REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 296 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

GLORY DRIVING SCHOOL.....RESPONDENT

JUDGMENT

The Claimant is a registered trade union with the mandate of representing employees in the transport and allied sectors. The Respondent is a limited liability company incorporated in Kenya and licensed to carry out the business of offering driving lessons and driving instructor training. The Respondent was the employer of the Claimant's members (the Grievants) before they were declared redundant.

The Claimant approached this Court vide the Memorandum of Claim filed on 31st May 2013 seeking to avert imminent loss of employment of 44 of the Respondent's employees. Interim orders were issued to stop the impending redundancies but the Respondent never complied, went ahead and terminated the services of the Grievants on account of redundancy.

The Claimant therefore sought payment in lieu of notice, days worked but not paid, untaken annual leave, severance pay, underpayment, overtime claim, unauthorized salary deductions and certificate of service.

During the subsistence of this suit, 6 grievants withdrew their claim. The Claimant therefore represents only 29 grievants who signed an authority to act dated 30th November 2018, authorizing Jackson Mbuthia and Charles Odhiambo Ongili to act on their behalf in the conduct of this suit.

The Respondent filed response to the claim vide its Response to the Claimant's Memorandum of Claim filed on 21st March 2013. The Respondent contended that the redundancy was carried out fairly, in accordance with the law and the CBA. It was also the Respondent's contention that the redundancy was necessitated by decline in business volume which necessitated restructuring and re-organization of the company. The Respondent denied refusing to adjust the Claimant's salaries and contended that the failure to adjust the salary was due to lack of funds. The Respondent therefore urged this Court to dismiss the claim.

The Claimant's Case

CHARLES ODHIAMBO ONGILI testified on behalf of the Claimant as

CW1. He adopted his witness statement as his testimony. He told this Court that he was one of the grievants and he was currently engaged in masonry. It was his testimony that he worked as a motorbike driving instructor from 28th February 2008 to 11th March 2013, when his services were terminated. He testified that he received his termination letter after participating in Collective Bargaining Agreement (CBA) negotiations and signing.

It was his testimony that new branches in Buruburu and Eastleigh were opened after his employment was terminated. He testified that all employees had been issued with a resignation letter from the Respondent and an employment letter from Glory East Africa, and were required to sign both letters. The new appointments commenced in November 2010. He denied the allegation that his employment had commenced on that date.

He testified that they were not paid their salaries for the month of March despite there being orders that they be paid the same. He further testified that though the CBA provided that he was to be paid a salary of Kshs.13,040.00, the Respondent paid him Kshs.7,000.00. Lastly, he stated that the Respondent never paid the terminal dues as indicated in his termination letter.

On cross examination, he maintained that he was employed on 28th February 2008 and later joined the Claimant union in 2010 and was a

member until 2013. He testified that the Respondent had never taken adverse action against him for being a member of a union. He further conceded that according to the CBA, his minimum wage ought to have been Kshs.11,060.00. He stated that all the Respondent's employees signed a resignation letter. He maintained that he was re-employed because the Respondent changed its name.

It was his testimony that he was not aware that the Respondent had been closing its branches and that as far as he was concerned, the Respondent had only closed 2 branches. He denied having knowledge of any communication from the Respondent to the Claimant regarding the closure of its branches or if the labour officer was informed of the redundancy yet he was the deputy shop steward. He maintained that he did not receive his terminal dues and that they were never paid their March salary.

With regard to the amount paid vide the petty cash voucher, he clarified that it was paid at the point of resignation in 2010 and that everybody was paid for the termination on 22nd October 2010.

On re-examination, he clarified that the payment made through the petty cash vouchers was for 2 years' service pay and leave which was paid at the time the Respondent was changing its name. He maintained that he was only aware of the closure of two branches.

The Respondent's Case

JOHNSON MATARA, the Respondent's Administration Officer testified as RW1. He adopted his witness statement and the Respondent's bundle of documents as his evidence. He confirmed that the grievants were employed when the Respondent who was operating as Glory Driving School and that they resigned and were issued with new contracts by Glory Driving School East Africa Limited.

He told this Court that the new company was experiencing cash flow issues and as a result, they closed down some branches and initiated a redundancy process of employees. He testified that the Respondent's financial situation was dire such that it was thrown out of the business premises at some point. It was his testimony that the union and the Ministry of Labour were notified of the impending redundancies. The Claimant proceeded to Court and obtained orders to stop the redundancies. Later, the orders were vacated and the redundancy process continued.

It was his testimony that the Grievants still continued with employment and were paid for the 10 days worked in March through Equity Bank. It was his position that at the time the redundancies were taking effect, no payments were owing to the employees. He stated that the Union gave the Respondent the greenlight to terminate the grievants' employment on account of redundancy. He contended that the grievants herein were stationed at the branches that were closed down and were informed that they would be called back if the Respondent's financial position improved.

