



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 438 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JAMES OYUGI MANGLA.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF TEACHERS.....1ST RESPONDENT

KENYA NATIONAL UNION

OF TEACHERS HOMABAY BRANCH..... 2ND RESPONDENT

JUDGMENT

1. The parties through their respective recorded a consent before Court on 18th September 2019 in the following terms:-

‘‘ It is hereby ordered:

1. **That** by consent of the parties, parties to file written submissions on the following pending issues: -

- a. Whether declaration of redundancy was lawful and fair.
- b. Whether the claimant is entitled to further terminal benefits.
- c. Who would bear the cost of the suit? ‘‘

2. The parties filed and proceeded to highlight the submissions on 18th December 2019. No viva voce evidence was adduced in the suit. Both parties relied on the pleadings and list of documents filed by the parties respectively.

History and facts of the Claimants case

3. The claimant was first employed by the union on the 10th July 1992 as junior clerk of KNUT (South Nyanza Region). He rose through the ranks to Accountant II KNUT Homa Bay Branch. That the claimant had a good work record and worked continuously until when he received a redundancy notice dated 18th July 2017. The notice was produced as annex I to the claim. It was written to the Claimant who is referred to in the letter as KNUT Junior Accountant KNUT Homa Bay Branch.

4. The notice was to take effect on 31st December 2017, and therefore gave the Claimant five and a half months’ notice period. The notice was copied to several officers including County Labour Officer Homa Bay County and was written by Mr. Cornel A. Ojuok, Branch Executive Secretary for KNUT HOTCES Homa Bay Branch.

5. The letter gave eight reasons why the existing staff establishment of the KNUT HOTCES – Scheme needed to be reduced including :

- i. Continued decline in the scheme’s income level occasioned by reduced membership and subscriptions.
- ii. Withdrawal of members from the scheme.
- iii. The scheme had since suffered great financial burden and unable to meet its financial obligations as and when they fall due

among others.

6. The respondent promised to pay the Claimant terminal benefits in terms of section 40 of the Employment Act no. 11 of 2007 listed as follows:-

- i. Salary for the days worked.
- ii. Payment in lieu of accrued leave days not taken.
- iii. One month notice pay.
- iv. 15 days salary for each completed year of service based on current basic pay on severance pay.
- v. Any other payment including salary arrears.
- vi. Certificate of service.

7. The claimant states that the notice was defective for errors enumerated under paragraph 7 of the memorandum of claim including that the notice purports that the claimant was an employee of the burial scheme and not KNUT, the 1st Respondent and that the reasons given for the declaration of redundancy are related to the employment of the claimant as an employee of the 1st Respondent and not of the burial scheme.

8. Further the terminal dues calculated are way lower than the entitlements due to the claimant. That the terminal dues did not factor in the consent Judgment already enforced in Nairobi ELRC No. 1325 of 2012. That the claimant is being targeted for filing the aforesaid case against the Respondents.

9. That the respondents have not set out the selection criteria applied vis a vis other staff of the respondents.

That claimant prays for orders that:-

- a. The declaration of redundancy was unlawful and unfair.
- b. The Claimant be paid exemplary damages as set out under paragraph 6 and Annex JOM2A of the memorandum of claim
- c. Interest and costs.

10. The claimant relied on a witness statement dated 5th December 2017 attached to the memorandum of claim which however was not adopted as evidence in chief in the consent entered into by the parties on 18th September 2019 on the manner in which the matter was to proceed for hearing and determination on the merits.

Defence

11. The respondents rely on a memorandum of reply filed on 27th March 2018, list of witness statements annexed thereto and list of documents annexed to the memorandum of reply.

12. Again the witness statements were not adopted as evidence in chief of the respondents in the aforesaid consent nor were the lists of documents for both parties admitted by consent of the parties.

13. Both parties filed final written submissions and the defence of the respondents is as follows:-

14. The claimant was employed on 1st September 1992 by Homa Bay Teachers Children Education scheme (HOTCHES) originally known as south Nyanza Teachers Education fund (SOTEFU).

