REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.845 OF 2017

(Formerly HCC 719 of 2006)

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

CHARLES KASISI.....1ST CLAIMANT

BEATRICE MUTHONI.....2ND CLAIMANT

ROSELYNE ANINDO.....3RD CLAIMANT

JANE WAMBOKA .....4TH CLAIMANT

FRANCIS OLE NASIEKU.....5TH CLAIMANT

JANEROSE A. ONGORO.....6TH CLAIMANT

AGGREY KHAYANJE.....7TH CLAIMANT

IBRAHIM S. DAWE.....8TH CLAIMANT

ALEX OUMA .....9TH CLAIMANT

ZAKARY DINDA.....10TH CLAIMANT

COMMUNICATIONS WORKERS UNION.....11TH CLAIMANT

(Suing in a representative in capacity in respect of 257 employees of Kenya Broadcasting Corporation)

VERSUS

KENYA BROADCASTING CORPORATION.....RESPONDENT

JUDGEMENT

1. Charles Kasisi and 10 others instituted this suit against Kenya Broadcasting Corporation (KBC) vide a Plaint dated 6th July 2006 and are suing in a representative capacity in respect of 257 employees of KBC. The Plaintiffs aver that they together with the other 257 employees were at all material times in the employment of the Defendant under various terms and conditions of service/employment. That they were also at all material times members of the 11th Plaintiff to whom the Defendant effected payment of their check-off dues in accordance with the provisions of the Trade Disputes Act.

2. The Plaintiffs aver that on or about 18th May 2006, the Defendant issued a vague internal memo to the Heads of Departments within its establishment forewarning them of an intended possible staff retrenchment but which notice was not copied to any of them nor brought to their knowledge at all. That on or about 30th June 2006, the Defendant proceeded to unprocedurally retrench them without any notice or at all and was finalizing their terminal benefits without having any regard to their contracts of employment. That they have consequently suffered great loss and damage with the 11th Plaintiff suffering loss of members, union dues and damages and that they pray for judgment against the Defendant for:-

a) A declaration that the defendant is duty bound to discuss the plaintiffs' termination of service with the 11th plaintiff and/or all the plaintiffs.

b) An order restraining the defendant from terminating the services of the plaintiffs or any other unionisable employees individually or collectively before paying their lawful dues and the benefits that accrue thereto to be discussed and agreed upon by the 11th plaintiff and the defendant.

c) Damages and any other relief.

d) Costs of the instant suit with interest.

3. The Defendant filed a Statement of Response dated 24th May 2007 (under protest) averring that pursuant to its staff rationalization programme, all its employees falling within the aforesaid programme were contractually, legally and procedurally terminated. It further avers that the 11th Plaintiff has no locus standi herein and is thus incapable of raising and or sustaining any cause as no collective bargaining agreement exists between the 11th Plaintiff and the Defendant. That the orders and or prayers sought therefore lack merit, are devoid of legal premise and thus, cannot lie and it prays that the Plaintiffs' suit be dismissed with costs.

4. The Defendant also filed a Witness Statement made by Pamela Mogaka on 18th May 2017 wherein she states that the entire suit is both procedurally and substantively fatally defective, incompetent and nonstarter in law. She further states that the subject employees received all their dues in accordance with the law.

5. The Plaintiffs then filed a Reply to Defence wherein they deny the Defendant's averments and pray for dismissal of the statement of defence and for Judgement as prayed in the plaint.

Claimants' Submissions

6. The Claimants submit that it is not disputed that they were members of the 11th Claimant union and which is acknowledged by the Respondent in their letters by the Managing Director dated 07/03/2005 and 18/04/2005 addressed to the Secretary General of the Claimants' Union. That the same is further fortified by the Minutes of the parties' meeting held on 15/07/2005 and which minutes are attached to the Affidavit of Benson Okwaro filed on 10th July, 2006. That the parties only disagreed on the level of union representation within the Respondent's organizational structure which would guide the signing of the recognition agreement. That the 11th Claimant union ought to therefore have been given audience to discuss matters touching on the Claimants' terms of engagement and/or exit by the Respondent and that the Claimants, including the union and the 257 employees have the locus standi to file the instant proceedings contrary to what the Respondent is alleging in its pleadings.

7. It is the Claimants' submission that the lack of consultation by the Respondent before it declared them redundant was a violation of **Section 5 (2) (c) of the Labour Relations Act** and **Article 41 of the Constitution.** That the Respondent has not laid any evidence before this Honourable Court, or any letters that were written to the Ministry of Labour informing it of the basis and/or reasons for the staff rationalization and the payment that was done. That they have adduced evidence before this Court demonstrating that they suffered unlawful redundancy and were not paid their lawful dues as set out at **Sections 40 and 41 of the Employment Act**. That they suffered violation of their rights to lawful expectation because of being represented by the 11th Claimant Union and that they are therefore entitled to damages as pleaded in the Plaint.

