



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2134 OF 2014

(Before Hon. Justice Hellen S. Wasilwa 9th March, 2020)

LINUS M. MOBEGI.....1ST CLAIMANT
DOMINIC MUTUKU.....2ND CLAIMANT
MAGARE JARED.....3RD CLAIMANT
KARNA GIBSON.....4TH CLAIMANT
GEOFFREY MOKAYA.....5TH CLAIMANT
NICHOLAS OTIENO.....6TH CLAIMANT
JOEL O. OTWORI.....7TH CLAIMANT
JAPHETH WATHOME.....8TH CLAIMANT
GEOFFREY MAUNDU.....9TH CLAIMANT
BENARD MARAGIA.....10TH CLAIMANT
WILLIAM OCHARO.....11TH CLAIMANT
JONES NYANDAGO.....12TH CLAIMANT
MUTISO KINGOO.....13TH CLAIMANT
JOB ONTIRI.....14TH CLAIMANT
JAMES NYAEMA.....15TH CLAIMANT
EVANS ABUTI.....16TH CLAIMANT
VICTOR ONYANCHA.....17TH CLAIMANT
AARON MUSYOKA.....18TH CLAIMANT
JOSHUA NYACHIEO.....19TH CLAIMANT
EMMANUEL IVAYO.....20TH CLAIMANT
CHARLES MURIUKI.....21ST CLAIMANT

WESLEY NYABUGA.....22ND CLAIMANT

PIUS MWALA MUSAU.....23RD CLAIMANT

VERSUS

DEVKI STEEL MILLS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants were employed by the Respondent on diverse dates and served in different capacities. On the other hand, the Respondent is a company with interests and dealings in the steel industry.

2. The Claimants have instituted this cause to challenge the termination of their employment and seek the following reliefs:-

a. 1 months' salary in lieu of notice as per Appendix 31.

b. Damages at 12 months' gross pay for wrongful dismissal under section 49 (c) of the Employment Act as per the attached tabulation on Appendixes 1 and 29.

c. Payment in lieu of annual leave as per Appendix 31.

d. Overtime pay (as tabulated in the respective appendixes for various periods under underpayments).

e. Severance (redundancy) pay at 22 and 27 days' pay for each completed year as per Appendix 1 and 31.

f. Outstanding wages due to underpayment as per the provisions of the Labour Institutions and Labour Relations Act as per the attached appendixes. For the following periods:-

i. The period of 2011 – 2012.

ii. The period of 2012 – 2013.

iii. The period from October 2013 to May 2014.

g. This Honourable Court do make declaration that the terminations were unfair, unlawful and wrongful and proceed to order and make award as per tabulations for the respective Claimants per paragraph 16 above and in the Appendixes as attached and referred to herein.

h. Interest on the total for the respective Claimants as from the date of filing this claim.

i. Certificate of Service.

j. Costs of the cause.

k. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.

3. The Respondent filed its reply on 13/4/2015 in response to the claim and urged this court to dismiss the same with costs.

The Claimants' Case

4. The Claimants aver that they were never issued with employment contracts but were given payroll numbers.

5. It is their case that their employment was terminated on the ground that they had become redundant. It is their position that the Respondent denied them the opportunity to discuss the issues surrounding the redundancy or present their case. According to them, the criterion for selection on who to be declared redundant ought to have been agreed upon between the concerned parties and in accordance with the laid down criteria in the employment law.

6. They depose that the Respondent failed to follow the labour law principles neither were they issued with notices regarding their impending redundancy, as such, the same was unfair and unlawful.

7. The Claimants aver that they have never been granted annual leave and were grossly underpaid during the subsistence of their employment. They further aver that since the loss of their employment, they have found it difficult to find alternative employment.

8. The 1st Claimant testified as CW1. He adopted his witness statement dated 10/5/2018 as his evidence. It was his testimony that he was

employed on 5/1/2008. He stated that on 9/6/2014, they were sent back home upon reporting to work. It was his evidence that the notice of 12/11/2014 was never served upon him as his employment was terminated on 9/6/2014.

9. Upon cross examination, it was his testimony that they were not issued with termination letters. He contended that the company did not have any economic problem in 2014. It was his testimony that the Respondent's operations continued even after they had been declared redundant.

10. He maintained that redundancy notice was issued after his termination as he received it in November 2014 yet his employment had been terminated on 9/6/2014. It was his testimony that the Claimants had complained of salary underpayments even before instituting the claim but conceded that there was no evidence of the complaints before Court.

11. It was his testimony that as the furnace charger, he was paid Kshs. 11,348.00 as opposed to Kshs. 14,040.00 stipulated in the CBA. He further testified that the payment during the redundancy was as per clause 26 (e) of the CBA. He contended that the schedule of payment at page 53 of the Respondent's bundle of documents was not the normal pay.

