



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E714 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

EFIL ENTERPRISES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the Labour Relations Act to represent employees in the engineering sector.
2. The Respondent is a limited liability company registered in Kenya and operates within the engineering sector.
3. The Claimant and the Respondent have a recognition agreement that is valid and subsisting.
4. It is the Claimant's averment that the Respondent unlawfully declared redundant six union shop floor officials, the Grievants namely:-
 - i. Titus Nzioki Mainga
 - ii. Sylivester Mwema Mutemi
 - iii. Paul Kilonzo Mbuvi
 - iv. Michael Makau Kavuvi
 - v. Thomas Lituvu Muoki
 - vi. Mike Mwaniki Mtembi
5. It is the Claimant's averment that the said grievants were declared redundant without consultation with the Claimant and that the redundancy was on grounds of union activities/affiliation, contrary to Articles 36 and 41 of the Constitution.
6. The Claimant further avers that the Respondent did not comply with the procedure for redundancy as set out under Section 40 of the Employment Act.
7. In its memorandum of claim dated 3rd November 2020 the Claimant prays for the following remedies:
 - (i) Spent
 - (ii) Spent
 - (iii) That the Respondent herein to be ordered by the Court to all the Claimant members back to work without loss of any benefits.
 - (iv) That the Respondent herein to be ordered to comply with Section 76 of the Labour Relations Act 2007 on lock out procedures and section 40 of the Employment Act on redundancy procedures.

(v) That the Respondent herein be ordered to pay costs of this suit and any allied consequences.

(vi) That the Respondent to be ordered to sign the C.B.A as the Recognition Agreement has been duly signed by the parties herein.

8. Together with the memorandum of claim, the Claimant filed an application by way of a notice of motion under certificate of urgency in which it sought orders that –

(i) Spent.

(ii) Spent.

(iii) THAT, the Respondent be ordered to allow back the Applicant members who were locked out and later on declared Redundant without consultation with the Claimant Union pending the hearing and determination of the Application.

(iv) THAT, the interim orders be issued against the Respondent restraining her from victimizing and or terminating the services of any member of the Applicant herein on grounds of union Activities/Affiliation.

(v) THAT, the Honourable Court be pleased to issue interim orders against the Respondent to comply with the mandatory provisions of the law and section 76 of Labour Relations Act 2007 by way of allowing back the Claimants members who were locked out or declared Redundant contrary to the law.

(vi) THAT, any other relief the Honourable Court may deem fit to grant.

(vii) THAT, the costs of this suit to be met by the Respondent herein.

9. The application is supported by the grounds on the face thereof and the affidavit of WYCLIFFE NYAMWATTA, the General Secretary of the Claimant in which he states that –

(a) THAT, the issues in dispute herein fall under section 74 of the Labour Relations Act 2007 therefore require urgent attention.

(b) THAT, the Respondent herein locked out Claimants members without giving seven (7) days' notice, and further declared the Claimant members Redundant without consultation with the Claimant contrary to section 40 of Employment Act 2007.

(c) THAT, the Respondent having failed to comply with the Section 76 by not giving seven (7) days and failure to act in line with section 40 of Employment Act 2007 prompted the Applicant/Claimant to move Court under section 74 of Labour Relations Act 2007.

(d) THAT, the Respondent herein failed to Recognize the Claimant by locking out claimant members without consultation and declaring her Employees Redundant without following procedures or involving the Claimant Union where her employees are members is a pure violation of Section 40 of Employment Act 2007 and Section 76 of Labour Relations Act 2007.

10. In response to the claim and the application, the Respondent filed a memorandum of defence in which it denies all the allegations of the Claimant. It avers that the six employees declared redundant were given the option to proceed on unpaid leave up to 15th January 2021 or to be paid their terminal benefits in light of the effects of COVID 19 pandemic and they all opted for redundancy.

11. It is the Respondent's position that the redundancies were legally effected, that the six employees were called for a meeting where they ratified their choice to be paid benefits and end their contracts mutually. The Respondent attached a copy of minutes of the meeting at annexure EEL 001 of the Respondent's bundle of documents.

