



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 131 OF 2016

(Before Hon. Justice Mathews N. Nduma)

DAVID AMBULI NGOTA.....CLAIMANT

VERSUS

UNIVERSAL NEWSPAPERS DISTRIBUTORS LIMITED.....1ST RESPONDENT

DAHYA ABDULHUSSEIN EBRAHIM.....2ND RESPONDENT

JUDGMENT

1. Cause no. 130, 131, 132 and 133 of 2016 were consolidated on 23rd January 2019 with cause no. 131 of 2016 as the lead file. The cause of action and the defendant are the same in the four causes filed by four (4) different claimants.

2. Three (3) claimants testified as CW1 and CW2 and CW3 respectively. All the claimants had filed witness statements which they adopted as their evidence in chief in the matter before being consolidated upon application by counsel for the respondents.

Cause of action

3. The four (4) claimants were employed by the respondent. CW1 was employed on 8th February 1982 as a clerical officer and rose to the position of Manager Distribution. The respondent was a distribution agent of daily nation newspapers in the Nyanza Region.

4. CW1 earned Kshs. 25,000 a month at the time the employment was terminated on 7th August 2015. CW1 stated that on that day the four (4) claimants were told there was no longer work and their employment was terminated. CW1 testified that they worked from 5.30 am in the morning to 6 pm in the evening daily for 7 days a week. That they were not paid overtime. That they did not go on leave and were not paid in lieu of leave. That they were paid salary up to end of July 2015. CW1 produced exhibits I to IV' in support of the claim. CW1 testified that they were not given notice nor paid in lieu of notice. That they were not paid severance pay.

5. That CW1 continued coming to the office up to December 2015 and was not paid for the period August to December 2015. CW1 was collecting money from distribution agents who had not remitted money from newspaper sales. CW1 testified that other claimants continued to work for the person who took over the business from the respondent Universal Newspapers Distributors Company Limited.

6. That the respondent owed Kshs. 28 Million to the newspaper publishers. That is the reason the business of the respondent was terminated by the Nation Media. That the respondent distributed newspapers for Nation Media only. That the operations of the company (1st respondent) ceased due to debts. The Nation Media terminated business with the 1st respondent on 7th August 2015. That is the only business the respondent did. The Company could no longer continue operating.

7. CW1 was appointed a Director so as to be able to sign documents from 2004, and was a signatory for a period of ten (10) years.

8. The 2nd respondent was the other director of the company. CW1 an accountant and a grandchild of the 2nd respondent operated the company. That the company experienced financial difficulties between the years 2012 to 2015 leading to closure.

9. CW1 under cross examination stated that the 1st respondent simply went out of business and the employment of the claimants came to an end. That the new management had no relationship with the 1st respondent.

10. CW2 Michael Angote Amboko testified that he was the claimant in cause no. 133 of 2016. CW2 relied on the witness statement dated 6th February 2017 as his evidence in chief. CW2 produced exhibits I to III'. CW2 stated that he was employed as cashier. That the

employment came to an end on 7th August 2015. Nation media stopped giving newspapers for distribution to the 1st respondent. The business of the company came to an abrupt standstill and the company went under.

11. CW2 stated that he was not paid terminal benefits set out in the statement of claim including one month salary in lieu of notice, unpaid salaries for period worked between August to November 2015, severance pay for 32 years worked, overtime not paid for the entire 32 years period including working on Saturdays, Sundays and public holidays, unpaid annual leave at 21 days a year for 20 years, underpayments from July 2013 to May 2015 and compensation for the unlawful termination of employment.

12. CW3 John Odongo Okongo testified that he was he claimant in cause no. 130 of 2016. CW3 testified just like CW2, he was employed by the 1st respondent as a cashier. CW3 adopted witness statement dated 6th February 2017 as his evidence in chief. Under cross examination CW3 stated that the 1st respondent distributed newspapers and magazines for the Nation Media. That on 7th August 2015, Nation Media stopped to supply the newspapers and magazines to the 1st respondent. That the employees were not aware of the intended stoppage until that morning. The business ended abruptly and so was their employment. That the 2nd respondent became sickly sometimes in the year 2012. CW1 became the manager of the business.

13. CW3 prays that the claimants be awarded as prayed. The claims are similar in the four suits which were consolidated since circumstances of employment and termination were the same. CW3 prays to be awarded as set out under paragraph 13 of the statement of claim. CW3 relied on exhibits I to III which included the identity card, computation of terminal benefits and letter of demand. Similar documents were produced on behalf of all the four claimants.