15. An employment letter dated 10th July 1992 was issued to him.

16. The letter annexed to the claim specifically state.

17. ‘ ‘ Following your interview of 12th June 1992,you were successful and wish to appoint you with this letter for the post of Junior clerk of KNUT South Nyanza Teachers Children Education Fund with effect from 1st September 1992’ ’.

18. The claimant wrote a letter of acceptance dated 30th July 1992 as follows:-

19. ‘ ‘ I hereby accept the appointment as a clerk of KNUT SOTEFU subject to the terms of the appointment letter. ‘ ‘

20. By a letter dated 14/12/1994, the Executive Secretary of the 2nd Respondent wrote a letter of confirmation of the claimant to the position

of “ Accountant with KNUT SOTEFU” which partly reads:-

21. “ I am pleased to confirm your appointment as the Accountant of KNUT SOTEFU following your probation period since your employment at the 1st January 1993.”

22. The Claimant was confirmed to work under the terms provided in the two aforesaid letters and that the respondents fell in arrears of unpaid salaries to the Claimant due to operational reasons resulting in the filing of cause no. 1325 of 2012 by the Claimant against the respondent and he consent reached by the parties to settle the dispute which consent has been partly fulfilled by the respondents to date.

23. The respondents wrote a letter dated 17th January 2017 to the Executive Secretary of the 2nd Respondent clarifying that employees serving under KNUT schemes are not employees of KNUT. That their salaries are paid from the scheme commissions sent direct to the scheme account by the Teachers Service Commission (TSC) and KNUT was not responsible and would not pay those salaries from its coffers.

24. This letter was closely followed by the letter declaring the claimant redundant for operational reasons written seven (7) months later and dated 18/7/2017.

25. It is against this background that the present dispute is founded.

Determination

26. As set out in the consent order, the two issues for determination are:-

- a. Whether the declaration of redundancy of the Claimant was lawful and fair.
- b. Whether the Claimant is entitled to the reliefs sought.

Redundancy

27. Declaration of redundancy is provided under section 40 as read with section 2 of the Employment Act 2007.

28. Section 2 defines redundancy to be:

29. “ *Loss of Employment, occupation job or career by involuntary means through no fault of an employee involving termination of the employer where the services of an employee are superfluous and the practices commonly known as abolition of officer, job or occupation and of employment.* ”

30. Section 40(1) on the other hand provides procedural and substantive requirements of declaration of redundancy to include:-

- a. At least on month notice to the employee(s) and union where applicable.
- b. Fair selection criteria of the employee including consultation for the purpose.
- c. Payment in lieu of leave days not taken.
- d. Payment in lieu of one month notice and
- e. Payment of severance pay calculated at not less than 15 days salary for each completed year of service.

31. The requirements were succinctly explained by the court of Appeal in the case of **Kenya Airways limited-Vs- Aviation & Allied workers union Kenya & 83 others (2014) eKLR, Civil Appeal No. 46 of 2013.**

32. While the court of Appeal appreciated that the reason to terminate must be a genuine operational reason, the court emphasized that this was a prerogative for the employee to decide and thereafter embark on complying with the substantive and procedural requirements set out under section 40(1) of the Act.

The court said:

33. “ *The purpose of the notice under section 40 (1) (a) and (b) of the employment Act as is also provided for in the said convention No. 158 – Termination of Employment convention, 1982 is to give the parties an opportunity to consider.*

34. *Measures to be taken to avoid or minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment “ I agree with counsel for the respondent that consultation is an imperative requirement under the law.”*

35. The fact of the matter in this cause as it clearly came out in ELRC cause no. 1325/2012 is that the claimant was an employee of the Homa

Bay Teachers Children Education Scheme (HOTCHES) originally known as South Nyanza Teachers Children Education Fund (SOTEFU).