8. The Claimants premise their prayers on **Cause No. 256 of 2015: Kenya Hotels & Allied Union v Anoop Gars & Others** where the court found that the claimant members were unlawfully declared redundant and it awarded them pay in lieu of notice, severance pay, public holidays pay and leave. That the court in **Cause No. 955 of 2018: KTJCFAW v Home Africa Ltd** similarly found that the grievant was wrongfully declared redundant and awarded notice pay, severance, compensation and costs.

Respondent's Submissions

9. It is the Respondent's submission that **Order 4 rule 1(2) of the Civil Procedure Code** states that "*a plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averment contained in rule 1(1) (f) above"* and that on this ground alone, the suit/claim by the 11th Claimant ought to be dismissed for not complying with a mandatory requirement.

10. The Respondent submits that as per the Court record, neither the 2nd, 3rd, 4th, 6th, 8th, 10th and 11th Plaintiffs nor their representatives appeared in Court to prosecute their respective cases and that it should equally be noted that all the Plaintiffs apart from the 11th Plaintiff filed verifying affidavits in the matter. That the 1st, 5th, 7th and 9th Plaintiffs testified on their own behalf based on circumstances peculiar to their redundancies and gave evidence that they were not representatives (in any capacity) of the 11th Plaintiff in the suit. That it thus ends that no representative from the 11th Plaintiff union came to testify and produce evidence before the Honourable Court on behalf of the 257 other employees, before the Claimants closed their case. That consequently **Order 12 Rule 3(1) of the Civil Procedure Rules** ought to apply in such circumstances and the Court should dismiss the Claim as filed by the 2nd, 3rd, 4th, 6th, 8th, 10th and 11th Plaintiffs. It relies on the case of **Amos Munyi Njue v Denis Murithi Mutegi & another [2017] eKLR** to support this submission.

11. It further submits that DW1 gave evidence that there was no recognition agreement between the 11th Plaintiff and the Defendant at the time the redundancy of the employees were ongoing and that the recognition agreement between the parties came into force on 13th February, 2012. It is the Respondent's submission that this evidence on recognition agreement has not been controverted in any way by the Plaintiff who has not produced a recognition agreement and/or given evidence that there was one in force at the time the redundancies were being undertaken. That it is trite law that without this piece of document the union even though registered did not have locus to represent the

interests of the employees both before the employer and even in the suit herein. It submits that this also explains why no representative of the union could swear a verifying affidavit on behalf of the union which did not also file a witness statement.

12. That the 11th Claimant has further not produced any documents showing that the Claimants herein are members of the union and or produced documents outlining the check off payments, if any, that they had been receiving in relation to the 257 employees they claim to represent. That the letters the Claimants refer to in their submissions are not in the Plaintiffs bundles of documents and it calls upon the Court to disregard the same.

13. That **Section 2 of the Labour relations Act** defines a "Recognition Agreement" as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organization (emphasis theirs). That a "collective agreement" on the other hand is defined in the Act as a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers (emphasis theirs). The Respondent submits that a recognition agreement cannot exist without a collective agreement which is given life based on discussions by parties after the employer recognizes the union. That both documents were not in existence even at the time the suit was filed and it relies on the case of **Kenya Scientific Research International Technical and Institutions Workers Union v Black and Beauty Products & another [2018] eKLR** to support its submissions hereinabove.

14. The Respondent submits that the Claimants did not adhere to **Section 46 of Kenya Broadcasting Corporation Act, Cap 221** which provides: -

> ***"Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect:-***
>
> > ***a) the action or legal proceeding shall not be commenced against the corporation until at least one month after written notice containing the particulars of the Claim and the intention to commence the action or legal proceeding has been served upon the managing director by the plaintiff or his agent, (emphasis theirs).***

15. That the Claimants have produced no such notice in their bundle of documents to satisfy the provisions of this section which is couched in mandatory terms and that this qualifies this suit as both legally and procedurally defective.

16. It submits that the burden of proof rests with the Claimants in the first instance and it relies on **Gateway Insurance Co Limited vs. Jamila Suleiman & another [2018] eKLR** where the Court opined that **Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya** provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. That the evidential burden of proof is further captured in **Sections 109 and 112 of the Evidence Act** and that as to what happens to the evidence not produced by those who never prosecuted their cases, it relies on the case of **Gateway Insurance Company Limited vs. Jamila Suleiman & Another (supra)** which agreed with the position in **Kenneth Nvaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** that:-

> ***"Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the Court to have the document produced as an exhibit and be part of the Court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account." (Emphasis theirs)***
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> ****....****
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> ***It is my view that having failed to challenge the Respondents' evidence given on oath, the same challenge cannot be taken at this stage without causing injustice to the Respondents who may have believed that since their case was not being challenged there was no reason to adduce further evidence. (Emphasis theirs).***

17. The Respondent calls upon this Honourable Court to completely disregard the pieces of evidence associated with the 11th Plaintiff as filed and for the same to be expunged from the court record.

