



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 955 OF 2018**

**Before Hon. Lady Justice Maureen Onyango**

**KENYA UNION OF COMMERCIAL FOOD AND**

**ALLIED WORKERS (KUCFAW)**

**CLAIMANT**

**VERSUS**

**HOME AFRICA LIMITED**

**RESPONDENT**

*(In the Matter of Labour Relations Act, 2007 Employment and Labour Relations Court Act, the Industrial Court Procedure Rules 2016, the Constitution of Kenya and all the enabling provisions of the Law)*

**JUDGEMENT**

In its claim filed on 14<sup>th</sup> June 2018, the Claimant Union avers that the Respondent unfairly terminated 14 of its employees on account of redundancy. It avers that on 6<sup>th</sup> June 2018 the Respondent issued to the 14 grievants notices of redundancy which they refused to sign. Consequently, on 7<sup>th</sup> June 2018 they were issued with letters sending them on 4 days off.

It avers that on 11<sup>th</sup> June 2018 the grievants reported to work and were issued with redundancy letters dated 6<sup>th</sup> June 2018. It avers that the Respondent terminated the grievants who were unionisable employees because of the union's application for Recognition Agreement in Nyeri Employment Labour Relations Court Cause 62 of 2017 that was coming up for hearing.

The Claimant seeks the following orders:

- i. That the Respondent's action is unfair and unprocedural.
- ii. That the Notices dated 6<sup>th</sup> June, 2018 and the redundancy letters of the same date and which were issued to the fourteen employees be and are hereby withdrawn.
- iii. That the fourteen employees to continue working as per their contract with the Respondent dated 1<sup>st</sup> December 2017.
- iv. That costs of the claim be provided for in favour of the Claimant

In the alternative and where the Court finds this redundancy should take place, then the Claimant prays that the Court grants benefits as follows:

**1. Daniel Lugudwa**

- i. One month's notice 20,808.40
- ii. June 2018 salary 20,808.40
- iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80
- iv. Accrued annual leave 8,348.50

v. Underpayment of wages since May 2017

to date 12,592.80

vi. Severance pay for 4 years 23,852.80

vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs of the suit to the Claimant

## **2. Mary Wangui Maina**

i. One month's notice 20,808.40

ii. June 2018 salary 20,808.40

iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80

iv. Accrued annual leave 8,348.50

v. Underpayment of wages since May 2017

to date 12,592.80

vi. Severance pay for 4 years 23,852.80

vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs of the suit to the Claimant

## **3. Silas Else Imoh**

i. One month's notice 20,808.40

ii. June 2018 salary 20,808.40

iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80

iv. Accrued annual leave 8,348.50

v. Underpayment of wages since May 2017

to date 12,592.80

vi. Severance pay for 4 years 23,852.80

vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs of the suit to the Claimant

## **4. Seth Omondi**

- i. One month's notice 20,808.40
- ii. June 2018 salary 20,808.40
- iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80
- iv. Accrued annual leave 8,348.50
- v. Underpayment of wages since May 2017  
to date 12,592.80
- vi. Severance pay for 4 years 23,852.80
- vii. Maximum compensation for unlawful  
redundancy 249,700.80

**Total 440,125.90**

- viii. Costs of the suit to the Claimant

#### **5. Emmanuel Wangatia Mukenya**

- i. One month's notice 20,808.40
- ii. June 2018 salary 20,808.40
- iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80
- iv. Accrued annual leave 8,348.50
- v. Underpayment of wages since May 2017  
to date 12,592.80
- vi. Severance pay for 4 years 23,852.80
- vii. Maximum compensation for unlawful  
redundancy 249,700.80

**Total 440,125.90**

- viii. Costs of the suit to the Claimant

#### **6. Vincent Ondicho Kiage**

- i. One month's notice 20,808.40
- ii. June 2018 salary 20,808.40
- iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80
- iv. Accrued annual leave 8,348.50
- v. Underpayment of wages since May 2017  
to date 12,592.80
- vi. Severance pay for 4 years 23,852.80
- vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs or the suit to the Claimant

**7. Nathan Onduso Onduma**

i. One month's notice 20,808.40

ii. June 2018 salary 20,808.40

iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80

iv. Accrued annual leave 8,348.50

v. Underpayment of wages since May 2017

to date 12,592.80

vi. Severance pay for 4 years 23,852.80

vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs or the suit to the Claimant

**8. Leonard Marauni Wanjala**

i. One month's notice 20,808.40

ii. June 2018 salary 20,808.40

iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80

iv. Accrued annual leave 8,348.50

v. Underpayment of wages since May 2017

to date 12,592.80

vi. Severance pay for 4 years 23,852.80

vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs or the suit to the Claimant

