



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

ELRC CAUSE NO. 682 OF 2015

KENYA PRIVATE UNIVERSITIES NON-TEACHING WORKERS UNION.....CLAIMANT

VERSUS

PAN AFRICA UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Claimant Union instituted this suit against the Respondent University in April 2015 for the unfair and unprocedural redundancy of its members namely; Angulu Kilausi Mmbaya, Festus Agevi, Rodgers L. Imbuga, Joshua Otieno, Geoffrey Maye, Vincent Litiema, George Angweye, Shadrack Mwanzia, Jacinta Muthoni Njubi, Mary Atema Maganga and Rosemary A. Muhenje. It subsequently amended the Claim on 20th May 2020 and filed an Amended Memorandum of Claim on 27th May 2020 wherein it prays:

1. THAT the Honourable court do make a declaration that the Respondents termination services was unfair within the meaning of Section 40 and 45 of the Employment Act, 2007.
2. THAT this Honourable court do order the Respondent to pay 12 months compensation to the claimants members for wrongful termination of services and days off employment due to redundancy and or their Claims as per Paragraph 2.8 above.
3. THAT the Respondent be made liable to any monetary guarantee granted to the aggrieved during their working period.
4. THAT the honourable court do order the Respondent to pay balance of wages in lieu of notice of termination of employment during years worked.
5. THAT this Honourable court do order the Respondent to pay outstanding wages for the days worked and while the matters were in court until determined.
6. THAT this Honourable court do order the Respondent to issue the Claimant with Certificates of Service for each of the employees that was not given.
7. THAT cost of this suit be paid by the Respondent.

2. The Claimant Union avers that the 11 Grievants were employed by the Respondent on diverse dates and in various capacities to serve in different cadres and departments but were however not issued with proper letters of appointment. The Claimant Union further avers that it recruited the Grievants into its membership on diverse dates in the months of January, February and March 2015 and served the Respondent with the requisite form "S" vide a letter dated 9th February 2015, under a certificate of posting dated 11th February 2015. The Claimant Union averred that the Respondent has opposed without any valid reasons its recruitment activities of the Respondent employees, and on 25th February 2015, its members were abruptly summoned for interviews and threatened with dismissal if they failed to produce professional certificates in various capacities within a period of two months, yet they had worked for the Respondent for periods between 5 to 25 years. It averred that in sum, its members were being harassed and threatened with termination on account of their union activities before the Union proceeded to file a suit being ELRC Cause No. 347 of 2015 and obtained interim restraint orders against the Respondent on 10th March 2015. It further avers that the filed suit and orders were terminated by the Court on 16th April 2015 after its Secretary General unavoidably missed a mention session and the orders that had protected its members ceased to exist. Consequently, the Respondent immediately issued redundancy letters to the Grievants on 17th April 2015 without following the laid down procedures as stipulated in the labour statutes. Further, that the validity of the reasons the Respondent relied on to declare the Grievants redundant are false without any proof and therefore unfair and unlawful. It contends that the main reason the Respondent terminated the Grievants' services was because of their decision to affiliate to the Claimant Union, which is their protected right under the Labour Relations Act, 2007 and the Constitution of Kenya. The Claimant thus seeks against the Respondent for payment of terminal dues and compensation for unfair redundancy for the 11 Grievants

which it tabulates at paragraph 2.8 of the Amended Memorandum of Claim.

3. The Respondent filed a Memorandum of Reply dated 21st July 2015 and while it notes in its submissions of having filed an Amended Memorandum of Reply on 25th August 2020, the same is not in the Court record (nor in the CTS). It avers that it is unaware of the allegations of union membership as it had never been notified by the Claimant or Grievants of their membership in the Claimant union prior to the time they ceased being employees of the Respondent. Further, it avers, the said allegations are subject of another suit namely ELRC Cause No. 347 of 2015. The Respondent admits that the Grievants were its employees before they were declared redundant and paid their respective dues which they willingly accepted and that the Grievants signed their letters of release and absorbed the Respondent of any claim subsequent to their departure from employment. It further avers that the process to declare the Grievants redundant began in 2014 pursuant to a directive issued by the Commission for University Education for the Respondent to comply with the Charter it had been issued with. The Respondent avers that the Grievants were sufficiently consulted, given all the requisite information and notices and participated in the entire process before they were declared redundant and that the restructuring of the Respondent was equitably done for all employees and staff members. The Respondent denies that it offended the Employment Act or any law as alleged and prays that the Claimant's claim be dismissed with costs.