He testified that the grievants were members of NSSF and that statutory deductions were made in that regard. That to the best of his knowledge the grievants were paid notice pay, salary for the days worked in March and payment in lieu of leave.

On cross examination, he conceded that the owners of Glory Driving School East Africa owned 8 companies including Pride Inn Hotels and Glory Safaris. He contended that some of the companies do not exist but also conceded that at the time of the grievants' termination of the grievants on account of redundancy, the companies were in existence.

He admitted that the grievants were not allocated work even after the Court ordered for their reinstatement up until the order was vacated. He further admitted that the Grievants were paid up to the date of notice, which was 8th March 2013. He stated he did not know whether the grievants were indeed paid. It was his testimony that his employment was not terminated because he was in charge of other duties in other companies.

He stated that he did not know how long CW1 had served the Respondent. He admitted that 15 out of 45 motor vehicle trainers were retained in employment. However, he didn't know the criteria used in the redundancy process. He contended that the employees were never forced to sign resignation letters and that the prefilled forms originated from both the employer and the employees. He conceded that there were no minutes to show that the proposal to resign had been arrived at in a meeting between the Respondent and its employees. He stated that upon their resignation, the employees were issued with fresh contracts and were never interviewed.

He admitted that he was aware that Buruburu, South B and Langata branches were in operation. He further admitted that these branches had not been included in the Respondent's letter of redundancy to the Claimant. It was his evidence that the employees who were declared redundant had been employees of the branches that were closed down. He agreed that there was no evidence to prove that the company had been experiencing financial difficulties.

It was his testimony that the 6 grievants who withdrew from the suit were re-hired in 2016 but contended that those who were re-hired had been willing go come back and not because the Respondent had wanted to settle the case. He stated that he was not sure of the number of people the Respondent had wanted to re-hire and that there was no evidence that the Respondent had offered to re-hire the 29 grievants.

It was his testimony that the issue of the grievants' terminal dues was settled with the union and payments made to them through the bank. He conceded that no other payment was made to the grievants other than their salary. He conceded that the longest serving employees were Mbuthia, Oswe and Nganga with the longest having served the Respondent for 18 years.

During re-examination, he stated that the evidence he adduced related to the matters that he was privy to. He clarified that only 44 out of 65 employees were declared redundant and not the entire workforce. He maintained that employees were not forced to sign resignation letters and that none of them protested the format of the letters. With regard to Buru Buru, South B and Langata branches, he stated that they did not appear on the company letterhead as they were opened after the letterhead had been printed. He stated that those three branches were the only operational ones.

He explained that the reason the grievants were not taken through an interview process is because they were not strangers to the Respondent. Further, they had an agreement that if they resigned, they would take up new contracts. He also clarified that the letters to terminate the leases for some branches were sent to the respective landlords, received and the leases terminated on account of financial difficulties. It was his testimony that the Respondent reached out to the 6 grievants who were re-hired. He however had no knowledge of whether other grievants had been approached.

The Claimant's Submissions

The Claimant submits that the termination on account of redundancy was not lawful or legitimate and therefore unfair. The procedure as set out in section 40(1)(c), (e) and (g) of the Employment Act was not followed. The Claimant relied on the case of **Bertha Awuor Kowido v Speed Capital Limited [2019] eKLR** where the Court observed that a redundancy that did not meet the requirements set out in section 40 of the Employment Act was unlawful within the meaning of section 45 of the Employment Act.

The Claimant further submits that even if the procedure outlined in section 40 had been followed, the Respondent did not prove that it had justification for declaring employees redundant. It is the Claimant's position that the reason given by the Respondent is superfluous as no evidence was tendered to prove that it had been experiencing financial constraints. The Respondent had opened more branches after the said termination and reabsorbed some grievants after the institution of this suit.

The Claimant concluded its submissions by stating that the grievants were entitled to one months' notice pay by dint of section 45 and 49 of the Employment Act. The Claimant also submitted that the grievants were entitled to payment for days worked from 11 th March 2013 until 26th March 2013, when the court order was lifted due to the Respondent's refusal to obey court orders.

It was also the Claimant's submissions that the grievants were entitled to 12 months' compensation for unfair termination and owing to their length of service to the Respondent. Further, that the grievants were entitled to severance pay as the same had not been paid to them. Finally, the Claimant urged this Court to award the grievants the costs of this suit together with interest.

Analysis and Determination

I have carefully considered the pleadings filed by the parties, the evidence adduced in court and submissions. The following are the issues for determination before this Court–

a. Whether the Grievants termination on account of redundancy amounts to unfair termination.

b. Whether the Claimant is entitled to the prayers sought.

