on account of redundancy contrary to the provisions of Section 40(1)(d)(e)(f) and (g) of the Employment Act;
- d) The Respondent had no genuine reason to declare the Claimant redundant and there was nothing to suggest or show that work schedule had been disrupted, as alleged in the Claimant's termination letter and due process not followed.

6. Mabachi's claim is as follows:

- a) 1 month's salary in lieu of notice.....Kshs. 103,079.00

- b) House allowance for 42 months.....649,397.00
- c) Unpaid overtime worked for 33 months.....2,553,408.00
- d) Leave pay for 2018 (10.5 days).....41,622.00
- e) Severance pay for 3 years.....178,380.00
- f) 12 months' salary in compensation.....1,236,948.00

7. The 2nd Claimant, Peter Opondo Okoth also filed his Memorandum of Claim on 16th October 2018.

8. Okoth states that he was employed by the Respondent as a Mechanic in January 2014. At the time of leaving employment on 30th June 2018, he held the position of Senior Mechanic and was earning a monthly salary of Kshs, 111,637.

9. Okoth's pleadings are similar to those of Mabachi and his claim is as follows:

- a) 1 month's salary in lieu of notice.....Kshs. 128,382.00
- b) House allowance for 42 months.....808,806.10
- c) Unpaid overtime worked for 45 months.....4,331,340.00
- d) Leave pay for 2018 (42 days).....207,354.00
- e) Severance pay for 4 years.....296,220.00
- f) 12 months' salary in compensation.....1,540,584.00

10. The Claimants also ask for costs plus interest.

The Respondent's Case

11. The Respondent's defence is by way of Statements of Reply dated 26th November 2018 and filed in court on 27th November 2018.

12. The Respondent admits having employed the Claimants and states that the Claimants were released on 31st July 2018, by reason of redundancy.

13. The Respondent denies that letters of termination were issued to the Claimants without any prior engagement. The Respondent avers that the Claimants were issued with thirty days' notice and that payment in lieu of notice was made and acknowledged.

14. The Respondent further avers that prior to issuance of the notices, a meeting was held between the employer and all employees, where the reasons for redundancy were explained.

15. The Respondent counters the particulars of unfair redundancy pleaded by the Claimants.

16. The Respondent adds that after issuance of the notices, the terminal dues for all the affected employees were tabulated and paid by cheque. Outstanding third party loans were deducted from the terminal dues.

17. The Respondent states that the affected employees were truck drivers operating between Mombasa and Nairobi, together with staff offering support services, who were mechanics, messengers and workshop managers. According to the Respondent, all the employees on the said route were affected, thus no selection criteria could apply.

18. The Respondent avers that it is a matter of public notoriety that the trucking industry had been heavily hit by the directive from the Kenya Ports Authority that all inland containers be railed to Nairobi by Standard Gauge Railway, for collection at Embakasi, Nairobi. The Respondent maintains that it is a matter of judicial notice that many jobs had been lost as result.

19. The Respondent avers that all the requisite procedures on redundancy were followed to the letter.

Findings and Determination

20. There are two (2) issues for determination in this matter:

- a) Whether the termination of the Claimants' employment was lawful and fair;

b) Whether the Claimants are entitled to the remedies sought.

The Termination

21. The Claimants' employment was terminated by individual letters dated 30th June 2018 stating:

“RE: TERMINATION OF YOUR EMPLOYMENT BY REASON OF REDUNDANCY

The purpose of this letter is to communicate to you the outcome of a recent review of Unigroup Transporters Ltd (the employer) of its operational requirements, and the impact to your employment.

It is with regret that the company informs you that your role as a.....with the company has become redundant, meaning your employment will therefore be terminated. This decision is not a reflection on your performance.

This letter therefore serves as Notice of Redundancy. Your notice period is one month with effect from 1st July 2018. Therefore your employment will end on 30th July 2018.

During this notice period you will be paid in lieu of notice and therefore you are not required to report to work. This decision has been made as a result of current operational requirements of the company due to low business launch of new Standard Gauge Railway (SGR) operations, low turnover, unsustainable wage bill and introduction of new technological systems in our operations.

When your employment ends, based on your length of service, you will be paid your service pay plus any other redundancy entitlements due set out below.

- 1. Salary up to the last day of working*
- 2. 15 days of every year worked*
- 3. Any pending leave days not utilized.*

During this notice period, you're requested to prepare the hand over notes. The notes should be handed to your superior. The notes should also indicate any company property in your possession including records of your work for which you may be responsible together with any rules and lists that were given to you or compiled by (sic) in the execution of your duties.

We thank you for your valuable contribution during your employment with us. Please contact us if you wish to obtain a reference in the future.

Yours sincerely,

(signed)

HERBERT LUSENO

HUMAN RESOURCE MANAGER

22. From the evidence on record, it is evident that the Claimants' employment was terminated on account of redundancy.

23. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define 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 services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

24. Redundancy is one of the employment separation modes permitted under the Employment Act, subject to the following conditions, set out under Section 40 (1) of the Employment Act:

(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 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) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(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.

25. Conditions (a), (b) and (f) provide for notices to the affected employee, their trade union (where one exists) and the local Labour Officer.

