



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 308 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA PRIVATE UNIVERSITIES

WORKERS UNION.....CLAIMANT

VERSUS

KAG EAST AFRICA.....RESPONDENT

JUDGMENT

1. The Claimant herein is duly registered trade union within the meaning of the Labour Relations Act, 2007 with the mandate to represent workers both academic and non-academic in all private universities in Kenya.
2. The Respondent is a private university established under the Universities Act No. 42 of 2012 whose core mandate is to offer higher education.
3. The Claimant and the Respondent have a valid recognition agreement dated 20th June 2018.
4. Under the terms of the recognition agreement and the law, the Respondent is under a duty to engage with the claimant on matters pertaining to the terms and conditions of service and welfare of the unionisable members.
5. The parties were in the process of negotiating their first collective bargaining agreement when the COVID 19 pandemic broke out thus affecting the negotiations.
6. It is the Claimant's averment that the **Employment Act, No. 11 of 2007** has now given the following provision on employment relations during the Covid-19 pandemic.

Section 94(1) where the Covid -19 pandemic has adversely affected the ability of an employer to pay salaries or wages, the employer shall not:-

a) Terminate a contract of service or dismiss an employee; or

b) Coerce an employee to take a salary cut.

(2) Despite subsection (1), where an employer is unable to meet his obligations to pay salaries or wages, the employer shall permit an employee to take leave of absence without pay for the duration of the Covid-19 pandemic.

7. It is the Claimant's averment that by letters dated 26th and 27th May, 8th and 9th June 2020 respectively, the Respondent unilaterally issued letters to the Claimant's members for termination, retirement, redundancy and unpaid leave effective 10th June 2020 until end of COVID-19 pandemic. That the Respondent did not involve the Claimant or seek its input before the circulars were issued. That this infringed on the Claimant's rights under the recognition agreement and Article 41 of the Constitution.

8. The Claimant seeks for the following remedies against the Respondent in its memorandum of claim dated 14th July 2020:-

(i) A declaration do hereby issue that the : termination, retirement, redundancy and unpaid leave of the Respondent's unionisable employees as communicated in their letter dated ; 26th and 29th May 2020, 8th and 9th June, 2020 and effected through the 10th June, 2020 is unlawful/procedural, in bad faith and bad labour practice.

(ii) A permanent order of injunction do hereby issue restraining the Respondent from effecting and /or continuing with non-payment of the salaries and wages in respect of their unionisable employees.

(iii) THAT, an order of mandatory injunction compelling the Respondent to immediately refund all unpaid wages and salaries in respect of their unionisable employees.

(iv) THAT pending hearing and determination of this application, this Honourable Court do grant an order of temporary injunction restraining the Respondent from effecting any non-payment of salaries in respect of its unionisable employees due to Covid-19.

(v) THAT pending hearing of the claim filed herewith, this Honourable Court do grant an order of temporary injunction restraining the Respondent from effecting: termination retirement and redundancy in respect of its unionisable employees due to Covid-19 without involvement of the union .

(vi) THAT the Honourable court do grant an order of mandatory injunction compelling the Respondent to involve the claimant union and provide a full list of those he is intending to send on; unpaid leave, termination, retirement and redundancy to all unionisable employees .

(vii) THAT, an order that interest do accrue at court rates on all the wages unlawfully and unfairly not paid to all unionisable employees who are claimant members.

(viii) Any other order the Honourable court deem fit to address the cause of the suit.

(ix) Costs of the suit be awarded to the claimant as quantified by the court as it deems fit and just.

(x) An order that in default, execution to ensue to recover the said unpaid dues and cost of the suit.

9. Together with the statement of claim, the Claimant filed an application under Section 12 of the Employment and Labour Relations Court Act, Sections 19 and 94 of the Employment Act and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules and all enabling provisions of the law. It seeks the following orders in the notice of motion application –

(i) Spent.

(ii) 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.

(iii) 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.

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

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

10. Upon hearing the application ex parte on 14th July 2020, the Court granted the following orders –

(i) Spent.

(ii) THAT the Application is fixed for interparties hearing on a date to be set by the Deputy Registrar not later than 14 days from today

(i) THAT temporary injunction be and is hereby issued restraining the Respondent from terminating, retiring or declaring redundancy any unionisable employee or sending any employee on unpaid leave pending interpartes hearing of the application.

11. In response to the application, the Respondent filed a replying affidavit of DINA MWINZI, the Vice Chancellor of the Respondent in which she deposes that the Claimant failed to disclose material facts about the exercise of restructuring of employees of the Respondent in so far as the issue relating to unpaid leave.

12. She deposes that by the time the Claimant moved to Court, the Respondent had issued a one month's notice to members of the Claimant vide letter dated 8th June 2020 and subsequently issued personal letters to the individual employees dated 9th June 2020. That it had also notified the Claimant of the intended redundancies by letter dated 8th June 2020 in accordance with Section 40 of the Employment Act.

13. It is Ms. Dina Mwinzi's averment that by the time the Claimant moved the Court, its members had already served their notices and were not within the precincts of the Respondent which had already scaled down its operations.

14. It is further the averment of Dina Mwinzi that the dispute as filed is premature as the same was never referred to conciliation. That the dispute reported to the Minister was for refusal to sign Collective Bargaining Agreement (CBA) and not unlawful/unauthorized nonpayment of employees' wages sent on unpaid leave due to COVID-19 or unfair retirement/redundancy of employees due to COVID-19 or unfair termination of employees due to COVID-19.