12. It is further the Respondent's position that both the Claimant and the Ministry of Labour were informed of the decision. That the final dues of the employees were prepared for their collection. That they however reneged on the agreement and proceeded to sue the Respondent through their Union.

13. The Respondent insists that the redundancies were carried out in accordance with the law and it acted with clean hands. That the suit filed by the Claimant is therefore misplaced and without merit as there is no dispute between the Claimant and the Respondent in line with Section 76 of the Labour Relations Act. That the suit is malicious, vexatious and aimed to armtwist the Respondent to agree to terms of the CBA. That the suit is also filed in the wrong forum.

14. It prays that the suit be dismissed with costs.

15. The Respondent further filed a notice of preliminary objection in which it prays that the claim be struck out with costs on the following grounds –

i. That the Honourable court does not have jurisdiction to

hear and determine the present application and main suit as filed as the employees to whom the union is filing the present suit for, earned a salary of less than Kshs. 80,000.

ii. THAT the dispute relating to CBA should be forwarded to the minister in line with Section 76 of the Labour Relations Act and the court of first instance is the magistrate court.

16. The Respondent also filed a replying affidavit of ANNE WAUSI KAMWANZA, the Respondent's Secretary who deposes that this suit has been filed in the wrong court as the employees on behalf of whom the claim has been filed were earning less than Kshs.80,000 per month. The Affiant has filed and relies on Gazette Notice No. 6024 of 2018 and states that this court lacks the jurisdiction to hear this claim as it belongs to the Chief Magistrates Court. The Affiant reiterates that the redundancy of the six Grievants is legal, that they opted for the redundancy and both the Union and the Labour Officer were notified.

17. The Court directed that the claim, application and preliminary objection be disposed of together by way of written submissions. Both parties filed and exchanged submissions which were highlighted by Mr. Araka for the Claimant on 18th May 2021. Mr. Mokaya, Counsel for the Respondent opted to fully and wholly rely on the pleadings and submissions.

Determination

18. The issues arising for determination are the following: -

- (i) Whether this court has jurisdiction to hear and determine this suit;
- (ii) Whether the Grievants were unlawfully declared redundant, locked out or opted to leave employment of their own free will;
- (iii) Whether the Claimant is entitled to the orders sought.

Jurisdiction

19. In the notice of preliminary objection filed by the Respondent it pleads that this Court has no jurisdiction by virtue of Gazette Notice no. 6024 of 2018 by which the Chief Justice appointed all Magistrates of the rank of Senior Resident Magistrate and above as special Magistrates designated to hear and determine the following employment and labour relations cases within their respective jurisdiction: -

1. Disputes arising from contracts of employment (excluding trade disputes under the Labour Relations Act, 2007) where employees gross monthly pay does not exceed KSh.80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. Matters relating to the following specific areas—

- (i) offences under the Work Injury Benefits Act, 2007*
- (ii) offences under the Employment Act, 2007*
- (iii) offences under the Labour Institutions Act, 2007*
- (iv) offences under Occupational Safety and Health Act, 2007; and*
- (v) offences under the Labour Relations Act, 2007.”*

20. It is clear from the Legal Notice that the Magistrates have no jurisdiction to hear and determine trade disputes under the Labour Relations Act, 2007.

21. The preliminary objection by the Respondent is therefore premised on a misapprehension of Legal Notice No. 6024 of 2018 and the jurisdiction donated to Magistrates under the said Legal Notice as the claim herein relates to a trade dispute under the Labour Relations Act, the same being a dispute between a trade union and an employer as defined under Section 2 of the Labour Relations Act as follows –

“trade dispute” means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers’ organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union;

22. For the foregoing reason, I find no merit in the preliminary objection filed by the Respondent. The same is accordingly dismissed.

Redundancy

23. Redundancy is defined under Section 2 of the Employment Act as follows –

“redundancy” means 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 practice commonly known as abolition of office, job or occupation and loss of employment;

24. The procedure for redundancy is set out under Section 40(1)(a) of the Employment Act.

25. In the instant suit the Claimant avers that the grievants were locked out/declared redundant unlawfully while the Respondent insists that the same was in accordance with the law.

