



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1378 OF 2015

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

PETER MBAKA OMERU.....1ST CLAIMANT

GEORGE MAINGI.....2ND CLAIMANT

ERIC MOMANYI.....3RD CLAIMANT

JANARUIS KYALO.....4TH CLAIMANT

FELIX MWONGELA.....5TH CLAIMANT

JUSTUS MWANZA.....6TH CLAIMANT

JOSEPHAT ONSONGO.....7TH CLAIMANT

EVANS MAYAKA.....8TH CLAIMANT

ANTHONY MAKAU.....9TH CLAIMANT

ISAAC MUSYOKA.....10TH CLAIMANT

VINCENT OMBWORI OCHI.....11TH CLAIMANT

JAMES MUSYOKI.....12TH CLAIMANT

RICHARD KITONYI.....13TH CLAIMANT

MOSES MASIKA.....14TH CLAIMANT

DENNIS IBAALA MAJUNE.....15TH CLAIMANT

ANTHONY MUTUKU.....16TH CLAIMANT

DAVID NYAMWAMU.....17TH CLAIMANT

VERSUS

CROWN INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. Peter Mbaka Omweru and 16 others instituted this suit in August 2015 and then filed an Amended Memorandum of Claim dated 29th March 2016 suing the Respondent, Crown Industries Limited for unfair and unlawful dismissal and non-payment of terminal benefits and damages. They aver that they were employed by the Respondent in various capacities from the particular times enumerated in the schedule

attached to the Memorandum of Claim and that they undertook various duties to the Respondent's satisfaction.

2. They further aver that they were recruited and did join the Kenya Shoe and Leather Workers Union in 2013 and which union consequently moved to Court seeking for a recognition agreement with the Respondent. That on or about the 29th of July, 2013 the Respondent's Directors summoned them to a public meeting and instructed them to withdraw from the Union and avail the letters of withdrawal to the management by 21/08/2013. That they declined to withdraw from the union and were consequently served with letters terminating their employment on 22/08/2013 when they reported to work. That however the said letters indicated that the termination was on the basis of restructuring due to "current economic situation" and were actually dismissal letters since their employment was brought to an abrupt and unexplained stoppage for no valid and lawful reason. They aver that the said dismissal was unlawful and unfair and also breached the good tenements of labour practice and natural justice.

3. The Claimants further aver that considering their many years of service and dedication and their family and personal obligations, the dismissal of their employment was inhumane and caused untold personal and financial trauma and distress for which they are entitled to damages. That they are equally entitled to their terminal benefits and other unpaid dues including outstanding salaries, overtime, notice, leave etc; none of which was paid in spite of promises. They pray for judgment against the Respondent for:-

a) A declaration that the Respondent's action to summarily dismiss the Claimants from employment was illegal, unlawful, unfair and inhumane.

b) An order for the Respondent to pay the Claimants their terminal dues and compensatory damages as pleaded in paragraph 12 herein totaling to Kshs. 13,668,553/=.

c) An order for the Respondent to pay the Claimants Costs of this claim plus interest thereon.

4. The 1st Claimant Peter Mbaka, filed his witness statement dated 26th June 2018 giving evidence on his behalf and on behalf of his co-claimants. He also adopted the amended memorandum and all its contents and the exhibits/documents produced and filed in court in support of their case, as part of their common evidence before this Court.

5. He states that they worked both day and night shifts throughout their employment period and that for the night shift, they reported to work at 4.30 pm and left the following day at 7.30 am thus covering 15 hours. That they however never received any payment in compensation for the overtime of 7 hours worked during the night shift. He further states that the summary dismissal was unlawful, unfair, discriminatory, unjustified and illegal because:-

a) No notice to show cause laying down the grounds and/or charges preferred against the Claimants and requiring them to answer to the same was issued.

b) No disciplinary hearing of any kind was undertaken by the Respondent's management to find culpability before the decision to dismiss the Claimants was reached.

c) No letter(s) of dismissal detailing reasons or offence found and proved against the Claimants was issued.

d) All legalities, humanities and the basic tenets of natural human rights were not observed in the Respondent's premeditated decision to dismiss the Claimants from employment.