4. The Claimant presented one witness to testify on behalf of all the 11 Grievants. Mr. Vincent Litiema Imbali testified on his own behalf and on behalf of the other 10 Grievants. He sought for his filed statement to be considered as his evidence in chief. He also produced the Statement by Kilaus Angulu and the Claimant's List of Documents as exhibits. He testified that they were not notified of their dismissal earlier and that they had reported to work when they were called to the HR Office and given the letters of dismissal. He stated that they were only told the Respondent wanted to reduce staff through a redundancy and that he was a member of the Claimant Union. He referred to the calculation of their dues and their demands in the Claimant's Bundle and the Amended Claim and urged the Court to grant these. Under cross-examination, he confirmed he was employed in 2004, worked as a Gardener and that he joined the Union in January 2015 and the deductions began end of January 2015. He further stated that before their dismissal, he recalled a meeting of all employees and managers where the Vice Chancellor told them he wanted all employees to go to Egerton University in Njoro to get Certificates and that they would get 3 months to go study. He stated that the Vice Chancellor told them the University Council had sent him. He testified that they were forced to sign their letters which were given to them by the Secretary of the HR, Eunice and after congregating in the Boardroom, were told to go establish whether they had any debt and clear.

5. The Respondent's witness was Ms. Esca Juma, the HR and she relied on her filed Statement, documents annexed to the Memorandum of Reply of 21st July 2015 and the Respondent's Amended Memorandum of Reply. She testified that the Respondent complied with the requirements for declaring a redundancy and the Employment Act. She stated that they had informed the staff of the same prior to the redundancy. She testified that in January 2015 all employees were informed of auditing of the status of their qualifications and a meeting was called on 4th February 2015 to inform the employees of the kick starting of the process of verifying the qualifications. She stated that they had three to four sessions before the evaluation or interview by University Council of employees from Senior Management to the lowest cadre and that the Council gave feedback on each employee. She stated that the Ministry of Labour was also notified prior and even confirmed receipt of the notification and that the 24 employees who were declared redundant had their terminal dues processed within one week. She further testified that to the best of her recollection no one was reluctant or indicated there was coercion and reiterated that she was the one who gave out the letters and not the Secretary to the Vice Chancellor. She testified that they did not know the employees had registered with the Claimant Union and had no notification to deduct union dues and that the first communication they got was a Court order. Under cross-examination, she confirmed receiving the Form 'S' in late March 2015 and personally receiving the summons on 10th March or 11th March 2015 thereabout. She also confirmed that Vincent was a member of the meetings held prior and that the Grievants were paid as per Section 40 of the Employment Act. She stated that each of their letters was clear on what they were paid together with the payslip. She reiterated in re-examination that none of the employees told them they were union members.

6. The Claimant submits that the letter of redundancy dated 15th April 2015 demonstrates that the redundancy was flawed and unlawful against the provisions of Section 40 of the Employment Act, 2007 and further resulted to unfair termination under Section 45 of the Act. The Claimant cited the case of **Joseph Chege Njeri v Bollore Transport & Logistics Kenya Limited [2019] eKLR** said as follows:

"8. As to whether the Respondent followed due process in declaring the Claimant's position redundant, justification is but one aspect of redundancy, the other considerations are the mode and manner of selection of the employees whose services will be rendered obsolete. The Respondent was required to notify the Claimant that he was to be declared redundant alongside the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect. In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees. Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union and the employer must pay the employee any leave due in cash. The Respondent was required to pay the Claimant at least one month's notice or one month's wages in lieu of notice and severance pay at the rate of not less than 15 days for each completed year of service. It is common ground in this case that the Claimant was not a member of a union and therefore the notice he was entitled to ought to have been issued in accordance with section 40(1)(b). The period of one month is intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under Section 40(1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the Labour Officer to ensure that the redundancy will be carried out in accordance with the Act. For a termination of employment on account redundancy to be legal, the employer must prove that both the Labour Officer and the employee or the employee's union, where there is one, have been notified at least one month before the redundancy takes place...."

7. The Claimant also relied on the case of **Mary Nyawira Karimi v Pure Circle (K) Limited [2018] eKLR** where the Court cited with approval the Court of Appeal decision in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**, where the Court of Appeal held that where there is a redundancy, the employer must ensure two fundamental requirements – substantive justification for the same and procedural fairness and that the notices under Section 40(1) of the Act are mandatory. The Claimant also relied on the case of **Gerrishom Mukhutsi Obayo v Dsv Air & Sea Limited [2018] eKLR** where the court found the

respondent had failed to satisfactorily demonstrate that the selection for redundancy was rational and thus failed to comply with the redundancy procedure set out under Section 40(a) of the Employment Act, and consequently the redundancy of the claimant was unprocedural and therefore unfair. The Claimant also cited the Court of Appeal decision in **Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others [2018] eKLR** where the Court while agreeing with the views expressed by Maraga JA (as he then was) and Murgor JA observed that:

“...The Constitution in Article 41 is fairly loud on the rights to fair labour practices and we think it accords with the Constitution and international best practices that meaningful consultations be held pre-redundancy. We agree with the trial court that redundancy notices are not mechanical so as to satisfy the motions of the law, and that fair labour practice requires the employer to act in good faith. It is not good faith, for example, to subject innocent employees to making fresh job applications to their employer who was not undergoing a redundancy situation, then vilify them for rejecting the manoeuvre. Being of that persuasion, the questions of substantial justification and fair implementation posed above must be answered in the negative...”