**9. Raphael Kipchumba Moriot**

i. One month's notice 20,808.40

ii. June 2018 salary 20,808.40

iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80

iv. Accrued annual leave 8,348.50

v. Underpayment of wages since May 2017

to date 12,592.80

vi. Severance pay for 4 years 23,852.80

vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs or the suit to the Claimant

**10. Isaiah Adede Chwanya**

i. One month's notice 20,808.40

ii. June 2018 salary 20,808.40

iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80

iv. Accrued annual leave 8,348.50

v. Underpayment of wages since May 2017

to date 12,592.80

vi. Severance pay for 4 years 23,852.80

vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs or the suit to the Claimant

**11. Penina Karanja**

i. One month's notice 20,808.40

ii. June 2018 salary 20,808.40

iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80

iv. Accrued annual leave 8,348.50

v. Underpayment of wages since May 2017

to date 12,592.80

vi. Severance pay for 4 years 23,852.80

vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs or the suit to the Claimant

**12. John Lolarwa**

- i. One month's notice 20,808.40
  - ii. June 2018 salary 20,808.40
  - iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80
  - iv. Accrued annual leave 8,348.50
  - v. Underpayment of wages since May 2017  
to date 12,592.80
  - vi. Severance pay for 4 years 23,852.80
  - vii. Maximum compensation for unlawful  
redundancy 249,700.80
- Total 440,125.90**

viii. Costs of the suit to the Claimant

### **13. Bernard Ototo Mbeki**

- i. One month's notice 20,808.40
  - ii. June 2018 salary 20,808.40
  - iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80
  - iv. Accrued annual leave 8,348.50
  - v. Underpayment of wages since May 2017  
to date 12,592.80
  - vi. Severance pay for 4 years 23,852.80
  - vii. Maximum compensation for unlawful  
redundancy 249,700.80
- Total 440,125.90**

viii. Costs of the suit to the Claimant

### **14. Wandera Chrisantus Joel**

- i. One month's notice 20,808.40
- ii. June 2018 salary 20,808.40
- iii. Salary for July up to November, the period remaining before expiry of the contract 104,014.80
- iv. Accrued annual leave 8,348.50
- v. Underpayment of wages since May 2017  
to date 12,592.80
- vi. Severance pay for 4 years 23,852.80
- vii. Maximum compensation for unlawful

redundancy 249,700.80

**Total 440,125.90**

viii. Costs or the suit to the Claimant

The Respondent filed a Statement of Response on 4<sup>th</sup> July 2018. It confirms that the parties herein had a dispute on recognition and that on 6<sup>th</sup> December 2018 the Court dismissed the Union's claim.

It avers that during the financial year 2017 – 2018, it underwent major financial challenges causing it to undergo major restructuring. It avers that it decided to outsource various services including security services. That its redundancy notices stated that it would pay terminal dues to the grievants which included notice pay, pro-rated leave days, service pay and welfare refund.

The Respondent also filed a Notice of Preliminary Objection on 11<sup>th</sup> June 2018 on grounds that:

- i. By dint of section 54 of the Labour Relations Act, 2007 the Claimant herein lacks the requisite *locus standi* to institute and prosecute this suit.
- ii. Pursuant to the provisions of Section 62 (3) and (4) of the Labour Relations Act, 2007 this Court lacks jurisdiction to hear and determine this matter in the first instance.

The Court directed that the Claim be heard simultaneously with the Respondent's Notice of Preliminary Objection and that the matter proceeds by way of written submissions.

### **Claimant's Submissions**

The Claimant submitted that the redundancy was unlawful as the 14 grievants had signed their one year contracts that were to lapse on 30<sup>th</sup> November 2018. It submitted that the Respondent never followed the laid down procedure under section 40 of the Labour Relations Act. It avers that the Respondent never issued a redundancy notice to the labour office as required under Section 40(1)(b) of the Employment Act.

It submitted that there was no abolition of duties and that the grievants were replaced by outsourced employees. It further submitted that the Respondent never issued the grievants with one-month notice as stated in the redundancy letters dated 6<sup>th</sup> June 2018.

It submitted that the Respondent never paid the grievants their dues according to the law. It urged the Court to rely on the case of **Kenya Union of Commercial Food and Allied Workers v Olivado (Epz) Limited [2017] eKLR**. It submitted that the Court does order the Respondent to pay the grievants their terminal dues.

### **Respondent's submissions**

The Respondent relied on section 54 of the Labour Relations Act and submitted that for a trade union to be afforded recognition it must be determined whether the trade union is the right union to represent workers in line with its constitution and whether the union has recruited a simple majority. It relied on the case of **KUDHEIHA v Commission for Higher Education [2013] eKLR**.

