



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. E369 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

BAKERY, CONFECTIONERY,

FOOD MANUFACTURING AND ALLIED WORKERS UNION (K).....CLAIMANT

VERSUS

BAKERS OVEN LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant is registered as a trade union within the meaning of Section 19 of the Labour Relations Act, 2007 and has authority and legal mandate to institute proceedings and to champion the interest of its members and employees employed in food manufacturing, confectionery making and food related industries.
2. The Respondent is a limited liability company duly registered pursuant to the provisions of the Companies Act, Cap 486, Laws of Kenya, and is engaged in the business of sweets and similar confectioneries among others.
3. The Claimant and the Respondent have executed a recognition agreement and have negotiated several Collective Bargaining Agreements governing industrial relations between the parties.
4. The Claimant avers that on the 23rd of December 2020, the Respondent issued a Notice of Business Closure thereby closing down indefinitely with immediate effect, rendering its 18 employees who are grievants herein redundant without issuance of Notice to the Claimant and/or the labour office as required by the provisions of Section 40 of the Employment Act, 2007.
5. The Claimant avers that no notification was issued to the Claimant at least 30 days before the date of redundancy giving the reasons and extent of the redundancy as required under the provisions of Section 40(1)(a) of the Employment Act, 2007.
6. That the Respondent did not notify or hold discussions with the union on the reasons and the extent of the redundancy prior to effecting termination by way of redundancy.
7. That the Respondent did not make reference to the Collective Agreement in terms of the procedure and the terminal benefits payable in line with clause 8(b) as read with clause 9(c) of the Collective Bargaining Agreement (CBA).
8. That the Respondent has not paid terminal benefits due and owing to the grievants herein on account of the redundancy process as obligated under Clause 9(c) of the CBA as read together with Section 40(g) of the Employment Act, 2007.
9. The Claimant avers that the Respondent proceeded to terminated the services of the 18 grievants on account of redundancy through letters dated 21st of December 2020, without prescribing to the procedural safeguards and processes laid out in the foregoing paragraph.
10. The Claimant avers that as soon as it gained knowledge of the Respondent's unlawful redundancy it addressed a letter dated the 11th of January 2021 protesting the redundancy meted out on the grievants herein and requested for a meeting to be held on the 14th of January 2021.
11. That vide a letter dated 13th January 2021, the Respondent protested the short notice and requested for a meeting on 21st January 2021 at their premises and further requested that only shop-stewards be allowed to attend the said meeting.

12. The Claimant reported a dispute to the minister vide a letter dated 23rd February 2021 over unlawful redundancy of the 18 grievants pursuant to Section 62 of the Labour Relations Act, 2007. That vide a letter dated the 30th of March 2021, the Minister appointed Messrs. J. M. Gatimu as conciliator to adjudicate over the dispute by way of conciliation.

13. That Claimant prays for the following reliefs –

(a) *A Declaration that the redundancy meted out on the 18 grievants herein was unfair, illegal null and void.*

(b) *An order for payment of the 18 grievants terminal dues and entitlements including Notice Pay, Severance Pay, Service Pay, Unpaid Salary for days worked, Compensation for unlawful termination as particularized as particularized below in the sum of Kshs.26,674,666.37/-*