6. The Respondent filed an Amended Response dated 5th September 2018 admitting to have employed the Claimant but denies knowledge of their recruitment into The Kenya Shoe and Leather Workers Union or that it threatened the Claimants to withdraw from the said union. It avers that owing to the poor business in the Ball Pen and Shoe Department resulting from the 2012 post-election violence, it purchased Automatic Ball Pen Assembly Machines as a way of cost cutting. The said automation forced it to declare redundant about 100-150 workers in the Ball Pen and Shoe Departments, including the Claimants herein. That it complied with the law prior to terminating the said employees on the grounds of redundancy including furnishing Notice to the Labour Department; and paying the Claimants one (1) month's pay in lieu of notice (in cash), their outstanding leave dues and their service/severance pay.

7. It contends that the Claimants are non-suited since it paid them all dues in law and in accordance with their terms of service and it makes specific averments for each Claimant at paragraph 17 of its response. It also relies on respective bundles of documents relative to each Claimant marked "C-R" in the Respondent's bundle of documents of 18th September 2015 and prays that the amended Claim by the Claimants be dismissed with costs.

8. The Respondent filed two Witness Statements made by its Human Resource Manager, James Bobby Mwangi and a Director of the Respondent Company, Chetan Sanghrajka. James states that the Respondent fulfilled its statutory obligations relating to notification to the labour office and informing the workers of the termination including reasons leading to the termination such as redundancy. He further states that the said employees were paid service/severance pay despite the Respondent having paid statutory dues including NSSF contributions.

9. Chetan on the other hand states that on humanitarian grounds, the Respondent retained the employees in the Ball Pen and Shoe Department for 6 months while giving them tasks in other departments so as to retain them and ensure that they had income. That the Respondent notified the Ministry of Labour twice while each Claimant was further paid their August 2013 salary as reflected in their pay slips for August 2013, attached to the Respondent's bundle of documents.

Evidence

10. CW1 testified in court virtually where he adopted his filed witness statement and stated that they were employed by the Respondent on diverse dates from the year 2008 until the year 2011 when the Respondent accorded them formal employment contracts. That the sole reason that informed their abrupt termination was them expressing their intention to join the workers union and their resolve not to quit the union affairs as demanded by the Respondent's management.

11. RW1, James Bobby Mwangi testified and adopted his filed statement while RW2, Chetan Sanghrajka also adopted his filed statement and confirmed that the records attached to the Respondent's bundle of documents traces the Claimants' employment back to the year 2008.

12. RW2 further stated that out of a total of 500 workers, the Respondent declared only 31 redundant and that the Respondent had a recognition agreement with the Union in 2017 which allowed for representation by the Union.

Claimants' Submissions

13. The Claimants submit that their employment was converted to term employment by virtue of **Section 37 of the Employment Act**. That **Section 43 of the Employment Act, 2007** provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of **Section 45 of the Act**. That the reason or reasons for termination of a contract are the matters the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

14. It submits that the Respondent did not substantiate its reasons for terminating the Claimants' employment by redundancy and that it was ascertained during the trial that there was no post-election violence when the Claimants' employment was terminated. Further, that it is a matter of public notoriety that post-election violence occurred in 2007- 2008.

15. They submit that the cardinal principle of redundancy is that an employee's position has been rendered superfluous and the said position and or work are no longer needed in an organization. That it was incumbent upon the Respondent to exhibit through its financial statement that prior to the purchase of the machine, it incurred a specific amount in overhead expenditure vis-a-vis the returns as compared to the period post the purchase of the machine. That it is unfathomable a single machine would render 100-150 employees redundant even if the same were to require one attendant and that it is the reverse that should have happened. That the Respondent having bought an automatic machine, needed more hand men to manage the soaring production level.

16. The Claimants cite the case of **Walter Ogal Anuro -v- Teachers Service Commission (2013) eKLR** where the court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. They submit that the fairness test in this case was never achieved as there was no substantive justification for the Respondent to terminate their employment. As whether there was fairness in the procedure followed by the Respondent to declare them redundant, they analyse **Section 40 of the Employment Act** and submit that the Respondent did not at all abide by the requirements set under the said provision of the law thus rendering their dismissal unfair and unlawful.

17. The Claimants submit that the Respondent failed to compute their terminal benefits in the letters of termination and that it was the Claimants' testimony that what was paid to them was their salary for the days worked. That in the absence of any evidence that their dues were properly computed and fully paid, this Court ought to award them their due entitlement as computed in the amended memorandum of claim. That in such cases of summary dismissal, Courts have found that damages must be awarded as under **Section 49 of the Employment Act** and they urge this Honourable Court to award the full 12 months gross salary in compensation. They further urge the Court to be guided by the following authorities:-

1. *Kenya Union of Journalists and Allied Workers v Nation Media Group Limited [2013] Eklr*

2. *Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR*

3. *Banking Insurance and Finance Union v CFC Stanbic Bank [2014] eKLR*

Respondent's Submissions

18. The Respondent relies on the case of **Aoraki Corporations Limited V. Collin Keith McGavin; CA 2 of 1997 [1998] 2 NZLR 278** where the Court of Appeal of New Zealand observed that:-

"...Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies..."