12. During re-examination, it was his testimony that he was not issued with an appointment letter or pay slip.

13. The 3rd Claimant testified as CW2. He adopted his witness statement dated 19/9/2018 as his evidence. It was his evidence that he never resigned from his employment as alleged by the Respondent. He stated that on 9/6/2014, he was informed by Stephen Mutuku the Assistant Personnel, that his services were no longer required.

14. During cross examination, he conceded that he was not given authority to give evidence on behalf of the other Claimants. The witness was not re-examined.

15. The 6th Claimant testified as CW3. It was his testimony that he was employed on 28/2/2012. He stated that his employment terminated on 18/10/2014 when he was directed by his supervisor to go to the office where he would be paid his dues. He denied being issued with a termination letter. He further stated that he was never issued with a warning letter, a notice to show cause or subjected to disciplinary proceedings.

16. During cross-examination, it was his testimony that his basic salary had been Kshs. 10,000.00. He was not re-examined.

17. The 7th Claimant testified as CW4. He adopted his witness statement filed on 21/9/2018 as his evidence. He led evidence that he was employed on 4/1/2004 and his employment terminated on 9/6/2014. He denied being issued with a termination letter or a notice in lieu of termination of his employment. He further, stated that his employment was not terminated on account of poor performance as he had been directed by Stephen to make the necessary clearances when he reported to work.

18. During cross-examination, it was his testimony that the signature at page 65 had been forged. He maintained that the Respondent had never complained about poor performance. He stated that his employment was terminated because there was no work.

19. The 21st Claimant testified as CW5. He adopted his witness statement dated 21/9/2018 as his evidence. He denied resigning and contended that his employment was terminated on the ground that there was no work. He further contended that his duties were performed properly and averred that he was never issued with a notice to show cause or a termination letter.

20. During cross-examination, it was his testimony that he was not paid as per the provisions of the CBA and maintained that there had been no problem between him and the Respondent. He was not re-examined.

The Respondent's Case

21. The Respondent contends that each individual who has been engaged as an employee is issued with a letter of appointment and an instruction letter to read, understand and sign before commencing employment.

22. The Respondent denies declaring all the Claimants redundant and avers that the 2nd and 14th Claimants left employment on medical grounds while the 23rd resigned to pursue further studies and before employees were redundant. The 3rd Claimant left employment voluntarily while the 6th, 11th, 18th and 23rd Claimants left employment before employees were declared redundant. As such, their claims are not supported in law or the CBA.

23. The Respondent contends that the redundancy was not unlawful as the provisions of clause 6 of the CBA and Section 40 of the Employment Act were complied with. Further, the union did not raise any issue regarding the redundancy, which have been raised in this claim.

24. Further, it is averred that the Claimants were informed of the impending redundancy in the presence of shop floor stewards and the area secretary of the union.

25. The Respondent avers that the Claimants were paid all their dues being their salaries for the days worked, severance pay and notice pay as per the CBA, accrued leave, travelling allowance and bonuses due. Further, they accepted the said payments.

26. It is averred that leave and overtime payments are done to all employees at the end of each year. According to the Respondent, the issue

of underpayment was never raised during the course of employment.

27. The Respondent's position is that this claim is premature as it has not been submitted to the labour office for conciliation.

28. Alexander Sambu testified as RW1. He adopted his statement dated 14/8/2014 as his evidence. He stated that in 2014 the furnace section was shut down due to lack of raw materials. Notice was served upon the labour office and the Claimants' union. Thereafter, a redundancy notice was pinned on the notice board.

29. It was his testimony that some employees resigned on 11th September 2013 while some sought greener pastures when they learnt that the furnace could be shut down. It was also his evidence that every employee signed the document at page 71 of the Respondent's bundle of documents and denied the possibility of the signatures being forged.

30. He contended that all the employees were paid their dues and averred that those employees who worked overtime were paid their dues.

31. During cross-examination, it was his testimony that the Claimants were declared redundant at different dates and that the redundancy took place between November and December 2014. However, when he was referred to page 52 and pages 59 to 71, he conceded that the employees' employment was terminated in 2014 and 2013 respectively.

32. He further conceded that the documents at pages 65, 71 and 75 indicated that the reason for termination was because of poor performance but contended that they were taken through the disciplinary process. However, he had no evidence to prove this fact. He also lacked the evidence to prove that the Respondent had been experiencing financial difficulties.

33. Upon re-examination, it was his testimony that the documents at pages 58 to 77 were marked for future consideration in case the company was re-opened. He stated that in the company, one was considered terminated after 7 days of absence. It was also his testimony that there was no reason for the Claimants to be subjected to a disciplinary procedure as they were not indisciplined.

Claimants Submissions

34. In their submissions filed on 19/12/2019, the Claimants submit that the Respondent did not adhere to the provisions of the Employment Act neither was there proof adduced to prove such adherence. In particular, Section 40 which outlines the procedure to be followed before an employee can be declared redundant was not followed.

35. They further submit that the Claimants were informed of their termination when they reported to work and were advised to go back home and that the notices were issued months after the said termination.