14. The fourth claimant is David Omondi Ainda the claimant under cause no. 132 of 2016. CW1, CW2 and CW3 testified on his behalf. CW4 was employed as a cashier on similar terms and conditions of service as CW2 and CW3. The 4th claimant had his employment terminated under similar circumstances and on the same day as CW1, CW2 and CW3. The 4th claimant prays to be awarded in terms of paragraph 12 of the statement of claim. The reliefs sought are similar to those sought by other claimants. The 4th claimant had served for only one year.

Defence

15. The respondent filed amended statements of response on 22nd January 2019 in respect of the four (4) consolidated suit in which it accuses CW1, as the sole cause of the collapse of the 1st respondent due to breach of fiduciary duties owed to the 1st respondent by CW1 in his capacity as acting managing director of the 1st respondent. With respect to CW2, CW3 and the 4th claimants, the 1st respondent pleaded that they all left the employ of the 1st respondent voluntarily upon collapse of the business and 1st respondent ceased operations. The 1st respondent denies that it terminated the employment of the claimants and prays the suit be dismissed with costs.

16. The respondents did not adduce any evidence in defence.

Determination

17. The issues for determination are:

- a. Whether the employment of the claimants was terminated unlawfully and unfairly by the respondents and
- b. If the claimants are entitled to the reliefs sought.

18. From the testimony of CW1, CW2 and CW3 it is common cause CW1 was the manager of the business of the 1st respondent the 2nd respondent having fallen sick and was unable to operate his business any longer. That CW1 was assisted by a grandchild of the 2nd respondent in running the business. It is also common cause that the 1st respondent was in the business of distributing newspapers and magazines for the Nation Media group and did no other business. It is also common cause that from the year 2012 when the 2nd respondent left the management of the 1st respondent to CW1, the company started experiencing financial difficulties. The 1st respondent fell into a large debt to the tune of Kshs. 81 million being unremitted price of sales to Nation Media group. It is common cause that CW2, CW3 and the 4th claimant were the cashiers for the 1st respondent and were responsible under the supervision of CW1 to collect money from newspaper and magazine sales and remit to the principal, the Nation Media group. It is not in dispute that the 1st respondent under the stewardship of the four (4) claimants had failed from the year 2012 to 2015 in this cardinal responsibility.

19. From the testimony of the three witnesses, the operations of the 1st respondent ground to a halt on the morning of 7th August 2015, when the Nation Media Group abruptly stopped the supply of newspapers and magazines to the 1st respondent. The operations of the 1st respondent ceased immediately.

20. It is not in dispute that the four claimants' employment came to an end abruptly as a result. That they had all become redundant because the 1st respondent had ceased to operate. However, they remained in employment for a further three months till November 2015 and December 2015 for CW1 collecting debts from newspaper vendors. CW1 testified that CW2, CW3 and the 4th claimant continued to work for a new employer who had taken over the business of the 1st respondent. CW2, CW3 and the 4th claimant did not dispute that testimony by CW1. The court finds that CW2, CW3, and the 4th claimants were taken up from November 2015 by the successor of the 1st respondent and since the successor of the business of 1st respondent is not a party to this suit we say no more of the matter.

21. It is the court's finding that the four (4) claimants became redundant in law and fact as provided under *Section (2) read with Section 40 of the Employment Act 2007* on 7th August 2015. The court finds that CW1, being the manager of the business of the 1st respondent at the time had the responsibility to comply with the provisions of *Section 40 of the Employment Act, 2007* in respect of the rest of the claimants. CW1 was in circumstances of this case obliged to pay himself and other claimants in lieu of one month salary since the operations of the respondent ceased suddenly and there was no time for the claimants to serve one month notice prior to the termination. However, it would appear the claimants stayed on collecting debts from newspaper vendors who still owed the 1st respondent money in respect of sales. This is the money that ought to have been applied by CW1 to pay the claimants' in lieu of one month notice and severance pay for the number of years served by the claimants.

22. The claimants have in the circumstance of the case failed to prove on a balance of probabilities that the sudden termination of their employment because the operations of the 1st respondent ground to a halt on the morning of 7th August 2015 was unlawful and unfair. Indeed, the four (4) claimants were solely responsible for the collapse of their employer and cannot be heard to say that their employment ended unfairly, when they were individually and collectively responsible for the collapse of the business.

23. The court finds that the termination of employment of the claimants on grounds of redundancy was lawful and fair in the circumstances of the case. The claimants are not entitled to any compensation in respect thereof.