| NAME | NOTICE PAY | SEVERANCE PAY | SERVICE PAY | 12 MONTHS' COMPENSATION | UNPAID SALARY | TOTAL |
|--------------------------|-------------------|----------------------|--------------------|--------------------------------|----------------------|--------------|
| Benson Gitau Kamanja | 199,761.00 | 1,664,675.00 | 1,609,185.83 | 799,044.00 | 199,761.00 | 4,472,426.83 |
| Andrew Mathenge Wambugu | 86,808.00 | 636,592.00 | 615,372.27 | 347,232.00 | 43,404.00 | 1,729,408.27 |
| John Orondo Oloo | 110,052.00 | 807,048.00 | 780,146.40 | 440,208.00 | 55,026.00 | 2,192,480.40 |
| Joseph Mwakavi | 86,808.00 | 636,592.00 | 615,372.27 | 347,232.00 | 43,404.00 | 1,729,408.27 |
| Boniface Nzioki Nyamau | 86,808.00 | 607,656.00 | 587,400.80 | 347,232.00 | 43,404.00 | 1,672,500.80 |
| Austine Mwachai Mwalugha | 102,267.00 | 647,691.00 | 626,101.30 | 409,068.00 | 51,133.50 | 1,836,260.80 |
| Reuben Mativo | 79,590.00 | 344,890.00 | 333,393.67 | 318,360.00 | 39,795.00 | 1,116,028.67 |
| James Thiongo Ngotho | 86,808.00 | 376,168.00 | 363,629.07 | 347,232.00 | 43,404.00 | 1,217,241.07 |
| Fredrick Odera | 86,808.00 | 347,232.00 | 335,657.60 | 347,232.00 | 43,404.00 | 1,160,333.60 |
| Oliver Ochieng Miyere | 85,590.00 | 256,770.00 | 248,211.00 | 342,360.00 | 42,795.00 | 975,726.00 |
| Samuel Karanja Gachoka | 79,200.00 | 184,800.00 | 178,640.00 | 316,800.00 | 39,600.00 | 799,040.00 |
| Godfrey Kariithi Gahuru | 79,200.00 | 184,800.00 | 178,640.00 | 316,800.00 | 39,600.00 | 799,040.00 |
| Mary Karanja Wambui | 81,300.00 | 298,100.00 | 288,163.33 | 325,200.00 | 40,650.00 | 1,033,413.33 |
| John Gatumu Mwangi | 80,250.00 | 588,500.00 | 568,883.33 | 321,000.00 | 40,125.00 | 1,598,758.33 |
| Charles Wangombe Wambugu | 26,400.00 | 26,400.00 | 25,520.00 | 316,800.00 | 39,600.00 | 434,720.00 |
| Charles Mwangi Warui | 26,400.00 | 26,400.00 | 25,520.00 | 316,800.00 | 39,600.00 | 434,720.00 |
| Margaret Ngarachu Mbaire | 79,200.00 | 633,600.00 | 612,480.00 | 316,800.00 | 39,600.00 | 1,681,680.00 |

| | | | | | | | |
|--------------|----------|-----------|------------|------------|------------|-----------|----------------------|
| Symon Maina | Macharia | 79,200.00 | 633,600.00 | 612,480.00 | 316,800.00 | 39,600.00 | 1,681,680.00 |
| TOTAL | | | | | | | 26,564,866.37 |

(c) Interest on (b) above from date of filing suit until payment in full.

(d) Cost of the Suit

14. Simultaneously with the memorandum of claim, the Claimant filed a notice of motion in which it seeks the following prayers –

(1) Spent.

(2) THAT pending hearing and determination of this matter, this Honorable Court do and hereby order the Respondent to deposit the sum of Kshs.26,564,866.37 being the redundancy benefits due and owing to 18 grievant unlawfully declared redundant into a joint-interests earning account to secure the grievants terminal benefits should they be successful in this suit or such other proportion of the sum claimed as this Honorable Court may deem appropriate to order.

(3) THAT in the alternative to prayer 2 above, pending hearing and determination of this matter this Honorable Court do order the Respondent to deposit in Court an irrevocable bank guarantee that their bankers undertake to pay Kshs.26,564, 866.37 due and owing to the redundant employees upon conclusion of this suit should it be decided in favour of the 18 grievants.

(4) THAT without prejudice to the foregoing, the court do allocate a hearing date on a priority basis.

(5) THAT the cost of the application be provided for.

15. On 16th June 2021 when parties appeared in Court for hearing of the application, the Court directed that the application and claim be heard together. The Court further directed that in view of the nature of the reliefs sought and there being no dispute on the facts, the claim and application be disposed of by way of written submissions, documents and affidavit evidence.

16. In the replying affidavit of Ghalib Mohamed, Director of the Respondent sworn on 4th October 2021, he states that the suit is premature under Section 73 of the Labour Relations Act as it does not fall under Section 74 of the Act. He avers that the Respondent was forced by the COVID 19 pandemic to close its operations. That both the Labour Office and Union offices were not operational hence the difficulty in advising them of the closure of business.