36. They rely on the case of **Francis Maina Kamau vs. Lee Construction [2014] eKLR** where the Court held that where the procedure outlined in Section 40 was not followed before an employee was declared redundant, then the said termination was deemed unfair within the meaning of Section 45.

37. The Claimants submit that the Respondent has failed to prove that it had valid reasons to terminate their employment. They contend that the Respondent has not adduced evidence to prove that the reasons the Claimants employment was terminated was because they could not access raw materials. Further, no evidence was adduced to prove that the Claimants whose employment was terminated on account of poor performance were subjected to a disciplinary process. It is their position that unlike in the case of **Kenya Airways Limited vs. Aviation Workers Union Kenya & 3 Others [2014] eKLR** no audited reports were presented to prove that there was lack of raw materials thus necessitating the alleged redundancies.

38. The Claimants submit that they worked overtime as tabulated in the memorandum of claim and urge this Court to award their claim for overtime as tabulated. They further submit that they are entitled to notice pay because their employment was terminated without payment of notice or payment in lieu of the same.

39. It is submitted that the Claimants are entitled to an award of accrued annual leave as the Respondent has failed to adduce evidence that they went on leave. They rely on the case of **Grace Keverenge Kendeli vs. Laborex Kenya Limited [2013] eKLR** where the Court allowed the claim for accrued leave out of the Respondent's failure to produce evidence proving that the Claimant took her leave days.

40. The Claimants have urged this Court to exercise its discretion and award them the 12 months' compensation sought as their employment was terminated unfairly. The Respondent treated them inconsiderately and failed to follow due procedure if indeed there was a redundancy. They further urged this Court to grant them the award for severance pay for every 27 years for each year worked.

41. They submitted that they are entitled to costs since the Respondent was the author of its own misfortune.

Respondent's Submissions

42. In its submissions filed on 27/1/2020, the Respondent submits that the Claimants assertion that they were not issued with termination letters is deceitful as the Respondent had provided the 19th Claimant's appointment letter.

43. It is the Respondent's submissions that the termination of the Claimant's employment was lawful and fair as the Claimants were declared redundant as the furnace section was being shut down for unavailability of raw materials necessary for production. Further, the Claimants did not adduce evidence of their termination letters as such, their employment was terminated.

44. It is the Respondents position that the documents at pages 58 to 77 are forms given to employees seeking payment of their terminal dues and not termination notices. Further, that the section showing that the Claimants' services were not required was for the Respondent's use for future employment consideration. They note that the Claimants failed to adduce any evidence to prove that their signatures had been forged.
45. The Respondent has cited the case of Evans Otieno Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR and the Court of Appeal case of Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi [2013] eKLR where the Court held that the burden of proof lies on the person who invokes the aid of the law and substantially asserts the affirmative of the issue.
46. The Respondent avers that some of the Claimants were not declared redundant nor was their employment terminated as they had already left employment by the time the Respondent was declaring its employees redundant. And where employees were declared redundant section 40 of the Employment Act and the provisions of the 2012 – 2014 CBA were followed.
47. The Respondent submits that the Claimants' dues were calculated, paid and acknowledged by the Claimants as evidenced in documents at pages 53 to 57 of the Respondent's bundle of documents.
48. I have examined all the evidence on record from both Parties and submissions filed herein. The 1st Claimant herein testified on behalf of the other Claimants having been authorized to do so.
49. From the evidence of the Claimants, the Claimants were terminated on 9/6/2014 and had not been issued with any termination letter and that the notice of termination was dated November 2014 after their termination in June 2014.
50. CW3 told the Court that he was terminated on 18/10/2014 on account of there being no work.
51. The Respondent's witness indicated that the section in which the Claimants were working in was shut down due to lack of raw materials. The witness is in effect admitting that there was a redundancy situation, which necessitated that the Claimants' services be terminated.
52. In case of redundancy then, the Claimants were to be given notice as per Section 40 of Employment Act 2007 which the Respondent failed to do.
53. The Respondent's RW1 indicated that the Claimants were terminated in December 2014 and notices issued but also admitted that the notices issued were to the effect that the Claimants were not performing their duty properly. This contradicts the Respondent's position of the termination being due to redundancy.
54. If indeed there was a redundancy situation, then the Respondents were to follow the law as provided for under Section 40 of Employment Act 2007 which states as follows:-

(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".

55. The Respondents failed however to adhere to the law as provided above and they did not pay the Claimants as per the Collective Bargaining Agreement (CBA).
56. In terms of remedies therefore I find for the Claimants and award them as follows:-

1. 10 months' salary for the unlawful redundancy.

2. 1 month salary in lieu of notice

3. Severance pay as per the CBA Clause 26(e) (page 63) of Claimants' documents) depending on length of service for each Claimant.

4. The Parties will make tabulation for the amounts stated above for adoption by Court if agreed or for consideration if there is a disagreement.

5. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this **9th day of March, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kori for Respondent – Present

Mwaniki holding brief Kiarie for Claimant – Present