18. It is the Respondent's submission that since there was no recognition agreement as well as a Collective Agreement between the parties, the Respondent was not warranted to issue any notice of the intended redundancy. That the Claimants who testified they had received their notices which were in writing never produced proof in Court of being union members and the Respondent submits that the said Claimants confirmed being paid (in full) the terminal dues outlined in the **Staff rationalization programme letter(s).** That this confirmed it considered the requirements of the law when paying the terminal dues to the employees who were declared redundant. That what then the Claimants seek upon confirmation of receiving the above payments, is akin to benefitting twice from the same transaction and it calls upon this Court to dismiss the same based on the documents on record and evidence adduced.

19. The Respondent submits that ***prayers (a) and (b)*** have been overtaken by events and that the Court cannot issue orders in vain. On the issue of damages, it relies on the case of **Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR** where the Court observed that Courts have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice and that compensation awarded to the Claimant is not awarded to punish the employer. That therefore, taking the above into consideration and the Claimants confirming receiving their dues in full (including payment in lieu of notice), and which payments were over

and above the requirements in law, the damages of Kshs. 1 million sought in the submissions (but not pleaded) for each of the Claimants has no basis in law and should be disregarded by the Honourable Court. That the Claimants who prosecuted their case have failed to prove their respective cases on a balance of probity as required in law.

20. I have examined the evidence and submissions of the Parties herein. The main contention by the Claimants herein is that they (1st to 10th) Claimants were unfairly declared redundant without any regard to the law.

21. This Claim was initially filed in the High court as Civil Case No. 719/2006 but by an order of the High Court (Ougo J) on 18/7/2014, this matter was transferred to the ELRC Nairobi. Previously, by an order of Visram J (as he then was) on 7/7/2006, authority was given to 4 to 5 Claimants to testify on behalf of the rest of the Claimants.

22. During the oral hearing of this Claim on 29/10/2019, 4 of the Claimants testified. The Claimants who testified were the 1st, 5th, 7th and 9th Claimants. They also averred that they were members of the 11th Claimant Union and were also declared redundant vide a letter received on 3/7/2006 but dated 28/6/2006 indicating they had been declared redundant.

23. This matter having occurred in 2006, the law applicable to the retrenchment would be the Employment Act (Cap 226) now repealed which provided as follows under Section 16A:-

> ***1) "A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:-***
>
> > ***a) the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;***
> >
> > ***b) the employer shall have 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;***
> >
> > ***c) no employee shall be placed at a disadvantage for being or not being a member of the trade union;***
> >
> > ***d) any leave due to any employee who is declared redundant shall be paid off in cash;***
> >
> > ***e) an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;***
> >
> > ***f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay".***

24. Under Section 16A above, no retrenchment could be effected without involvement of the Union without proper notice and without also paying the dues pending.

25. Whereas the Claimants contend that the Respondents did not follow the above processes, the Respondent insist they did.

26. A closer look at the retrenchment letters show that they were dated 28/6/2006.

27. The Claimants testified that the letters were received by the Union on 3/7/2006 and yet took effect on 30/6/2006. There is no indication that notice of the retirement was served upon the Claimants at all. There is no indication that the Claimants nor their Union were also involved in consultations around the redundancy before they were effected.

28. Though the retrenchment notice were served upon the Union this was done too late in time as the requisite notice period of 1 month was not given.

29. The purpose of notice and indeed consultation has been explained in **Civil Appeal No.46 of 2013 Kenya Airways Limited vs Aviation and Allied Workers Union Kenya and 3 Others (2014) eKLR** where Maraga JA (as he then was) rendered himself as Follows:-

> ***"52. As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law. Mr. Oraro's criticism of the learned trial Judge's reliance on the UK Employment Appeals Tribunal's decision in Mugford v. Midland Bank, UK Employment Appeal Tribunal,10 and the treatise by Rycroft and Jordan, - "A guide to the***

South Africa Labour Law" both of which dealt with the requirement of consultation, was therefore unfair. Those were authorities on comparative jurisprudence which the learned Judge was perfectly entitled to make reference to and where appropriate rely on".

30. The issue of consultation cannot therefore be under estimated as it serves its purpose as stated above. In the current case, there is no lota of evidence that this was done and therefore the assertion by the Respondents would adequately, compensate the Claimants. "Due to the number of employees involved the Claimant will submit a schedule of the 257 employees with their attendant salaries multiplied by 12 months to indicate payments due against each. This will be submitted to Court for consideration by Court and adoption/or as part of this judgement.

31. The Respondents will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jumba holding brief Odhiambo for Respondent – Present

Guserwa for Claimant – Present