17. The Affiant deposes that it did not declare the grievants redundant but rather, the company collapsed due to COVID 19.

18. It is further the Affiant's deposition that for 8 months leading to the closure the Company was operating at a loss and was compelled to borrow from a sister company to pay its employees.

19. That for the entire 2020, there was no work or any operations at the Company, facts well known within the Union and its members but the Respondent still struggled to pay the employees in spite of no work done at all.

20. It is Mr. Mohamed's position that the Respondent has filed for bankruptcy, that its machinery and equipment were possessed by the Landlord as a result of rent arrears and it will not be able to comply with Court orders. That Court orders should not be made in vain.

21. In the Respondent's statement of Defence and witness affidavit of Ghalib Mohamed both filed with the replying affidavit, the Respondent reiterates the averments in the affidavit of Ghalib Mohamed.

22. The issues for determination are the following –

- a) Whether the suit is premature vide section 73 of the Labour Relations Act;
- b) Whether the redundancy of the grievants herein was lawful;
- c) What remedies are available to the Claimant;
- d) Who is to bear the cost of the Suit.

Is the suit premature

23. Section 73 and 74 of the Labour Relations Act cited by the Respondent in support of its position that the suit is premature provide as follows –

73. Referral of dispute to Industrial Court

(1) If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.

(2) Notwithstanding the provisions of subsection (1), if a trade dispute—

(a) is one in respect of which a party may call a protected strike or lockout, the dispute may only be referred to the Industrial Court by an aggrieved party that has made a demand in respect of an employment matter or the recognition of a trade union which has not been acceded to by the other party to the dispute; or

(b) is in an essential service, the Minister may, in addition, refer the dispute to the Industrial Court.

(3) A trade dispute may only be referred to the Industrial Court by the authorised representative of an employer, group of employers, employers' organisation or trade union.

74. Urgent referrals to Industrial Court

A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns—

(a) the recognition of a trade union in accordance with section 62; or

(b) a redundancy where—

(i) the trade union has already referred the dispute for conciliation under section 62(4); or

(ii) the employer has retrenched employees without giving notice; or

(c) employers and employees engaged in an essential service.

24. The Respondent did not explain why it insists that this matter is prematurely filed. The Claimant has demonstrated that it reported a dispute to the Minister of Labour and a Conciliator, Mr. Dismas Okumu was appointed on 30th March 2021. This dispute was filed on 4th May 2021 without the Conciliator resolving the same. The dispute therefore was filed in compliance with Section 69(b) of the Act as pleaded in paragraphs 8, 9 and 10 of the memorandum of claim.

25. Section 73(1) specifically provides for reference of disputes to the Court in the manner that the instant dispute was filed. Section 74(b) further allows a trade union to file an urgent referral to Court in cases of redundancy as is the case herein. In any event this dispute was not filed under Section 74 but under Section 73(1) of the Act. The fact that the Claimant filed a motion under certificate of urgency on its own does not make it a reference under Section 74 of the Act.

26. I find that the suit as filed is regular and within the provisions of both the Labour Relations Act and the Employment and Labour Relations Court (Procedure) Rules.

Was the redundancy lawful

27. Section 40 of the Employment Act provides for the procedure for redundancy. The Respondent issued a Notice of Business Closure dated 21st December 2020 to the grievants, terminating their services by the notice. A copy of the same is reproduced below –

21st December 2020

EMPLOYMENT NUMBER:

EMPLOYEE NAME:

Dear Sir/Madam,

RE: NOTICE OF BUSINESS CLOSURE

We are in deep pain and much regret to inform you of our closure due to the following reasons:

1. As you are well aware, Farmers Choice was our only customer and they, for reasons best known to them, have not sent an LPO since July this year even after I have spent close to Kshs.1 million on renovations and repairs as per their requirement. As we no longer have a customer, we have been forced to shut down immediately due to bankruptcy.