26. Section 40(1)(a) specifically provides for notification of both the Union and Labour Officer as follows –

40. Termination on account of redundancy

(1) 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) 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 to 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.

27. The opening words of Section 40(1) are specific, that an employer **shall not** terminate a contract of service on account of redundancy unless the employer complies with the conditions set out under the Section.

28. The Respondent has produced minutes of a meeting held with the employees and letters to both the Labour Office and Union to demonstrate that the redundancy was carried out in accordance with the law. It submits that the remedy of reinstatement is out of the question, the Court should not impose the parties into a relationship which is clearly unworkable and cannot therefore be sustained, and that the Employment Act has enacted the common law principle that the remedy of reinstatement should not be given except in very exceptional circumstances.

29. The Respondent relies on the decision of the Court of Appeal in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where the court state thus:

“The remedy of reinstatement is discretionary. However the Industrial Court is required to be guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer. Thus, the court could consider in a redundancy situation whether reinstatement would be a surplus to employer's requirements; whether the employer will be required to dismiss other employees and whether it would perpetuate the problems of the employer.”

30. The minutes of the meeting held between the Grievants and the Respondent are reproduced below –

“GENERAL MEETING HELD ON 28/10/2020 IN THE OFFICE MAIN AGENDA – LACK OF WORK/JOB SCARCITY DUE TO ECONOMIC DOWNTURN IN BUSINESS FOLLOWING THE GLOBAL COVID 19 PANDEMIC

MINUTES OF THE MEETING

PRESENT EMPLOYEES

1. MR. TITUS NZIOKI MAINGA ID NO. 11677751

2. MR. MICHAEL MAKAU KIKUVI ID NO. 13637414
3. MR. SILVESTER MWEMA MUTEMI ID NO. 290817D3
4. MR. PAUL KILONZO MBUVI ID NO. 20488927
5. MR. THOMAS KITUVU MUOKI ID NO. 34341197
6. MR. MIKEL MWANIKI MUTEMI ID NO. 34530519
7. M/5 ANNE WAUSI KAMWANZA ID NO. 22899191 - OFFICE SECRETARY
8. MR. MANJI SHAMJI RABADIA ID NO. 2SS33QS - MANAGING DIRECTOR.

OPENING

THE MEETING WAS DULY CALLED BY THE COMPANY M.D MR. MANJI SHAMJI RABADIA AT 4:30 PM, WHEN THE MEETING STARTED.

MR. MANJI SHAMJI RABADIA CHAIRED THE MEETING WHILE M/S ANNE WAUSI WROTE DOWN THE MINUTES.

MAIN AGENDA

LACK OF WORK/JOB SCARCITY

AS YOU ARE ALL AWARE, OUR COMPANY HAS BEEN AFFECTED

ECONOMICALLY DUE TO THE COVID 19 PANDEMIC OVER THE LAST 8 MONTHS EFIL ENTERPRISES LTD HAS EXPERIENCED LACK OF WORK IN OUR CONSTRUCTION INDUSTRY. LEADING TO FINANCIAL DIFFICULTIES.

WE HAVE EXPLORED A VARIETY OF OPTIONS TO INCREASE

THE NEED FOR LABOR, BUT UNFORTUNATELY OUR EFFORTS HAVE BEEN UNSUCCESSFUL.

TO BE SINCERE WITH YOU THE COMPANY IS STRUGGLING ECONOMICALLY AND BECAUSE OF THIS FACT EFIL ENTERPRISES LTD HAS COME UP WITH DIFFICULT DECISION TO RELEASE YOU OFF YOUR DUTY/SERVICES IN THE COMPANY.

AS PER KENYA LABOUR LAWS, WE HAVE COME UP WITH (2) TWO OPTIONS AND IT IS UPON EACH ONE OF YOU TO DECIDE WHICH WAY TO GO.

1. YOU GO UNPAID LEAVE UP TO 15/01/2021, PAY YOUR SALARY DUE OF 2020. IF AND WHEN ECONOMIC CONDITION IMPROVES WE REINSTATE YOU BACK TO WORK. THIS STAND DOWN IS EFFECTIVE ON 01/11/2020.