36. The two letters of employment produced in this suit clearly indicate the said scheme to be the employer of the claimant and not the 1st and 2nd Respondents.
37. It is also a fact that the scheme was for a long time experiencing difficulties leading to inability of the scheme to pay the monthly salaries of its three (3) employees including the claimant timeously.
38. This led to the filing of cause no. ELRC 1325/2012 in which the claimant claimed arrear salary from the 1st and 2nd respondents leading to a consent that settled the suit providing for payment of the arrear salary by the respondents in installments of Kshs. 50,000 a month.
39. The payment of the arrear salary was to be accompanied of course by timely payments of monthly salary to the claimant. As at the time this suit was heard, the respondents had not fully complied with this requirement.
40. The respondents having undertaken to meet the payment of remuneration due and owing to the claimant under the scheme in the consent they are estopped from denying liability in respect of the past and present monthly salary of the claimant including any other remuneration due to the Claimant, during his time of service and or being terminal benefits.
41. The above finding notwithstanding, does not derogate from what the Court considers a proven fact that the claimant was an employee of the scheme and not an employee of the 1st and 2nd respondents.
42. The importance of this finding is that the financial performance of the scheme and its ability to meet future financial obligations to pay its staff including the claimant was crucial in determining if there was a genuine need for the scheme to reduce its staff or not.
43. The scheme was established and promoted by the respondents primarily to serve the respondents' members in a separate fund and was intended to be self-sustaining.
44. This was not clearly the case as at the year 2017 when the claimant received redundancy notice. The membership of the scheme had diminished to very low levels especially upon the split of KNUT South Nyanza into several branches including Homa bay branch.
45. SOTEFU then changed its name to Homa bay Teachers Children Education scheme (HOTCES) and took on a much leaner role of catering for the welfare of Homa bay branch only.
46. It is not disputed that the 2nd respondent had over 12 years supported SOTEFU/HOTECES obligations including payment of the staff salaries. However as at the year 2016, the arrear salaries to the claimant alone had risen to Kshs. 2.5 million hence the court action by the Claimant.
47. Even after the consent Judgment was entered into the 2nd respondent was still unable to fully pay the arrear salary hence the compromise to pay in installment.
48. Given the circumstances of the case the court is satisfied that the 2nd respondent on behalf of the members' scheme had a genuine reason to minimize its staff compliment. The 2nd respondent had a genuine reason w to retrench some of its staff therefore.
49. The next issue to be determined is whether the 2nd respondent followed a fair procedure in selecting the claimant for retrenchment and whether all the requirements under section 40(1) of the Employment Act, 2007 were met by the 2nd respondent on behalf of the scheme.
50. In this regard, notice to declare the claimant redundant was sent to the claimant on 18/10/2017. The notice was copied to among others the Homa bay County Labour office. The actual termination was to take place by 30th December 2017.
51. The claimant was an Accounts officer and the only one in that category for the scheme. The only other employee who could have been considered for selection to be retrenched was one M/s. Otieno a clerical officer who earned much less that the Claimant and had served the scheme in that capacity for a period of six years since the year 2011.
52. The burden of proof in establishing whether the redundancy was lawful or not initially falls on the employer to demonstrate in terms of sections 40, 43(1) and (2) read with sections 45 and 47 (5) that the reason for declaration of redundancy was valid (genuine) and that the employer followed a fair procedure in effecting the redundancy.
53. The employee bear the lighter burden under section 47 (5) of demonstrating that the termination was wrongful or unfair considering the circumstances of the case.
54. Given that the parties chose not to call any witnesses in the matter, this made it more difficult for the Court to evaluate the probabilities of the matters alleged by the parties in the pleadings and documentary lists presented before court.
55. However, some of the matters especially that the 2nd respondent was for a long time unable to meet the financial obligations to pay the salary of the employees including the claimant leading to the suit by the claimant against the 2 respondents on the matter are common cause and cannot seriously be disputed. The court finds this fact to have been proved.

