



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 392 OF 2020

(ELRC CAUSE NO. E368 OF 2020)

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VERSUS

ASSOCIATED MOTORS LIMITED.....RESPONDENT

JUDGMENT

1. The Suit was filed on 7/8/2020 by the Claimant praying for reliefs set out in the Statement of Claim as follows: -

(a) That the Honourable Court do find actions of the Respondent in declaring the Claimant members redundant a contravention of Articles 36, 41 and 47 of the Constitution of Kenya 2010, Section 5(1), (2) and (3) and 40 of the Employment Act 2007 and Clause 16 of the parties Collective Bargaining Agreement.

(b) That, the Honourable Court do order **unconditional reinstatement** of the aggrieved employees without loss of benefits, status and privileges.

(c) That, if in the opinion of the Court, reinstatement is practically not possible, then in the alternative, the Honourable Court do order payment of terminal benefits as per the Redundancy Clauses of the parties Collective Bargaining Agreement (CBA) and Section 40 of the Employment Act, 2007 based on the right salary structure.

(d) That, the Honourable Court do order payment of compensation of 12 months' wages (**salary and house allowance**) per each grievant employee for the unprocedural, unfair and unlawful loss of employment.

(e) That the Honourable Court be pleased to order payment of costs of this suit in favour of the claimant.

(f) That the Court do order any other relief the Court may deem fit in favour of the claimant and the grievants.

2. The suit is premised on facts set out in the Statement of claim being that the 12 grievants being employees of the respondent were unprocedurally and unfairly declared redundant by the respondent in violation of Section 40 of Employment Act, 2007 and Articles 36, and 47 of the Constitution of Kenya 2010. That the declaration also violates Section 5(1) (2) and (3) of the Employment Act and clause 16 of the parties Collective Bargaining Agreement (CBA).

3. That the particulars of Employment of the 12 employees are as follows: -

i. Elizabeth Nelima herein referred to as the 1st grievant in this matter was employed on 1st December, 2013 as a Stores Clerk. She was earning a basic salary of Kshs. 30,000/= without a house allowance. At the time of redundancy on 31st July, 2020, she was still earning a basic salary of 30,000 without House Allowance.

ii. Francis Liyosi Luyali herein referred to as the 3rd grievant in this matter was employed on 1st November, 2013 as a painter. He was earning a basic salary of Kshs. 28,000/= without a house allowance. At the time of redundancy, he was still earning a basic salary of Kshs. 28,000/= without House Allowance.

iii. James Otieno Mungah herein referred to as the 3rd grievant in this matter was employed on 9th December, 2014 as a Mechanic grade 3. He was earning a basic salary of Kshs. 30,000/= without house allowance. At the time of redundancy, he was still earning

30,000/= without house allowance.

iv. George Tela Ingati herein referred to as the 4th grievant in this matter was employed on 1st May, 2014 as a supervisor. He was earning a basic salary of Kshs. 28,000/= without house allowance. At the time of redundancy, he was still earning 28,000/= without house allowance.

v. Christopher Mutinda Mbuvi herein referred to as the 5th grievant in this matter was employed on 1st June, 2014 as a Welder/Fitter/Designer. He was earning a basic salary of Kshs. 33,000/= without house allowance. At the time of redundancy, he was still earning 33,000/= without a house allowance.

vi. Joseph Makau Kioko herein referred to as the 6th grievant in this matter was employed on 13th September, 2016 as a Technician. He was earning a basic salary of Kshs. 32,000/= without house allowance. At the time of redundancy he was still earning 32,000/= without house allowance.

vii. Daniel Musau Musembi herein referred to as the 7th grievant in this matter was employed on 5th September, 2017 as a technician. He was earning a basic salary of Ksh. 40,000 without house allowance. At the time of redundancy, he was still earning a basic salary of 40,00/= without house allowance.

viii. Geoffrey Cheloti Mulongo herein referred to as the 8th grievant in this matter was employed on 21st September, 2017 as a technician. He was earning a basic salary of Ksh. 45,000 without house allowance. At the time of redundancy, he was still earning a basic salary of 45,000/= without house allowance.

ix. Stephen Kiarie herein referred to as the 9th grievant in this matter was employed on 2nd September, 2019 as a Store Keeper/After sales. He was earning a basic salary of Ksh. 25,000 without house allowance. At the time of redundancy, he was still earning a basic salary of 25,000= without house allowance.