2. You are also aware that as of March this year with the Covid-19 situation, we have been greatly affected in our other 2 companies, and as a result they cannot offer us any further financial assistance.

3. We have also run up rent arrears of 6 months on our premises, and as such the landlord has seized the plant and equipment,

offering us no way forward to try and reopen elsewhere as we now have no place to work from and no equipment to work with.

4. You may also be aware that August and the half of September salary that we did pay to you was from borrowed money. The source of those funds has graciously agreed to help us for the last time with funds to make a final settlement to you.

We would also like to inform you of our great pleasure and appreciation of your great service to us and wish you all the best in life and future endeavours. We wish you well and may God bless you more.

Yours sincerely,

SIGNED

GHALIB MOHAMED

Director”

28. As the letter of closure demonstrates, the closure did not happen due to circumstances that occurred in one day. It was a process. Indeed, at paragraph 11 the Respondent pleads “*The Respondent further avers that for over 6 months leading to the closure of its operations, the company was operating at a loss and was further forced to borrow monies from its sister company to pay the employees.*”

29. In the case of **Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited [2013] eKLR**, Mbaru J. while addressing procedural aspects of Section 40 of the Employment Act, 2007 held as follows:-

“Thus, these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the provisions of the law. This is not a one-day process as it must be participatory, consultative and informative.”

30. The law requires that before the decision to terminate employment of employees on account of closure of business which amounts to a redundancy, the employer engages the Union if an employee is a member of the Union. The Respondent had sufficient time to engage the Claimant as provided under Section 40(1)(a) of the Employment Act and Clause 9 of the CBA which provides as follows –

CLAUSE 9; REDUNDANCY

(a) Should it become necessary for the company to terminate the services of employees for reasons of redundancy, consideration of either membership or non-membership of the Union shall not be taken into account. Selection of such termination will be determined by the company on consideration of merit and ability but when these factors are equal as between employees, “the last in, first out” principal shall apply.

(b) In the event of an intended redundancy, the company shall discuss with the union the reasons for and the extent of the redundancy prior to effecting redundancy.

(c) Any employee who is declared redundant shall be entitled to normal notice or pay in lieu thereof coupled with all terminal benefits under Clause 8 (b) above and shall further be entitled to severance pay at the rate of thirty (30) days pay for each year of service based on the rate of pay at the time of discharge.

31. The Respondent’s averment that it did not declare any redundancy is also not valid. Section 3 of the Labour Relations Act defines redundancy as –

“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;

32. As was stated in the case of **Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others (2018) eKLR** by the Court of Appeal:-

“There is a heavy burden of proof placed upon the employer to justify any termination of employment. As stated earlier, the appellants here ought to have given the “the reasons and the extent of the redundancy” but there is no evidence on record sufficient to discharge that burden. It was further contended by the respondents that the Labour Officer was not served with any letter or reasons as required under section 40 but the appellants merely made a bare assertion that service was made and reasons given for redundancy. In the absence of proof, we must find that there was no service and therefore the notice was invalid.

40. Furthermore, consultation was necessary before the redundancy notices were issued. **Article 13 of Recommendation No. 166 of the ILO Convention No. 158- Termination of Employment Convention. 1982 - 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 minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

33. Again, in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, the Court of Appeal addressed itself on the issue of consultations before effecting terminations through redundancy. Justice Maraga (as he then was) rendered himself as follows:-

“... the requirement for consultations is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provisions are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4) for conciliation, I am of the firm view that the requirement for consultations implicit in these provisions.”

34. From the evidence on record, it is manifestly clear that the Respondent terminated the employment of the grievants by way of redundancy without complying with the requirements of both Section 40 of the Employment Act and Clause 9 of the CBA between the Claimant and Respondent. The redundancy was therefore unlawful and unfair.

35. Even if the Court were to consider the disengagement of the grievants as a normal termination under Section 35 of the Employment Act, it would still be unfair for want of compliance with the procedure set out under Section 41 of the Employment Act.