56. The court also considers it proved vide letters of appointment produced by the claimant himself that he was employed by the respondents directly

57. It follows that the claimant is entitled to terms and conditions of service including terminal benefits provided in his letters of appointment and promotion under the scheme since he was not strictly speaking an employee of the respondent. These facts aforesaid have been proved to the satisfaction of the court on a balance of probabilities.

58. The notice period of not less than one month given to the claimant and the Labour office has not been placed in dispute also. The court finds that adequate notice of redundancy was given to the claimant.

59. The letter of redundancy sets out clearly all terminal benefits to be paid to the claimant upon declaration of redundancy. The court finds that the respondent complied with section 40(1) of the Act in all these procedural requirements.

60. As regards selection criteria of the claimant, the claimant had served the scheme for over 25 years and was the only Accountant of the scheme. He was the most highly paid and was suited for retrenchment for the purpose of minimizing the expenses of the scheme to ensure its sustainability.

61. The Court finds no reason to fault the selection criteria by the 2nd Respondent as the overseer of the scheme on behalf of the members of the Respondents.

62. The Court finds that the termination of the employment of the claimant on grounds of redundancy was therefore lawful and fair.

Terminal Benefits.

63. The real issue in this case is whether the terminal benefits due and owing to the claimant were carefully computed and whether the same have been fully paid or not.

64. It is not in dispute that the Claimant had served the scheme from September 1992 and had therefore worked for 25 years and 4 months (304 months) as at the effective date of his termination.

65. The gross and basic salary earned by the Claimant as of date of termination is also very clear.

66. It is not disputed that his basic salary was Kshs. 38,300. The Claimant was also paid a house allowance of Kshs. 33,500 per month, medical allowance of Kshs. 8,810, commuter allowance of Kshs. 6,800 and NSSF contribution of Kshs. 1,080 giving a gross pay of Kshs. 88,490.

67. From the letter of termination, the respondent stated it would pay the following terminal benefits:-

- I. Salary for the days worked.
- II. Payment in lieu of accrued leave.
- III. One month in lieu of notice.
- IV. Service pay calculated at 15 days basic salary for each completed year of service.
- V. Any other due amount e.g salary arrears.
- VI. Certificate of service.

68. Under paragraph 6 of the statement of claim, the claimant prayed for payment of a total sum of Kshs. 16,991,973 set out in Annexures Jmo '2' and '2a' attached. The amount includes sums in the consent Judgment.

69. For the avoidance of doubt, any sums Claimed and emanating from the consent Judgment cannot be the subject of this suit. The claimant obtained a separate Judgment and decree in that matter which included the mode of payment of the decretal amount. That dispute cannot be subject of further adjudication in this suit. The same is *res judicata* same in respect of enforcement of the decree.

70. In JMo'2' the claimant tabulated the terminal dues as follows:-

1. Service gratuity for the period January 2013 Kshs. 362,766.60.
2. Terminal benefits Kshs. 3,122,274.60
3. Loss of income Kshs. 11,464,158.
4. Unpaid salaries Kshs. 416,198

5. Burial scheme Ksh. 76,760.

6. Leave Claims Ksh. 88,052

7. Salary arrears Kshs. 210,868

Total Kshs. 16,991,973.90.

71. The makes the following finding on law and fact:

a) Service gratuity for the period 2013 cannot be the subject of this suit filed on 3rd December 2017 more than four years from the date the cause of action arose. This claim is not only time barred but it was also the subject of the settlement in the consent Judgment entered into by the parties in cause no. 1325 of 2012.

b) The claim for the period January 2008 to December 2012 in the sum of Kshs. 48,912.65 lacks merit for the same reason that the claim is not only time barred but it was also the subject of the consent judgment referred to herein.

c) Loss of income from date of termination to date of expected retirement at 60 years old lacks merit the court having determined that the declaration of redundancy was lawful and fair and is dismissed.

d) Consent Judgment balance Kshs. 1,201,983.55.