2. SECOND OPTION, YOU BE TERMINATED OFF YOUR DUTIES. YOU ARE PAID DUE SALARY OF 2020, ONE MONTH NOTICE, PAID 20 DAYS LEAVE, 16 DAYS SERVICE FOR EACH COMPLETE YEAR OF EMPLOYMENT. THE TERMINATION IS EFFECTIVE ON 01/11/2020. .

- THE SECOND OPTION TOOK THE DAY.

THE MANAGING DIRECTOR POINTED OUT THAT HE WISH TO KEEP ONLY ONE DRIVER. HE DID NOT MENTION THE NAME OF THE DRIVER.

ATTENDANCEES WERE ASSURED THAT THEY SHALL BE CALLED BACK TO GET THEIR DUES AS DISCUSSED IN OPTION 2.

WITH NO OBJECTION ON THE MINUTES & NO ANY OTHER BUSINESS THE MEETING ENDED AT 5:10 PM.

SIGNED BY MR. MANJI SHAMJI RABADIA.

SIGNED BY ANNE WAUSI KAMWANZA”

“29/10/2020

TO MANAGING DIRECTOR

KENYA ENGINEERING WORKERS UNION

P. O BOX 73987-80200,

NAIROBI.

Dear Sir/Madam

RE: TERMINATION NOTICE

This is to inform you that due to economic challenges affecting our construction Company we have come to a decision to terminate work to some of our employees.

Please, attached find the list of employees affected and Minutes of the meeting for you to go through.

Thank you in advance.

Yours Faithfully,

SIGNED

Manji Shamji Rabadia

MANAGING DIRECTOR”

32. The letter to the Labour Officer is also reproduced below –

“29/10/2020

MINISTRY OF LABOUR AND SOCIAL PROTECTION

P. O BOX 40326-00100

NAIROBI.

Dear Sir/Madam

RE: TERMINATION NOTICE

This is to inform you that due to economic challenges affecting our construction Company we have come to a decision to terminate work to some of our employees.

Please, attached find the list of employees affected and Minutes of the meeting for you to go through.

Thank you in advance.

Yours Faithfully,

SIGNED

Manji Shamji Rabadia

MANAGING DIRECTOR”

33. It is clear from the minutes of the meeting that it was not a meeting as alleged by the Respondent. What the Respondent’s Managing Director appears to have done is summon the employees and address them on what he intended to do. There is no evidence that the Grievants knew beforehand that there would be a meeting to discuss their redundancy, or that they opted for the redundancy rather than leave without pay.

34. The provisions of Section 40(1)(a) are clear, that where the employees are members of a union, the consultations on the redundancy are

held with the union.

35. Further, Section 40 provides for notification of not less than one month. The Grievants, the Union and the Labour Officer were not given any notification of the intention to declare them redundant as provided in the Act.

36. The Respondent has not attached any letter written to any of the employees setting out their terminal dues. It has further not attached the tabulation of the terminal dues it intended to pay them as it has alleged in its pleadings. The Act is clear that payment of terminal dues is made before the employee is released by the employer.

37. From the foregoing it is clear that the redundancy was without compliance with the statutory provisions under Section 40(1) of the Employment Act. The redundancy was thus unprocedural and therefore unfair.

Remedies

38. The Claimant prayed for reinstatement of the grievants. In view of the fact that the Respondent has stated that the reasons for redundancy was low volumes of work, reinstatement will not be the best option for the Grievants. I will instead award them compensation for their unfair termination.

39. **I award each of the Grievants six (6) months' salary compensation.** In awarding the same, I have considered the manner in which their services were terminated and the fact that they were not paid any terminal dues. I have also taken into account the wages of each of them which are minimum wages.

40. The Respondent shall also pay redundancy benefits to the employees as set out in Section 40(1) of the Employment Act. Parties are directed to agree on the tabulation and file the tabulation in Court within 30 days so that the Court can deliver final judgment on the amount payable to the Grievants. Should the parties not agree, each of them should file its tabulation within 30 days. A date of mention shall be given at the time of delivery of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st 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 had 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 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.

MAUREEN ONYANGO

JUDGE