x. William Nyaga herein referred to as the 10th grievant in this matter was employed on 28th January, 2013, as a Welder/Fitter. He was earning a basic salary of Ksh. 23,000/= without house allowance. At the time of redundancy, he was still earning a basic salary of 23,000/= without house allowance.

xi. Jackson Waweru herein referred to as the 11th grievant in this matter was employed on 16th June, 2016 as a technician. He was earning a basic salary of Ksh. 40,000 and house allowance of 10,000. At the time of redundancy, he was still earning a basic salary of 40,000/= with house allowance of Kshs. 10,000/=

xii. Nashon Nina Sunga herein referred to as the 12th grievant in this matter was employed on 1st May, 2018 as a Pannel Beater. He was earning a basic salary of Ksh. 35,000 without house allowance. At the time of redundancy, he was still earning a basic salary of 35,000/= without house allowance.

4. That the parties have both valid Recognition Agreement and Collective Bargaining Agreement (CBA) guiding parties on how to proceed with such a situation and in particular Clause 16 of the Collective Bargaining Agreement.

5. That the union, the labour office and grievants were not notified of the intended redundancy in terms of Section 40(1) (a) of the Employment Act, 2007 and Section 16(1) of the Collective Bargaining Agreement which provisions are mandatory.

6. That the grievants were unfairly targeted hence were discriminated against contrary to Section 5(2) and (3) of the Employment Act, 2007 in that the grievants had been denied the right to join the claimant union despite the Respondent being unionised.

7. That the grievants joined the union on 27th June, 2020 and the Respondent was notified of the joinder on 6th July, 2020. The respondent's action to declare the grievants redundant was actuated by their joining the union as they were soon declared redundant with effect from 30th July, 2020. The new members were therefore discriminated on this unlawful basis.

8. The respondent did not follow the Tripartite Memorandum of Understanding (MOU) signed by Central Organisation of Trade Union (COTU), Federation of Kenya Employers (FKE) and Cabinet Secretary Labour to guide the employers and unions during the COVID – 19 pandemic.

9. That the claimant's right to fair administrative action, to freedom of Association and to fair labour practices were violated by the respondent.

10. That this Court finds in favour of the claimant.

11. The respondent filed statement of response to the Claim dated 11/9/2020 in which it denies having unlawfully retrenched the grievants. That all employees were paid a gross salary inclusive of house allowance. That the respondent does not have a Recognition Agreement nor a Collective Agreement with the claimant union.

12. That the respondent is not a member of the Motor Trade Group which has a Collective Bargaining Agreement with the claimant.

13. That in June, 2020 the respondent decided to reorganize its business due to the current economic climate. That the losses made by the

company meant that, the respondent could no longer sustain the wage bill. The respondent took measures to reduce its costs.

14. On 1/7/2020 the respondent wrote an internal memo communicating to the staff, its intention to declare staff redundant. On 1/7/2020, the respondent duly notified the County Labour officer of its intent.

15. That the respondent was issued with check-off forms of the grievants on 6/7/2020 after it had issued them with the notice to declare them redundant.

16. The respondent denies that it discriminated against the grievants. The respondent denies that it refused the grievants chance to join the union.

17. That the respondent did not serve the union with redundancy notice because the grievants were not its members at the time. The shop stewards were however given notices of intended redundancies.

18. That the termination of the grievants was lawful and fair.

19. That it was the prerogative of the respondent to determine its structure. That between 2013 and 2019, the respondent made losses of Kshs. 165,948,561. That its business contracted by 22% by July, 2020 due to COVID – 19 pandemic despite measures to mitigate the impact.

20. That the claimant did not report the dispute to the Minister of Labour for Conciliation purposes. That it came to Court prematurely and in bad faith.

21. That the grievants did not pick their terminal dues cheques except (four) 4 only named James Mungah, George Tela , Nashon Sunga and Elizabeth Nelima.

22. That remaining cheques have been deposited with the Advocate's office.

23. That the claimant has no *locus* to represent the grievants since they are not its members.

24. That James Mungah and William Nyagah did not sign form 's' presented by the claimant in Court.

25. That the grievants are not entitled to service pay as they were registered with National Social Security Fund (NSSF) and dues were remitted. That the respondent does not owe the grievant as prayed or at all.