This matter is *res judicata* and cannot be revisited by the Court in a fresh suit.

The court will now deal with the rest of claims:-

a. Severance pay

72. The claimant worked for the scheme under the auspices of the respondents from 1st September 1992 until the date of termination being 30th December 2017, a period of 25 years and 4 months.

73. Section 40(1)(g) provides that severance pay be calculated at the rate of not less than 15 days' pay for each completed year of service. The sum of **Kshs. 478,750** payable under this head is not in dispute.

74. The respondent submits that it has already paid the sum to the claimant. The court finds accordingly.

b. Service Gratuity

75. The court has found out that the service gratuity payable from January 2013 up to 25th June 2014 was computed in the ELRC cause no. 1325 of 2012 and cannot be the subject of litigation again.

76. The claimant is entitled to service gratuity for the period February 2014 to December 2017 in the sum of **Ksh. 290,672**. The Court orders accordingly.

c. Referable gratuity 2008 to 2012

77. Referable gratuity is a deduction levied on service gratuity and is payable to an employee together with the next service gratuity payment. The sum of **Kshs. 48,912.05** payable to the Claimant is not in dispute and is awarded accordingly.

d. Terminal Leave

78. The Claimant seeks payment of terminal leave calculated at six months' salary which is a mandatory terminal Leave period provided under circular KNUT/Circ/122/31/2018. The respondent did not address this item in its final submissions. The Court has considered the circular and is satisfied that employees declared redundant or upon retirement were entitled to mandatory six months terminal leave.

79. The claimant was not given terminal leave upon declaration of redundancy and has proved on a balance of probabilities that he is entitled to payment of **Ksh. 530,940** being payment in lieu of terminal leave calculated at six (6) months' salary of the claimant at the time of termination. The court awards the claim accordingly.

e. Burial and Development funds

80. The claimant sought payment of **Kshs. 76,700** being his total contribution towards KNUT – PROJECT funds for Teachers and as employee of KNUT. The sum was deducted from the Claimant's salary by the 2nd Respondent. The respondent did not address the issue in its final submission. The Court finds that the claim has been proved and it is awarded accordingly.

f. Salary Arrears

81. The Claimant prays for a sum of Kshs. 1,237,750.30 in arrear salary as a result of under payment due to accrued annual increments, underpayments and salary reviews.

82. The respondent submitted that it owed the Claimant arrear salary for the period February to May 2016 in the sum of **Kshs. 273, 760** calculated at the rate of Kshs. 68,440 per month being the claimant's gross salary then. That this amount was fully paid.

83. The court finds that other than the arrear salaries not paid and which were computed in ELRC Cause no. 1325 of 2012 the claimant has failed to prove that he was owed any other arrear salary and the claims under this head are dismissed.

g. Terminal Lump sum Benefits

84. The Respondent offered to pay the Claimant terminal Lump sum benefits calculated at Kshs. 83,910 X 60 months in the sum of Kshs. 503,460. The claimant of the other hand sought payment of a lump sum of Kshs. 3,122,274.60 and later changed to Kshs. 2,212,250 in the written submissions. The lump sum calculation by the claimant assume that the claimant was to work until retirement and was entitled to payment of his basic salary plus allowances up to the date of his retirement. It is the finding by the court that the amount claimed under this head has no foundation and awards the claimant the undisputed amount of **Kshs. 503,460** already offered to the claimant by the respondent.

85. In the final analysis Judgment is entered in favour of the claimant as against the respondents jointly and severally as set out in items (a) to (g) above in the Judgment.

86. Interest at courts rates from date of filing suit till payment in full.

87. The Judgment sum is payable less taxation to be remitted to KRA.

88. Costs of the suit to follow the event.

Ruling Dated, Signed and delivered at Nairobi this 11th day of June, 2020

Mathews N. Nduma

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, this ruling 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

Onyony for Claimant

Mr. Awere for Respondent

Chrispo – Court Clerk