19. The Respondent submits that the Claimants' employment and their basic salaries and benefits as indicated in their respective employment contracts is not disputed. That CW1 confirmed in his testimony that there was no proof the Claimants were recruited or were members of the Union and that he also did not have any proof of the alleged meeting where they were induced to withdraw from the Union. It submits that the only legal proof of an employee's membership to a trade union is a recognition agreement and the Minister's authority on the deduction of

union dues under **Section 48 of the Labour Relations Act** as was held in the case of **Kenya Union of Pre-Primary Education Teachers v Cabinet Secretary Ministry of Labour [2016] eKLR**. That in the instant case, there is no recognition agreement or proof that the Respondent was deducting any dues or agency fees and remitting to the said Union and that the Claimants have also failed to prove that they were dismissed due to their participation in union activities.

20. That it is trite law that whoever alleges must prove. That in line with **Sections 107 and 108 of the Evidence Act**; as read with **Section 47 (5) of the Employment Act** on the evidentiary burden of the employee, the Claimants' assertions having not been backed by evidence to the standard of preponderance of probability, ought to be dismissed. It relies on the cases of **Kipkebe Limited v. Peterson Ondieki Tai (2016) eKLR**; **Omar Ndaro Zuma v Modern Coast Express [2019] eKLR** and **Kenya Plantation & Agricultural Workers Union v James Finlays Kenya Limited [2017] eKLR** where this Court reiterated the place of discharging the Claimant's burden of proof. That in the case of **Omar Ndaro Zuma v Modern Coast Express [2019] eKLR**, this Court held that an employee alleging unfair termination or wrongful dismissal must lay before the Court the actual circumstances leading to his exit from employment, and it is not enough for an employee to simply say "my employment was unfairly terminated".

21. It is the Respondent's submission that the Court of Appeal discussed the justification for redundancy in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where it upheld the position that a company runs its affairs and makes decisions for its own good and for the good of its stakeholders. The Court of Appeal further held that redundancy is a legitimate ground for terminating an employment contract provided there is a valid and fair reason based on the operational requirements of the employer. That the appellate court further required that in the event of reorganization, the employer ought to prove that the services of the employees have been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.

22. On the issue of consultations, the Respondent relies on the holding in the New Zealand case of **Aoraki Corporations Ltd (supra)**. That the Court of Appeal in **Kenya Airways Ltd (supra)** also compared different jurisdictional applications on the place of consultations prior to redundancy and stated as follows:-

*"...There are jurisdictions like South Africa where the law provides that the employer must consult before contemplating dismissing employees on the basis of employer's operational requirements. Section 189(1) of Labour Relations Act of South Africa provides so. There are also jurisdictions like Philippines as exemplified by the decision of the Supreme Court in **Fasap v Philippine Airlines GR No. 178083** where the law provides that the employer's prerogative to bring down labour costs by retrenching must be exercised as a measure of the last resort.*

That is not the law of Kenya... the law of Kenya does not provide for pre-redundancy consultation but only post redundancy dispute resolution..."

23. It submits that redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. That it also discharged the burden of notifying both the Ministry of Labour and the affected employees as required of it under **Section 40 of the Employment Act** and that receipt of the notices dated 01/02/2013 and 01/07/2013 by the Ministry were not challenged by the Claimant.

24. It further submits that the substantive purpose for notifying an employee of the intended redundancy is to make them aware of the situation and that the contention that a letter in writing must be received by the Claimant so as to amount to a notice is a matter of procedural technicality which this Honourable court should not lend itself to. The Respondent cites the provisions of **Section 20 (1) of the Employment and Labour Relations Court Act** which states thus:-

"In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities: Provided that the Court may inform itself on any matter as it considers just and may take into account opinion evidence and such facts as it considers relevant and material to the proceedings. [Emphasis added]."