15. It is also the averment of Ms. Mwinzi that the suit is brought under Section 94(1) of the Employment Act which is nonexistent in our laws.

16. It is Ms. Mwinzi's averment that the restructuring of the Respondent's operations was necessitated by the tough prevailing economic times and was in accordance with the law. She prays that the application be dismissed with costs.

17. The Respondent did not file a defence to the statement of claim. The suit was disposed of by way of written submissions. The Respondent again only filed submission in respect of the application and not the statement of claim.

18. Having considered the pleadings and submissions, the issues for determination are whether by the time the suit herein was filed the Respondent had already carried out the actions that are the subject matter of the suit and whether the Claimant is entitled to the orders sought.

19. As pleaded by the Claimant, the Respondent issued notice of intended redundancies to all staff by letter dated 8th June 2021 and by letters dated 9th June 2020, the staff were sent on unpaid leave. The Respondent further issued letters of retirement to the affected staff dated 8th June 2020. Both letters for redundancy and letters of retirement gave employees notice of one month meaning that the redundancy/retirement took effect on 8th July 2020, one month from date of the letters.

20. The redundancy letters informed the workers as follows –

“INTERNAL MEMO

8TH JUNE 2020

TO ALL STAFF OF KAG EAST UNIVERSITY

Dear All,

RE: INTENDED REDUNDANCIES

It is my prayer that you are all well alongside your families. We thank God for His mercies and covering upon us during this season. I am glad to report that we have not received reports of illnesses to our staff and families connected to the Covid-19 pandemic.

Unfortunately, we have continued to face business challenges occasioned by the decrease in student numbers, and this has negatively impacted our financial position. This situation is not unique to our institution as the general education and business sectors have similarly been affected.

Faced with these challenging circumstances, we will have to make some difficult decisions to sustain the University as we await the situation to normalise. Accordingly, we regret to inform you of the University's decision to reduce our staff numbers as we are unable to sustain our normal business operations.

As stipulated in section 40 of the Employment Act, No. 11 of 2007, KAG EAST University hereby gives one month's notice of the intended retirement and redundancies. A total of ten (10) staff members will be declared redundant while (4) will be sent on retirement and will be paid a severance compensation at the rate of fifteen (15) days' pay for each year of service. Further, all impacted staff will be paid their salary, all accruing benefits, and any outstanding leave earned but not taken for the period up to and including the date of termination.

On behalf of the KAG EAST University Council, I would like to assure you of our commitment and support through this process. Please feel free to contact the Human Resource office with queries that you may have regarding this process.

Yours faithfully,

SIGNED

Dinah Mwinzi, CBS

Vice-Chancellor”

21. The retirement letter informed the workers as follows –

8th June 2020

Eliakim Senelwa Adove Gardner

P/F No.5024

ID NO. 1141256

Dear Eliakim

RE: RETIREMENT

Following my earlier communication to you concerning the intended retirement, I wish to inform you that the University Management has now declared your retirement effective 8th July 2020. This letter serves as a one month notice on the said retirement in accordance with the law.

We are committed to adhere to the rules and regulations and any other legally binding documentation as regards such retirement. In this respect, we would like to inform you of the following:

1) You will be:

- a. paid a severance compensation at the rate of fifteen (15) days' pay for each year of service.
- b. paid your salary and any accruing benefits as at the termination date.
- c. compensated for any leave outstanding, which has been earned but not taken, as at the date of termination.
- d. Provided with retirement related training.

2) You will be required to arrange to handover any company property that you have in your possession, including:

- a. Any work equipment
- b. communication equipment belonging to the University
- c. Keys to University premises and facilities.
- d. files in your custody
- e. any other property that may have been entrusted to you as a result of your employment within the institution.

As I had mentioned in my brief to you, I would like to assure you of our commitment and support through this process. Please feel free to contact our Human Resource office with queries that you may have regarding this process.

May God's love be a lamp unto your feet and a light unto your path.

Yours faithfully,

SIGNED

Dinah Mwinzi

Vice-Chancellor"

22. The claim herein was filed by 14th July 2020 and orders granted on 15th July 2020. By then the letters of retirement and redundancy had already taken effect on 7th July 2020. I thus agree with the Respondent that the orders sought in both the application and suit had been overtaken by events.

23. Besides the fact that the suit was filed after the fact, the Claimant has not stated the names of the employees who were sent on unpaid leave, or those who were declared redundant or retired.

24. The Claimant has further not stated whether the employees retired had not attained retirement age or if the procedure used to retire the said employees did not comply with the Respondent's procedure for retirement, if there was any.

25. On the employees declared redundant, it is evident from the facts on record that the Respondent did not comply with Section 40(1)(a) and

(c) of the Employment Act which requires that notice of intended redundancy be issued to both the Union and local labour officer at least one month before the same is effected. This means that the notice to the Union and Local Labour Officer should have been issued at least one month before 8th June 2020 when the letters were issued.

26. To this extent, the redundancies were irregular and therefore unlawful.

27. Having found that the unpaid leave, redundancies and retirements occurred before the date of filing suit, the orders of injunction sought by the Claimant are overtaken by events as the Court cannot stop that which has already happened.

28. The order for payment of wages withheld during the period of unpaid leave can also not be granted as the Claimant has not particularized the same.

29. Besides the order that the redundancy was unlawful for want of notification both the Union and Labour Officer as required under Section 40(1)(a) and for failure to set out the selection criteria for the employees declared redundant, all other prayers in the claim fail for want of proof and are dismissed.

30. Each party shall bear its costs.

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