It was its submission that under Rule 5(a) of the Claimant's submission, its employees are not eligible for membership by dint of the fact that the Respondent is a Real Estate Developer that engages in property development. It relied on the case of **Transport Workers Union v Trans-Trade Ltd (K) [2016] eKLR** where the Court held that a trade union must recruit a simple majority of unionisable employees before it can be accorded recognition in the industry it represents the said workers. It further relied on the case of **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) v British Army Training Unit Kenya [2015] eKLR**.

It submitted that without recognition by an employer, a trade union even where it is registered to represent workers in a sector, remains a bystander to the disputes between workers and their employers.

It submitted that it undertook to settle the terminal dues and that it complied with the procedure under Section 40(1)(b) of the Employment Act in declaring the grievants redundant. In conclusion, it urged the Court to dismiss the claim with costs.

### **Determination**

The Claimants herein were employed by the Respondent on a one year contract that was to commence on 1<sup>st</sup> December 2017 and lapse on 30<sup>th</sup> November 2018. They were terminated on account of redundancy vide letters dated 6<sup>th</sup> June 2018 but issued to them

on 11<sup>th</sup> June 2018.

The issues for determination are

1. Whether the Claimant has locus to institute the suit.

2. Whether the grievants termination on account of redundancy was unfair.

3. Whether the grievants are entitled to the reliefs sought.

#### **Whether the Claimant has locus to institute the suit.**

The Respondent avers that the Claimant has no locus to represent the grievants. It relies on section 54 of the Labour Relations Act. In addition, it contends that this Court lacks jurisdiction to determine the matter by virtue of Sections 62(3) and (4) of the Labour Relations Act. Mr. Macharia for the Respondent submitted that the decision in Nyeri Employment and Labour Relations Court Cause 62 of 2017 was dismissed as the Claimant had not attained a simple majority.

In highlighting its submissions, Ms. Macharia for the Claimant submitted that the Claimant has a right to represent its members in the absence of the recognition. She submitted that the grievants paid their union dues by way of check-off and that the respondent had effected the union dues.

Section 54 (1) of the Employment Act provides:

**An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.**

The Court's finding in Cause 62 of 2017 was that the dispute was about numbers and that the Claimant had not attained the requisite numbers for recognition. The Respondent submitted that it is in the real estate industry which is a different industry from the Claimant. It referred the Court to Rule 5(a) of the Claimant's Constitution but this Constitution was not produced in Court. Further, the issue of being in different industries does not seem to have been raised in Cause 62 of 2017.

Nevertheless, recognition and representation are distinct. Whilst, it is mandatory under Section 54(1) of the Labour Relations Act for the Claimant to have recognition for purposes of collective bargaining, such recognition is not necessary for purposes of representing its members. Article 41(2)(c) of the Constitution provides that every worker has the right to form, join or participate in the activities and programmes of a trade union. In addition, Section 4(1)(b) of the Labour Relations Act provides that every employee has a right to join a trade union. The respondent did not deny that the grievants were members of the claimant union.

In **Kenya Shipping, Clearing, and Warehouses Workers Union v Africair Management & Logistics Limited [2016] eKLR** the Court held:

*“The obligation of the Trade Union to represent its Members in and out of Court, and the right to the Members to representation, in work related grievances and disputes, flows from the membership of the Employee to the Trade Union. These are obligations and rights created by membership. Recognition is between the Trade Union and the Employer. Membership creates a relationship between the Trade Union and its Members. The two relationships are not the same thing, and do not have the same legal effect. Trade Unions collect regular membership fees from Employees, and the Employees in return, enjoy the representation and protection of the Trade Union under the Union Constitution and the law. Membership allows the Employees to have the Trade Union's legal representation in Court, while Recognition allows the Union to collectively bargain with the Employers, for the benefit of Members, and all Unionisable Employees.”*

It is therefore my finding that though the Claimant has no recognition agreement with the Respondent, it has a right to represent the grievants. Consequently, it has locus to institute

the instant suit.

#### **Whether the grievants were unfairly terminated**

The Claimant contends that the Respondent has since replaced 14 employees by outsourcing its services. The Respondent avers that in the financial year 2017-2018, it underwent major financial challenges causing it to undergo major restructuring. The Respondent did not produce any evidence to prove that it underwent financial challenges or that it did restructuring.

In **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** the Court of Appeal held that the decision to declare redundancy has to be that of the employer based on purely commercial considerations and that section 40 of the Employment Act makes it clear that employers have a right to declare redundancy provided that the act is justified and the implementation is governed by the criteria set out in that section

The Claimant submitted that the Respondent did not follow the laid down procedure under sections 40 of the Employment Act. The Respondent on its part submitted that it followed due procedure and that it paid some of the grievants notice pay, pro-rated leave days, service pay and Welfare refund.

