



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 247 OF 2018**

**CONSOLIDATED WITH CAUSES 250 & 251 OF 2018**

**DANIEL KIANGA KIMEU.....1<sup>ST</sup> CLAIMANT**

**WALTER BARAKA KIRAO.....2<sup>ND</sup> CLAIMANT**

**HAGAI MWAKALE NZIGHE.....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**MILLY GLASS WORKS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This consolidated claim is brought by Daniel Kianga Kimeu, Walter Baraka Kirao and Hagai Mwakale Nzighe. The Claimants filed individual Memoranda of Claim on 18<sup>th</sup> April 2018 and the Respondent filed Memoranda of Response on 21<sup>st</sup> January 2019.

2. At the trial, Walter Baraka Kirao testified for the Claimants and the Respondent called its Human Resource Manager, Joseph Kithikwa. The parties also filed written submissions.

**The Claimants' Case**

3. The 1<sup>st</sup> Claimant, Daniel Kianga Kimeu, states that he was employed by the Respondent as a Packer on 1<sup>st</sup> June 2013. At the time of termination, he earned a monthly salary of Kshs. 15,781.

4. The 2<sup>nd</sup> Claimant, Walter Baraka Kirao, pleads that he was employed by the Respondent sometime in January 2013, also as a Packer. At the time of termination, he earned a monthly salary of Kshs. 15,781.

5. The 3<sup>rd</sup> Claimant, Hagai Mwakale Nzighe claims to have been employed by the Respondent on 1<sup>st</sup> March 2013, also in the position of Packer. At the time of leaving employment, he earned a monthly salary of Kshs. 15,781.

6. The Claimants claim that on 13<sup>th</sup> December 2016, the Respondent, through its agents or servants unlawfully declared them redundant for the reason that the management was shutting down the operation of the Applied Colour Label (ACL) Department due to lack of orders for printed bottles.

7. The Claimants further claim that the redundancy was not genuine but was driven by bias and discrimination. They state that the alleged shortage of orders for printed bottles was a made up reason to terminate their employment. They add that the Respondent did not follow the laid down procedure in declaring the redundancy. In this regard, the Claimants aver that the Respondent did not comply with Section 40 of the Employment Act.

8. The Claimants now claim the following from the Respondent:

**1<sup>st</sup> Claimant: Daniel Kianga Kimeu**

- a. 1 month's salary in lieu of notice.....Kshs. 15,781
- b. 12 months' salary in compensation.....189,372

**2<sup>nd</sup> Claimant: Walter Baraka Kirao**

- a. 1 month's salary in lieu of notice.....Kshs. 15,781
- b. 12 months' salary in compensation.....189,372

**3<sup>rd</sup> Claimant: Hagai Mwakale Nzighe**

- a. 1 month's salary in lieu of notice.....Kshs. 15,781
- b. 12 months' salary in compensation.....189,372

9. The Claimants also ask for Certificates of Service plus costs and interest.

**The Respondent's Case**

10. The Respondent filed identical Memoranda of Response on 21<sup>st</sup> January 2019 denying the Claimants' claim that their employment was terminated without reasonable cause.

11. The Respondent avers that following a decline of orders for printed bottles, it was constrained to shut down the operations of the ACL, Warehouse and Quality Control Departments, so as to remain afloat in its business. As a result, the Claimants had to be declared redundant.

12. Regarding the procedure adopted in executing the redundancy, the Respondent states that prior to the redundancy, it duly informed the Labour Office and the Claimant's Union on 2<sup>nd</sup> November 2016 and 29<sup>th</sup> November 2016, regarding the intended redundancy.

13. The Respondent further states that on 15<sup>th</sup> November 2016, it held a meeting with the employees in the affected departments, including the Claimants, so as to deliberate on the matter.

14. The Respondent adds that on 8<sup>th</sup> December 2016, it issued individual redundancy notification letters to the Claimants, informing them of their redundancy, effective 12<sup>th</sup> January 2017.

15. The Respondent avers that at termination, the Claimants were paid their dues less statutory deductions.

16. The Respondent states that the Claimants' Certificates of Service are available for collection.

**Findings and Determination**

17. There are two (2) issues for determination in this case:

- a. Whether the Claimants have made out a case of unlawful redundancy;
- b. Whether the Claimants are entitled to the remedies sought.

**Unlawful Redundancy?**

18. On 8<sup>th</sup> December 2016, the Respondent wrote the following letter to the Claimants:

**"Re: Termination**

We refer to above and the meeting held with the undersigned on 15<sup>th</sup> November 2016. The Management is shutting down the operations of the ACL Department due to lack of orders for printed bottles. Consequently, the management has decided to terminate your services vide the Employment Act 2007 Section 40. Hence your last working day will be 18<sup>th</sup> January 2017. You will proceed on 30 days paid leave wef 13<sup>th</sup> December 2016 to 18<sup>th</sup> January 2017 which will be concurrent with the notice period.