26. In its decisions in *Thomas De La Rue v David Opondo Omutelema [2013] eKLR* and *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR*, the Court of Appeal decisively settled that in every redundancy situation, two separate and distinct notices, of not less than a month each, are required.

27. The first notice is of a general nature and addresses all employees within the targeted establishment, the relevant trade union and the local Labour Officer. By definition, this notice should set out the reasons for and extent of the intended redundancy. The second notice is a termination notice specifically addressed to each affected employee. The latter notice may be paid off in cash.

28. The question then is whether in executing the subject redundancy, the Respondent issued the requisite notices. The Respondent produced minutes of a staff meeting held on 29th June 2018, whose stated agenda was 'Changes in the Shipping and Transport Industry' and 'Implications of the Changes on Business and Employees'.

29. The Respondent's witness, Nelly Atieno Arunga, who at the material time worked for the Respondent as a Manager, told the Court that both the 1st and 2nd Claimants attended the meeting of 29th June 2018. Arunga testified that at this meeting, the reason for the redundancy was explained to the employees. Having observed Arunga on the witness stand, the Court had no reason to doubt her testimony.

30. In addition, the Respondent produced a letter dated 9th May 2018, addressed to the Mombasa County Labour Office, giving notice of intention to declare redundancy. In this letter, the Respondent gives the reason for the intended redundancy as 'rapid change in the Shipping and Transport Industry' occasioned by a government directive that a large segment of Nairobi-destined cargo be transported by the Standard Gauge Railway. In the same letter, the Respondent estimated the number of employees to be affected by the redundancy at 40-45, out of a staff complement of 145.

31. In the final submissions filed on behalf of the Claimants on 8th March 2021, reference was made to the Court of Appeal decision in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR* where the necessity of pre-redundancy negotiations was underscored.

32. In the earlier decision of *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR* Maraga JA (as he then was) stated as follows:

".....when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties....."

the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and other labour laws. The notices under this provision are not merely for information.....

The purpose of the notice under section 40(1) (a) and (b) of the Employment Act, as is also provided for in the....ILO Convention No 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment."

33. My reading of these decisions, which are binding on this Court, is that a proper redundancy notice, is one that avails adequate opportunity for pre-redundancy consultations. I do not think however, that the outcome of these consultations would necessarily be that the planned redundancy is halted or even delayed.

34. The Respondent asked the Court to take judicial notice of the government policy that cargo movement from the Port of Mombasa to

Nairobi would be largely via the Standard Gauge Railway and the adverse economic impact of that policy on road transport companies, such as the Respondent. The Respondent referred the Court to disputes arising from the policy shift as contained in *Petitions No 159 of 2018 and 201 of 2019: William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR*.

35. Being a matter of public notoriety, the Court is sufficiently persuaded to take judicial notice of the policy shift and its immediate impact.

36. The Court is also satisfied that in the circumstances of this case, a redundancy notice was issued to the employees and to the County Labour Officer, prior to the termination notices issued on 30th June 2018.

37. The third condition under Section 40(1) of the Employment Act deals with the selection criteria, including seniority in time, skill, ability and reliability of each employee within the affected establishment.

38. In this regard, the Respondent's position is that the category of employees serving in the road transport and container shunting line of business were affected. No evidence was led to show that the Claimants were discriminated in any way.

39. The last three conditions under Section 40(1) set out the statutory benefits to be paid to an employee declared redundant. The Claimants submit that because they were paid their dues after their exit from employment, the condition on payment of statutory dues was not met. To support this proposition, the Claimant relied on the decision in *Stephen Mulaki Kimei v Lochab Services Brothers Ltd [2016] eKLR*.

40. From the evidence on record, the Claimants were paid their terminal dues on 23rd August 2018, which would be three weeks after the end of their notice period. My view on this matter is this; employers operate in a dynamic macro-economic environment, where mathematical precision in meeting financial obligations, even to their employees, may not always be achieved. This is more so in a situation where the employer is forced to declare redundancy as a result of occurrences beyond its control, and the Court is convinced that this is what happened in this case.

41. Each case must be considered on its own merit and looking at this case in totality, the Court saw an employer striving to comply with the law and such an employer, the Court will not punish.

42. On the whole I find and hold that this was a case of genuine redundancy and in executing it, the Respondent complied with the law.

43. The claims for compensation for unlawful and unfair redundancy are therefore disallowed.

44. From the evidence on record, the Claimants were each paid one month's salary in lieu of notice as well as severance pay for completed years of service. These claims are therefore without basis and are dismissed.

45. In addition, the 1st Claimant was paid in lieu of pending leave days while the 2nd Claimant had no pending leave days. The claim for leave pay therefore also fails.

46. According to the Claimants' letters of employment, they were to be paid a gross monthly salary, which would ordinarily include house allowance. The claim for house allowance consequently fails.

47. The claim for overtime, being in the nature of special damages, ought to have been specifically proved and because this standard of proof was not achieved, this claim also fails.

48. In the end, the Claimants' entire claim fails and is dismissed.

49. Each party will bear their own costs.

50. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Mbithe for the Claimants

Mr. Ambwere for the Respondent