Remedies

36. The Claimant prays for the remedies as already set out herein above. The Respondent did not specifically contest the tabulation of the terminal benefits of the grievants as set out in “Appendix A” to the claim. I have looked at the tabulation and in my view, with the exception of compensation, I find the tabulation to be in accordance with both the law and the parties CBA.

37. Clause 8 of the parties CBA provide for termination notice and terminal benefits as follows –

CLAUSE 8: TERMINATION OF EMPLOYMENT

(a) Notice.

After the completion of probationary period, the employment may be terminated by either party giving to the other, notice of intention to do so, or in the alternative, pay in lieu thereof as follows:-

(i) Employee with less than one (1) year service – One (1) month notice

(ii) Employee with over one (1) but less than five (5) years – Two (2) months' notice

(iii) Employee with over five (5) years' service – Three (3) months' notice

(b) Terminal Benefits.

In addition to the notice provided for under (a) above, an employee whose services has been terminated by the company, or who tenders proper resignation by giving the required notice in accordance with this clause shall be paid terminal benefits by the company as follows:-

(i) Pay for days worked and not paid.

(ii) House allowance for days worked and not paid

(iii) All pending leave paid in cash.

(iv) Leave Travelling Allowance.

(v) Overtime worked and not paid.

(vi) Service pay at the rate of twenty nine (29) days pay for each year of service based on the employee's earnings at the time the contract terminates.

38. With respect to the prayer for compensation, I have considered the circumstances under which the grievants lost their employment, the length of service of each employee and all the relevant factors under Section 49(4) of the Employment Act.

39. It is my view that reasonable compensation of the grievants is as follows –

For grievants who had served more than 10 years' service, 10 months salary. For those who had served for less than 10 years 6 months' salary.

40. I therefore award the grievants the total sum of **Kshs.4,956,980/-** as more specifically set out in the Table

below.

41. The Respondent's shall pay the Claimant's costs of this suit and interest shall accrue from date of judgment.

TABLE ON SCHEDULE OF PAYMENT

| <i>NAME</i> | <i>GROSS PAY</i> | <i>YEARS OF SERVICE</i> | <i>COMPENSATION</i> <i>(10 months for 10 years' service and above, 6 months for below 10 years' service)</i> |
|----------------------------------|------------------|-------------------------|---|
| 1 Benson Gitau Kamanja | 66,587.00 | 25 | 665,870.00 |
| 2 Margaret Mbaire Ngarachu | 26,400.00 | 24 | 264,000.00 |
| 3 Symon Macharia Maina | 26,400.00 | 24 | 264,000.00 |
| 4 John Mwangi Gatumu | 26,750.00 | 22 | 267,500.00 |
| 5 Andrew Mathenge Wambugu | 28,936.00 | 22 | 289,360.00 |
| 6 John Orondo Oloo | 36,684.00 | 22 | 366,840.00 |
| 7 Joseph Mwakavi | 28,936.00 | 22 | 289,360.00 |
| 8 Boniface Nzioki Nyamau | 28,936.00 | 21 | 289,360.00 |
| 9 Austine Mwachai Mwalugha | 34,089.00 | 19 | 340,890.00 |
| 10 Reuben Mativo | 26,530.00 | 13 | 265,300.00 |
| 11 James Thiongo Ngotho | 28,936.00 | 13 | 289,360.00 |
| 12 Fredrick Odera | 28,936.00 | 12 | 289,360.00 |

| | | | | |
|--------|-----------------------------|-----------|----|----------------------------|
| 1 3 | Mary Wambui Karanja | 27,100.00 | 11 | 271,000.00 |
| 1 4 | Oliver Ochieng Miyere | 28,530.00 | 9 | 171,180.00 |
| 1 5 | Samuel Karanja Gachoka | 26,400.00 | 7 | 158,400.00 |
| 1 6 | Godfrey Gahuru Kariithi | 26,400.00 | 7 | 158,400.00 |
| 1 7 | Charles Wangombe Wambugu | 26,400.00 | 1 | 158,400.00 |
| 1 8 | Charles Warui Mwangi | 26,400.00 | 1 | 158,400.00 |
| | | | | <u>4,956,980.00</u> |

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER 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