Termination

Section 40(1) of the Employment Act provides for redundancy as follows –

40. Termination on account of redundancy

(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.

It is not in contention that the grievants were declared redundant. However, the Respondent did not adduce any evidence to prove that it was

experiencing financial constraints or that the redundancies were justified.

The Respondent closed its branches where the grievants were stationed but opened three other branches in Langata, Buruburu and Eastleigh. Additionally, 6 employees withdrew their claims and were re-engaged by the Respondent.

The Respondent did not show the criteria that was used in declaring the grievants redundant yet this was a requirement of Section 40(1)(c) of the Act and paragraph 23 (d) of the CBA which

provided that –

> *"d) Selection of Redundant Employees:*
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> *In deciding which employees shall be declared redundant, the company will assess the relative merits, ability and reliability of the affected employees, but when these factors are equal the discharge will be on the basis of "LAST IN, FIRST OUT". Members or non-members of the union will not be a factor."*

The Respondent did not also adduce evidence to show that the grievants were paid their terminal dues as required by Section 40(1)(e), (f) and (g).

It is also suggestive that the redundancy notices were issued soon after the Claimant and Respondent had concluded negotiations of a CBA. If the Respondent was experiencing financial constraints, the same would have been brought to the Claimant's attention during the negotiations. The fact that it was never communicated would imply that the Respondent used the redundancy as an excuse to terminate the employment of the grievants and avoid paying the benefits in the CBA.

Section 40(1) of the Employment Act provides that an employer SHALL NOT terminate the employment of an employee on account of redundancy unless it complies with the conditions set out therein. Additionally, paragraph 23(c) of the CBA required the Respondent to consult the union regarding the reasons and the extent of the redundancies, before declaring employees redundant. This was never done.

The respondent having failed to comply with both Section 40 and paragraph 23(c) and (d) of the CBA and having failed to justify the reasons for the redundancy, the same amounted to unfair termination of employment. In the case of **Francis Maina Kamau v Lee Construction [2014] eKLR** the court held that where an employer declares an employee redundant, it must observe the provisions of Section 40 of the Employment Act and failure to do so make the termination unfair within the meaning of section 45 of the Act. The Court in **Bertha Awuor Kowido v Speed Capital Limited [2019] eKLR** as cited by the Claimant had a similar holding.

Reliefs Sought

(i) Compensation for Unfair Termination

Having found that the grievants' termination on account of redundancy amounted to unfair termination, this Court awards the grievants compensation for unfair termination.

The grievants who worked for the Respondent for 1 to 3 years are awarded 3 months' salary as compensation for unfair termination. Those who worked for the Respondent between 4 and 6 years are awarded 5 months' salary as compensation for unfair termination. Those who worked for 7 to 9 years are awarded 8 months' compensation for unfair termination while those who worked for 10 to 18 years or more are awarded 12 months' compensation for unlawful termination.

In making these awards, I have taken into account the length of service, the manner in which the Respondent handled the redundancy immediately after concluding negotiations of the CBA without complying with both Section 40(10 of the Act or the CBA and further the fact that the grievants were released without payment of terminal benefits in accordance with the law and CBA. The termination was thus not just unfair but also amounted to an unfair labour practice, the decision having been made abruptly immediately after signing the CBA, without implementing the same.

(ii) Severance Pay

In view of the fact that the redundancy has been deemed to be unfair termination and compensation awarded, the award of severance pay would amount to double compensation. The prayer is therefore declined.

(iii) One month's salary in lieu of notice

The grievants are entitled to one months' salary in lieu of redundancy notice as the Respondent did not give notification of intended redundancy to both the Union and Labour Officer as required under Section 40(1)(a) of the Act and paragraph 23 of the CBA.

(iv) Unpaid salary

The claim for unpaid salary from 10th March to 26th March 2013 also succeeds as the Respondent disobeyed court orders staying the redundancy.

(v) Underpayment of salary, Overtime, Unauthorized Salary Deductions and pending annual leave days

The schedule for payment provided by the Claimant did not include underpayment of salary, overtime or unauthorized salary deductions or pending annual leave days which means they have not proved the claims. The same are declined for want of proof.

The Respondent shall bear the costs of this suit and issue the grievants with a certificate of service whose particulars are in line with Section 51(2) of the Employment Act.

The tabulation of compensation for unfair termination and notice pay shall be according to the salaries indicated in the schedule provided by the Claimant in its submissions, as the figures were never objected to by the Respondent and whose basis is the CBA. The length of service will be reckoned from the date of first appointment as there was no break in service in November 2010 when the Respondent issued fresh appointment letters to the employees on account of change of name.

This judgment applies to the 29 grievants who signed the authority to act only.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 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 15th March 2020 and subsequent directions of 21st 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, 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 1B** 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.

MAUREEN ONYANGO

JUDGE