8. The Claimant submits that there is a disclosed element of wrong calculation of terminal dues and underpayments by the Respondent and that in the column dealing with underpayment, as tabulated in their submissions, the Grievants rely on the **Regulation of Wages (General) (Amendment) Orders - Minimum Wages Orders - for 2009, 2012 and 2015** which are produced at pages 29-36 of the Respondent's List of Documents dated 30th October 2019. The Claimant thus urged the grant of the prayers in the amended claim as well as costs of the suit.

9. The Respondent submits that no evidence has been availed before this Honourable Court by the Claimant to confirm that the issue of membership pending before Court as at the time of filing this suit was ever resolved in court or not. It further submits that no evidence of membership of the Grievants was produced during the hearing of this case and that the union officials never signed witness statements or testified to confirm such membership. The Respondent submitted that it was incumbent upon the Claimant to prove that the Grievants were its members and since it elected not to do so, its allegations are not sustained at all and the same should be dismissed. The Respondent submitted that the two witness statement filed in support of the Claimant's case do not state when they were declared redundant and neither did Vincent Imbali who testified in Court, adduce any evidence to clarify when the alleged declaration of redundancy was done. The Respondent submitted that in terms of Section 47(5) of the Employment Act, 2007, the Claimant bears the burden of proof to establish a *prima facie* case that the termination of employment of the Grievants was wrongful and that there were mere allegations by the Claimant without providing any supporting evidence. The Respondent relied on the case of **Amalgamated Union of Kenya Metal Workers v Associated Motors Limited [2021] eKLR** which it submitted is a case almost on all fours similar to the instant case. It submitted that there is obvious and glaring contradiction between the Amended Statement of Claim and the written and oral evidence as to when and how the declaration of redundancy occurred which makes it difficult to know the specific Claim to respond to. The Respondent submitted that this Honourable Court does not have the responsibility of filling up the aforesaid gaps and that while the Claimant's submissions attempted to fill in the gaps of the claim, submissions are not a substitute for evidence. The Respondent submitted that this position was reiterated by the Court in the **Amalgamated Union** case (*supra*) which held that the entire suit failed for failure by the claimant union to prove their respective case. The Respondent cited the case of **Pure Circle (K) Ltd v Paul Koech & 12 Others [2018] eKLR** where the Court of Appeal observed that an employee who is not unionisable is also entitled to minimum of month's salary in lieu of notice just like a unionisable employee as provided in Section 40(a) of the Employment Act. It submits that even if the Claimant has established that the notices served were not accordance with Section 40 of the Employment Act, the same does not invalidate the declaration of redundancy as was reiterated in the case of **Mercy Wangari v Total Kenya Limited [2020] eKLR**. The Respondent further submits that it is trite law that special damages must be specifically proved but that the Claimant made no attempt to adduce evidence as proof of all the itemized calculations of dues allegedly payable to respective Grievants. The Respondent submitted that the Claimant's witness simply stated he was adopting the calculations and it is the Respondent's submission that the figures are mere allegations. The Respondent submitted that its witness confirmed that all dues to each of the Grievants were paid with their termination letters also showing that each of them was paid a month's salary in lieu of notice. The Respondent submitted that it duly complied with Section 40(a) and (b) of the Employment Act and urged the dismissal of the suit with costs.

10. The Claimant Union's members being the 11 Grievants were declared redundant. The redundancy was on account of the charter the Respondent University received. Whereas the issue of membership to the Union remained fluid, the Respondent is shown to have calculated terminal dues and included therein sums to cover notice, the severance pay, 12 days accrued leave, prorated leave travelling allowance less any dues owed to the University and statutory taxes. The letters are dated 15th April 2015 and took effect on 16th April 2015. This was not in keeping with Section 40 which requires at least a notice of 30 days, that is to say, a month. As the redundancy was not properly declared the employees are entitled to recompense for this. As regards the certificate of service issued, the Respondent imposed a condition that does not accord with Section 51 which is to call for additional information being sought from the employer. As such the certificate of service issued to each employee is therefore invalid in law and should be reissued to accord with the law. Each Grievant is entitled to 2 month's compensation for the unlawful redundancy declared as well as costs of the suit which I quantify at Kshs. 40,000/- only. In the final analysis I enter judgment for the Grievants as against the Respondent:-

i. 2 months salary for each Grievant as compensation for unlawful redundancy as follows:-

- a. Angulu Kilausi Mmbaya – Kshs. 31,492/-,
- b. Lubinze Festus Agevi – Kshs. 18,516/-,
- c. Rodgers L. Imbuga – Kshs. 19,336/-,
- d. Joshua Otieno Okello – Kshs. 17,518/-,
- e. Geoffrey Maye – Kshs. 19,336/-,
- f. Imbali Vincent Litiema – Kshs. 17,518/-,

g. George Angweye Mugalo – Kshs. 14,037/-,

h. Shadrack Mwanzia – Kshs. 18,516/-,

i. Jacinta Muthoni Njubi – Kshs. 89,418/-,

j. Mary Atema Maganga – Kshs. 69,826/-,

k. Rosemary A. Muhenje – Kshs. 39,144/-

ii. Costs of the suit – Kshs. 40,000/-

iii. Interest on the sums in (i) above at Court rates from the date of Judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

Nzioki wa Makau

JUDGE