Terminal benefits

24. The four (4) claimants pray for payment of terminal benefits including payment of overtime for hours worked above 8 hours a day and in respect of extra hours worked on Saturdays; double payment for work done on Sundays and Public holidays.

25. From the record David Ambul Ngota had served the 1st respondent for a period of 33 years. John Odongo Okongo had served for a period of 26 years. David Omondi Dinda had served for a period of one (1) year and Michael Angole Amboko had served for a period of 32 years.

26. There is no evidence before court that any of the four (4) claimants had made any claim for overtime against the 1st respondent during the entire period they served the 1st respondent. The claimants did not place any documentary evidence before court to support their respective claims for overtime. The claims for overtime were not proved on a balance of probabilities by any of the claimants and are dismissed accordingly.

27. In any event, the claims are time barred except with respect to the last three (3) years from date of filing suit.

Annual leave and underpayments

28. Similarly, the claimants have failed to prove on a balance of probabilities that they were underpaid for the entire period they served the 1st respondent. They have made claims for underpayments for the period 2013 to 2015 the period when the business was entirely under their collective watch. The claimants were paid Kshs. 25,000 for CW1; and Kshs. 10,107.10 for CW2; Kshs. 23,262 for CW3 and Kshs. 10,107.10 for the 4th claimant.

29. There is no evidence that any claim for underpayment was made against the 1st respondent whilst the claimants worked for it. The claimants have also failed to demonstrate that they were underpaid during the period 2013 to 2015 when the 2nd respondent had left the business for them to run collectively. This claim fails and is dismissed.

Payment in lieu of leave days.

30. Equally, there is no evidence adduced to prove on a balance of probabilities that any of the claimants was owed payment in lieu of leave days not taken for the lengthy period they served the 1st respondent. No documentary evidence has been placed before the court to prove this claim on a balance of probabilities. The claim is dismissed in respect of all the four (4) claimants.

One month salary in lieu of notice.

31. The claimants became redundant suddenly on the morning of 7th August 2015, when the Nation Media Group stopped supplying newspapers and magazines to the 1st respondent. That being the only business done by the 1st respondent, its operations ceased. In terms of *Section 40 of the Employment Act*, the claimants are entitled to one month salary in lieu of notice and the court awards them accordingly.

Severance pay

32. In terms of Section 40(1) (g) of the Act, each of the claimants is entitled to severance pay at the rate of not less than fifteen (15) days salary for each completed year of service having proved that they became lawfully redundant on 7th August 2015. The court awards each of the claimants the equivalent of fifteen (15) days salary for each completed year of service.

Arrear salary

33. The claimants testified that they were all declared redundant on 7th August 2015. CW1 testified that the three other claimants moved to work for a new employer from November 2015 and that himself he remained with the 1st respondent until December 2015 collecting

outstanding debts from the newspaper vendors. CW1 testified that the claimants received salary up to the end of July 2015. Therefore, the three claimants other than CW1 are owed 3 months salary from the month of August 2015 until November 2015. CW1 is owed salary for four (4) months worked from August to December 2015. The court so finds.

34. In the final analysis judgment is entered in favour of each claimant against the 1st respondent as follows:

a. David Ambuli Ngole.

i. One month salary in lieu of notice Kshs. 25,000.

ii. Severance pay $(25,000 \times 15 \times 33)$

30

Kshs. 412,500

iii. Salary Arrears for 5 months Kshs. 143,750.

b. John Odoyo Okongo.

i. One month salary in lieu of notice Kshs. 10,107.10.

ii. Severance pay $(10,107.10 \times 15 \times 26)$

30

Kshs. 131,392.30

iii. Salary arrear for 4 months Kshs. 40,048.40.

c. David Omondi Aindo

i. One month salary in lieu of notice Kshs. 23,262.

ii. Severance pay for 1 year

$(23,262.40 \times 15)$

30

Kshs. 11,631.20

iii. Salary arrears for 4 months Kshs. 93,049.20

d. Michael Angole Amboko

i. One month salary in lieu of notice Kshs. 10,107.10

ii. Severance pay

$(10,107.10 \times 15 \times 32)$

30

Kshs. 161,713.60

iii. Salary arrear for 4 months Kshs. 40,048.40

e. Interest at court rates from date of filing suit till payment in full

f. Costs of the suit.

Judgment Dated, Signed and delivered at Nairobi this 30th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 has 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. Kirma for Claimant

Mr. Itans Okhoe for Respondent

Chrispo – Court Clerk