Kindly arrange to return all company property before payment of your final dues as follows:

- Salary upto and including 18/01/17
- . . . .Leave & off days earned and not taken as at 18/01/17
- Severance pay @ 15 days for each completed year=45 days

- Less
- Any other monies owed to the company

Yours faithfully,

For: Milly Glass Works Ltd.

(signed)

Ms. Georgina Kilonzo

**Human Resource Manager**

19. The fact that the Claimants' employment came to an end as a result of redundancy is not in contention.

20. Section 2 of the Employment Act, 2007 defines 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 the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”**

21. As per the foregoing definition, in a redundancy situation, the employee's conduct is not a factor. In executing redundancy therefore, an employer is required to comply with the following mandatory conditions set out under Section 40 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.**

22. The Respondent claims to have fully complied with these conditions. Conditions (a) & (b) have to do with redundancy notice which by definition ought to set out the reasons for and extent of the intended redundancy. There also ought to be prior consultation with the affected employees on avenues for mitigating the negative impact of the redundancy.

23. This position was affirmed in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR* where the Court of Appeal cited with approval, *Article 13 of Recommendation No. 166 of the ILO Convention No 158 on Termination of Employment* with provides:

**1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:**

**a. provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;**

**b. give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on 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.**

24. The need for consultation in a redundancy situation was emphasised in the earlier Court of Appeal decision in *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others* [2014] eKLR where Maraga JA (as he then was) stated the following:

**“...when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties....At that initial stage, the employer would not have identified the employee(s) who will be affected.....It is after the conclusion of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.”**

25. The Respondent filed minutes of a meeting held on 15<sup>th</sup> November 2016, attended by the Claimants, among other employees in the affected departments. According to this record, the agenda of the meeting was ‘*intended staff termination on Redundancy grounds*’. The 2<sup>nd</sup> Claimant, Walter Baraka Kirao told the Court that he attended the said meeting and confirmed the agenda of the meeting as explanation on redundancy.

26. The Respondent also filed two letters dated 2<sup>nd</sup> November 2016 and 29<sup>th</sup> November 2016, notifying the Mombasa County Labour Office, of the intended redundancy.

27. From the evidence on record, the Respondent ceased operations in the entire department, where the Claimants worked. It seems to me therefore that as far as the Claimants were concerned, the reason for and extent of the redundancy was duly given. In light of the extent of the redundancy, being the entire department, the issue of selection criteria was not relevant in this case. This settles the question of compliance with conditions (a), (b) & (c).

28. Conditions (e), (f) & (g) provide for statutory dues payable to the employees declared redundant. According to the termination letters issued to the Claimants, they were required to proceed on leave during the notice period. This Court has stated elsewhere that leave and notice pay are mutually exclusive rights and none can be traded for the other (see *Fulgence Msangachi Mgholo v Hakika Transport Services Limited* [2018] eKLR).

29. By forcing the Claimants to take their pending leave during the notice period, the Respondent breached condition (e) which requires that such leave be paid off in cash, as part of terminal dues. The Respondent’s breach in this regard compromised the redundancy process and on this ground alone, the Claimants are entitled to some compensation.

#### **Remedies**

30. I therefore award each Claimant three (3) months’ salary in compensation. In arriving at this award, I have taken into account the Claimants’ length of service but also the fact that the Respondent did comply with some of the conditions under Section 40 of the Employment Act.

31. For the reason that the notice was compromised by the Respondent forcing the Claimants to take their annual leave during the notice period, I will allow the claim for one month’s salary in lieu of notice.

32. In the end, I enter judgment in favour of the Claimants as follows:

#### **1<sup>st</sup> Claimant: Daniel Kianga Kimeu**

a. 3 months’ salary in compensation.....Kshs. 47,343

b. 1 month’s salary in lieu of notice.....15,781

**Total.....63,124**

#### **2<sup>nd</sup> Claimant: Walter Baraka Kirao**

a. 3 months’ salary in compensation.....Kshs. 47,343

b. 1 month’s salary in lieu of notice.....15,781

**Total.....63,124**

#### **3<sup>rd</sup> Claimant: Hagai Mwakale Nzighe**

a. 3 months’ salary in compensation.....Kshs. 47,343

b. 1 month’s salary in lieu of notice.....15,781

**Total.....63,124**

33. These amounts will attract interest at court rates from the date of judgment until payment in full.

34. The Claimants are also entitled to Certificates of Service plus costs of the case.

35. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OCTOBER, 2021**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Okeyo for the Claimants

Mr. Mwawaza for the Respondent