25. The Respondent submits that even in the absence of a notice, it paid each of the Claimants a sum equivalent to one month's in lieu of the notice and that it is trite that the purpose of payment in lieu of notice is to compensate for the failure to give notice as was observed by this court in **Francis Aboge Oduok v Hasbah Kenya Limited [2020] eKLR**. That it is noteworthy that the amounts reflected to have been paid to the Claimants in their final salary (August 2013) was triple the amount they often earned in the rest of the months, and they urge the Court to put into consideration. That if however, this Court is inclined to find that the termination was unfair, one month's pay is a sufficient award to the Claimants as was similarly awarded in the case of **Francis Aboge Oduok (supra)**. The Respondent further urges the Court to award costs of the suit and in its discretion, consider that no notice of intention to sue was ever issued by the Claimants.

26. It urges this Honourable Court to find that there was a genuine redundancy situation, the Claimants were justifiably declared redundant, the Claimants were sufficiently compensated and/or paid their terminal dues and that the Claim is without merit and ought to be dismissed with costs to the Respondent.

27. I have examined the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. **Whether the Claimants herein were unlawfully and unfairly declared redundant.**
2. **Whether the Claimants are entitled to the remedies sought.**

Redundancy

28. The Claimants have given evidence that they were dismissed due to joining a union. That notwithstanding, the guidance reasons for the Claimants dismissal are pegged from the termination letters which indicate that the reason for the termination was due to current economic

situation. This reason fits in the definition of redundancy as defined under Section 2 of the Employment Act 2007 which defines redundancy as follows: -

“Redundancy means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment”.

29. The question that follows is whether in declaring the Claimants redundant, the Respondent followed the procedure.

30. Section 40 (1) of the Employment Act 2007 states as follows:-

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.

31. The Claimants have indicated that they were served with termination letters on 22/8/2012 without any notice. Indeed, the letter of redundancy served upon the Claimants was dated 22/8/2013 and the same was to take effect the same day. That is evidence that no notice was given to the Claimants before the termination which was contrary to Section 40 of Employment Act 2007.

32. The Respondents were expected to make payment for all dues owing and the termination letters indicated so but there is no breakdown to show what was being paid and if any outstanding dues were paid.

33. The Labour Officer was notified of the intending redundancy but the Claimants were actually not given any notice. In view of this issue, the redundancy of the Claimants was not done according to the law.

34. In terms of remedies, the Claimants claimed a number of prayers. The Claimants sought payment of overtime dues which is evident they were being paid as seen from the payslips submitted. This prayer is therefore not granted.

35. The Claimants also sought to be paid for leave not taken. I find also not payable as the Respondents annexed documents to show the Claimants applied and proceeded for leave over the year.

36. The only prayer I award is damages for unfair termination equivalent to 10 months’ salary for each Claimant tabulated as follows:-

1st Claimant - Peter Mbaka Omeru =

$$10 \times 11,270 = 112,700/=$$

2nd Claimant - George Maingi =

$$10 \times 12,765 = 127,650/=$$

3rd Claimant - Eric Momanyi =

$$10 \times 12,765 = 127,650/=$$

4th Claimant - Janaruis Kyalo =

$$10 \times 11,270 = 112,700/=$$

5th Claimant - Felix Mwangela =

$$10 \times 12,765 = 127,650/=$$

6th Claimant - Justus Mwanza =

$$10 \times 12,081.3 = 120,813/=$$

7th Claimant - Josephat Onsongo =

$$10 \times 11,270 = 112,700/=$$

8th Claimant - Evans Mayaka =

$$10 \times 12,765 = 127,650/=$$

9th Claimant - Anthony Makau =

$$10 \times 12,765 = 127,650/=$$

10th Claimant - Isaac Musyoka =

$$10 \times 11,270 = 112,700/=$$

11th Claimant - Vincent Ombwori Ochi =

$$10 \times 11,270 = 112,700/=$$

12th Claimant - James Musyoki =

$$10 \times 12,765 = 127,650/=$$

13th Claimant - Richard Kitonyi

$$10 \times 11,270 = 112,700/=$$

14th Claimant - Moses Masika =

$$10 \times 11,270 = 112,700/=$$

15th Claimant - Dennis Ibaala Majune =

$$10 \times 12,017 = 120,170/=$$

16th Claimant - Anthony Mutuku =

$$10 \times 12,765 = 127,650/=$$

17th Claimant - David Nyamwamu =

$$10 \times 12,765 = 127,650/=$$

TOTAL = Kshs. 2,051,083

37. The Respondent will 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:

Upendo holding brief Namada for Claimant

Onyango for Respondent – Present