Section 40 of the Employment Act states:

**(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.

The Claimant produced a Notice of redundancy dated 6<sup>th</sup> June 2018 issued to Leonard Wanjala Marauni being 30 days' notice. In its termination letters dated 6<sup>th</sup> June 2018 addressed to the grievants stated:

*“...Re: Redundancy*

*Following the Notice of redundancy dated 6<sup>th</sup> June 2018,*

*please note you are no longer an employee of Home Afrika Communities Ltd-Migaa effective 6<sup>th</sup> June 2018, this follows a 4 day off which commences on 7<sup>th</sup> June 2018 to 10<sup>th</sup> June 2018. The 4 days off are included in the notice period, which you are entitled to.*

*Note on 11<sup>th</sup> June, 2018 if you have any concerns with your final dues, you need to raise it then. ...”*

The Respondent issued both the Notice of termination and the termination letters in a span of one month. In its termination letter it stated that the notice of redundancy ended on 5<sup>th</sup> July 2018 during which time they had already been terminated. The respondent did not produce any document to prove that it complied with the provisions of section 40 of the Employment Act. In addition, it did not prove that it issued notice of intended redundancy to the Labour Officer.

In **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR** the court held:

*“It is quite clear to us that sections 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”*

The Claimant avers that the respondent did not state the criteria used in selecting employees. However, the respondent's case is that it decided to outsource various services which included security services which were offered by the grievants. Therefore, these positions became redundant and there were no persons who was retained in the positions.

It is my finding that the grievants were unfairly terminated as the Respondent did not comply with the procedure set out in Section 40(1) of the Employment Act.

#### **Whether the Claimant is entitled to the reliefs sought**

In the Witness Statement of Natasha Staussi, the Respondent's

Human Resource Manager, dated 15<sup>th</sup> December 2019, she states that the Respondent has paid the terminal dues owing to some of its grievants namely; Emmanuel Wangatia, Chistanus Joel, Silas Else Imoh, Vincent Ondich, Bernard Mbeki Ototo, Daniel Lugudwa, Davies Epale, Francis Gakumo, Nathan Onduso and Mary Wangui.

She further stated that the Respondent is actively engaging the 3 employees, Seth Omondi, Raphael Munoi and Isaih

Adede with the aim of settling the matter while Leonard Wanjala and John Loeku are disinterested in pursuing the matter and are set to collect their final dues.

The Respondent avers that it paid notice pay, pro-rated leave days, service pay and welfare refund. Of these payments, the claimants did not plead service pay and welfare refund. Despite stating that it had paid terminal dues, the Respondent did not produce any proof of payment. It did not also produce any evidence that 2 of the grievants are disinterested in the suit.

I therefore find that the grievants are entitled to one month's salary in lieu of notice and pay in lieu of accrued leave as prayed.

The claims for June 2018 salary are only payable up to 11<sup>th</sup> June 2018 when the grievants were served with the termination letters.

The Claim for salary for the month of July to end of contract fail as the Claimants did not render any services to the employer and these payments amount to anticipatory earnings. Further, such pay is not provided under section 49 of the Employment Act.

The claims for underpayment fail as the grievants did not prove the difference in the monthly amount paid to each of them as they produced only one payslip for the Month of February 2018 belonging to Silas Else Imoh.

With respect to severance pay, the grievants contract of employment were for a period of one year beginning 1<sup>st</sup> December 2017 to 30<sup>th</sup> November 2018 thus they had not completed any year of service. This claim therefore fails.

With respect to maximum compensation for unfair termination, the Claimant submitted that the grievants were engaged by the Respondent in 2015. They however produced contracts of employment providing that they were to be employed for one year. They had only served for a period of 6 months. Having found the grievants were terminated and taking into considering the provisions of Section 49(4)(e) of the Employment Act on the length of service, the Claimants are awarded two months' salary as compensation for unfair termination. This takes into account that they were not given notification of one month and that the termination was unlawful.

### **Conclusion**

Each grievant is awarded the following –

1. One month's pay in lieu of notice.
2. Two months' salary as compensation.
3. 11 days worked in June 2018

**In total, each grievant is awarded Kshs.71,228.00**

The Claimant is entitled to costs of the suit which I assess at Kshs.50,000 in view of the fact that the claimant being a trade union is not covered by the Advocates Remuneration Order, but is entitled to reasonable costs to cover expenses and disbursements expended on the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JUNE 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the 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**