26. The parties filed submissions which the Court has considered. The parties did not adduce any oral evidence and rely on their pleadings, annexed documents and submissions.

27. The issues for determination are: -

(a) Whether the union has *locus standi* to represent the grievants.

(b) Whether the declaration of redundancy of the grievants was lawful and fair.

(c) Whether the grievants are entitled to the reliefs sought.

28. In terms of Section 12 of the Employment and Labour Relations Court Act, No. 20 of 2011, (**Revised 2014**), this Court has jurisdiction over matters, including in terms of Section 12(1) (b).

“disputes between an employer and a trade union;”

29. This is one such dispute where the claimant union has brought a dispute to Court claiming that its members who were employees of the respondent were unlawfully and unfairly targeted for retrenchment.

30. This is the mandate the union has in respect of employees who are its members and/or those who are not its members but are unionisable employees of an employer where the union lawfully operates in terms of its Constitution.

31. Whether or not the grievants were members of the claimant union, provided they are unionisable employees, the claimant union has *locus standi* to represent them in this suit and the Court so finds.

32. From the description of the grievants in paragraph 2 (i) to (xii) in the Statement of Claim, which descriptions were not specifically traversed by the respondent in the statement of defence, the Court finds that the grievants were indeed employed by the respondent in the stated capacities and were therefore unionisable employees.

33. The claimant union did not file witness statements in respect of the twelve grievants and the union elected not to adduce any oral testimony in support of the respective claims of the grievants.

34. There is no material before the Court therefore upon which the Court may determine whether the termination of the employment of the grievants on the basis of redundancy was procedural, lawful and fair.
35. The claimant bears the burden of proof in terms of Section 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya as read with Section 47(5) of the Employment Act, 2007 to establish a *prima facie* case that the termination of the employment of the grievants was wrongful.
36. It is only when that *prima facie* case has been established by the claimant when the evidential burden shifts to the employer in terms of Section 43(1) and (2) and 47(5) of the Employment Act, 2007 to demonstrate that it had a valid reason to terminate the employment of the grievants.
37. In the present case, the respondent explained in detail in the statement of response to the claim, the reason for declaring the grievants redundant and the procedure it followed in effecting the redundancies. In the response, the respondent stated that it faced financial difficulties due to the prevailing economic environment, brought about by COVID- 19 pandemic. The respondent stated that it issued notice to the employees and to the labour officer with regard to the intended declaration of redundancy of the grievants. That it was not aware that the grievants were members of the claimant union and so it did not notify the union. That the termination therefore followed the provisions of Section 40 of the Employment Act and was lawful and fair.
38. The respondent further averred that it had issued cheques to the grievants in respect of their terminal benefits and four of the grievants had accepted payment whereas the rest of the cheques were deposited with the Advocates for the grievants.
39. The claimant union did not file a reply to the statement of response by the respondent and so did not traverse and or join issues with the averments by the respondent contained in the statement of response.
40. This situation was made worse by failure by the claimant union to adduce any evidence in support of the substantive claims it makes in the Statement of Claim.
41. Accordingly, the Court finds that the claimant has failed to prove on a balance of probabilities that the grievants were declared redundant unlawfully and unfairly.
42. The claimant union has also failed to demonstrate that the grievants were not paid terminal benefits set out in the statement of claim. Accordingly, the Court finds that the claimant union has not proved that it is entitled to the reliefs sought for the grievants.
43. The suit fails therefore in its entirety for failure by the claimant union to prove their respective case.
44. Pleadings and written submissions are not substitute for evidence and claimants must be slow to waive their right to adduce oral evidence in cases where there are clear disputes of fact.
45. This particular dispute was not even reported to the Ministry of Labour for purposes of conciliation. There was no report therefore from a Labour officer to guide the Court on dues that may be owed to the grievants and or the labour officer's opinion on the procedure followed to declare the grievants redundant. This was another indictment on the claimant union which ought to know better when dealing with Collective disputes.
46. Considering the circumstances of the case, the Court dismisses the entire suit with no order as to costs.

Dated and delivered at Nairobi this 7th day of June, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 of the Civil 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.

MATHEWS N. NDUMA

JUDGE

Appearances:-

Mr. Ongigi for claimant union

Mr. Ateko for Respondent

Ekale – Court Assistant