



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 280 OF 2018

(Before Hon. Justice Mathews N. Nduma)

KENYA PETROLEUM OIL WORKERS UNION.....CLAIMANT

VERSUS

DESNOL INVESTMENT LIMITED.....1ST RESPONDENT

MR. CLIVE NATOME.....2ND RESPONDENT

JUDGMENT

1. The issue in dispute is whether or not the declaration of redundancy of Tabitha Akoth Auma, Bosco Mongare Ondari and Rebecca Akinyi Onyango was wrongful and unfair.
2. The suit was filed by the claimant union on behalf of the grievants on 10th August 2018.
3. The claimant prays that the court finds that the declaration of redundancy of the three was unlawful and unfair and direct the respondent to reinstate the grievants and/or re-engage them. In the alternative, the court awards the grievants as set out in the statement of claim as follows:
 - (a) Tabitha Akoth Aura Kshs. 549,642.95.
 - (b) Bosco Mongare Ondari – Kshs. 480,365.08.
 - (c) Rebecca Akinyi Onyango – Kshs. 660,642.09
 - (d) Costs and interest.
4. The suit was served on the respondents on 26th September 2018. The respondents did not enter appearance nor file statement of defence. Various mention dates to take directions were taken by the claimant and served on the respondents. The respondents did not attend any of the mentions. Affidavits of service were filed in respect of each service on the respondents.
5. Matter proceeded to formal proof on 3rd December 2019 and CW1 Bosco Mongare Ondari and CW2 Rebecca Akinyi testified under oath. The witnesses relied on filed witness statements as their evidence in chief. The grievants testified that their retrenchment was unlawful and unfair. That they were employed in the year 2014 and were paid Kshs. 14,000, 13,000 and 11,000 monthly salary respectively.
6. That the 2nd respondent simply informed the grievants on 26th June 2018 that he was handing over its business to Lexo Energy and that there was no work for the grievants anymore. That the grievants were not paid any terminal benefits according to Section 40 of the Employment Acts, 2007.
7. That Tabitha Auma worked as a pump Attendant and ought to be paid a minimum wage of Kshs. 19,233 instead of Kshs. 14,000 as per Legal Notice No. 111 of 2017.
8. That Bosco Mongare Ondari was a General Labourer and was paid Kshs. 13,000 instead of Kshs. 13,572.80 per month in terms of the same Legal Notice.

9. That Rebecca Onyango was a Pump Attendant upon being promoted from general labourer and was paid Kshs. 11,000 instead of Kshs. 19,223 per same Legal Notice.
10. Effort to conciliate the dispute failed. That the grievants were victimized for joining the union and were not given notice, notice to show cause or a hearing in violation of Section 136, 40, 41, 43 and 45 of the Employment Act 2007.
11. The claimant prays on behalf of the grievants for payment in lieu of notice, underpayments for the period 2014 to 2018; three months unpaid salary from March to June 2018; payment in lieu of leave days not taken between 2015 to 2017; and three years severance pay.
12. Further the respondent should pay compensation to the grievants for unlawful dismissal if not reinstated.

Determination

13. From the documents produced by the claimants, the business of the 1st respondent was taken over by another entity named Lexo energy. Clearly, the 1st respondent could not continue to employ the grievants as they were no longer in business. The 1st respondent however failed to follow the provisions of Section 40 in terminating the employment of the grievants. The termination of the employment of the grievants was procedurally flawed even if the 1st respondent had a valid reason to terminate their employment on grounds of redundancy.
14. The onus of proving that the 1st respondent had a valid reason to terminate the employment of the grievants rests with the 1st respondent in terms of *Section 43 as read with 47(5) of the Employment Act, 2007*.
15. The respondents did not defend the suit.
16. The claimant has proved on a balance of probabilities that the termination of the employment of the grievants was wrongful and unfair. The grievants are entitled to the reliefs under *Section 49(1) and (2) read with (4) of the Act*.
17. In this respect, reinstatement or re-engagement is not viable. The claimant having failed to demonstrate that it is possible and plausible to reinstate or re-engage the grievants. The only option left is for the 1st respondent to compensate the grievants for the unlawful termination of employment and pay terminal benefits in terms of the law.. The grievants had served the 1st respondent for at least four (4) years. They were terminated in the same manner without payment of terminal benefits and without warning and/or notice of loss of employment.
18. They were not paid any terminal benefits which is an aggravating facts. All three were underpaid in their respective roles. The three did not contribute to the job loss. The three were not compensated for the job loss. The three wanted to be reinstated which the court finds unsuitable. The court awards each of the grievants the equivalent of five (5) months salary in compensation for the unlawful and unfair termination.
19. The claimant has also proved that the grievants were owed and not paid terminal benefits set out in the statement of claim including: notice pay; underpayments; arrear salary; leave days; public holidays and service pay as set out. No case has been proved against the 2nd respondent and no orders are issued against him personally.
20. In the final analysis judgment is entered in favour of each of the grievants against the 1st respondent as follows-

Tabitha Akoth Auma

- (a) Compensation – Kshs. 100,970.
- (b) One month notice pay Kshs. 20,194.
- (c) Three months arrear salary Kshs. 77,892.
- (d) Leave days Kshs. 50,079.80.
- (e) Public holidays Kshs. 24,374.
- (f) Severance pay Kshs. 34,951.51

Bosco Mongare Ondari

- (a) Compensation – Kshs. 74,341
- (b) One month notice pay – Kshs. 14,865.10
- (c) Arrear salary – Kshs. 44,595.
- (d) Leave days – Kshs. 42,022.22.

(e) Public holidays – Kshs. 20,582.42.

(f) Severance pay – Kshs. 25,727.88.

Rebecca Akinyi Onyango

(a) Compensation – Kshs. 100,970.

(b) One month notice pay – Kshs. 20,194.

(c) Arrear salary – Kshs. 77,892.

(d) Leave days – Kshs. 50,074.80

(e) Public holidays – Kshs. 24,374.10.

(f) Severance pay – Kshs. 25,727.88.

(g) Interest at court rates from date of filing suit till payment in full.

(h) Costs of the suit.

Judgment Dated, Signed and delivered this 16th 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

Mrs. Mwaka for claimant.

Chrispo – Court Clerk