REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 803 OF 2013

(Formerly Nairobi HCCC 398 of 2003)

Before Hon. Lady Justice Maureen Onyango

THOMAS M. NGUTI AND 196 OTHERS.....CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

FINAL JUDGMENT

On 12th August 2020, I delivered judgement herein in which I directed the parties to furnish the Court with a copy of the Respondent's Personnel Regulations 1988 and the Collective Bargaining Agreement relevant to the date of termination of the employment of the claimants. The same have now been furnished to the Curt

The Regulations provide for discipline at Section G. The letters dismissing the claimants referred to Section G13(e) of the Kenya Railways Regulations 1988. The Section provides as follows –

> ***(e) Absence without leave***
>
> *An employee must not be absent from duty without permission reasonable excuse, and if lie so absents himself for a continuous period of more than seven days he may be regarded as having forfeited his appointment with effect from the date of such absence. If such employee subsequently presents himself for duty he may, if the circumstances warrant such a course, be reinstated in the service and be permitted to resume duty, subject to such disciplinary measures as may be taken against him. An employee who is regarded as having forfeited is appointment under the provisions of this paragraph will be deemed to have been dismissed in accordance with these Regulations."*

As stated in the judgment delivered on 12th August 2020, the Court observed that the claimants went to court and obtained orders as follows –

> *1. The Respondent be and is hereby ordered to implement the industrial court award in cause No. 72 of 1995 dated 4th May 1998.*
>
> *2. The Respondent be and is hereby ordered to pay the Plaintiffs salary arrears under the respective contracts of employment as modified by the Industrial Court, award with effect from 1st January 1996.*
>
> *3. The Respondent be and is hereby restrained by itself its servants or agents from intimidating, harassing or interfering in any manner, whatsoever with the Plaintiffs employment and residence pending hearing and determination of this suit.*
>
> *4. The Respondent be and is hereby restrained from any future re-engagement not past ones.*
>
> *5. The Respondent's letter dated 30th April 2003 addressed to the Applicants be and is hereby nullified.*
>
> *6. Interest on (2) above at commercial rates of 25% percent from 1st January 1996 till payment in full.*
>
> *7. The Applicant be paid costs of this application."*

The orders were however reviewed by the Court of Appeal following an appeal by the respondents and orders made as follows –

> *"... In the result we allow the appeal to the extent that the orders for mandatory injunction numbers 1, 2 and 6 in the order of the superior court given on 26th September 2003 and issued on 23rd October 2003 are set aside. In respect of order No. 5 nullifying the letter of 30th April 2003, we set aside the-order of nullification and substitute it therefore an order suspending the letter dated 30th April 2003. We have no reason to interfere with the orders 3 and 4 for prohibitory injunction and we dismiss the appeal in respect thereof. However, in the interests of justice and in order to ensure that this old matter is expeditiously resolved, we limit the life of orders 3, 4 and 5 (suspension) to 12 months from the date of this judgment unless it is extended by the superior court*
>
> *for good reasons."*

As I pointed out in the judgment, none of the parities addressed the issue of whether or not the orders of the Court of Appeal suspending the letter dated 30th April 2003 were ever extended. I find that the employment of the claimants remained in force for 12 months from the date of the orders of the Court of Appeal being 8th May 2010.

I therefore find that all the claimants are entitled to salary and other benefits up to 8th May 2010. I further find that the letters of dismissal having been nullified and letter suspended by the Respondent, it was who should have sought to either lift the suspensions or bring this matter to an end in any other way. This having not been done, I do not think the issue whether or not the termination of the employment of the claimants was fair is valid as the termination by the Respondent was lifted and the employments terminated by virtue of the lapsing of the orders by the Court of Appeal. That cannot be tendered as unfair termination.

It is therefore my finding that the employment of the claimants lapsed upon the lapse of the orders of the Court of Appeal on 8th May 2010.

Whether the Respondent implemented the Court Award Gazetted vide Gazette Notice No. 4570 of 1998

It is the claimants' case that the Court Award in Industrial Court Cause No. 72 of 1995 was never implemented by the Respondent.

When asked in cross examination whether the court award was implemented, RW1 stated that he was aware the increment was renegotiated then implemented over time. He referred to various salary increase notices issued to staff. He stated that after the court award was gazetted, salaries were increased but not by 25%.

During cross examination RW1 agreed with Counsel for the claimants that the wage increases he had referred to related to periods before the award. He contradicted himself when he stated that the Respondent was implementing an award that was yet to be delivered.

RW1 conceded that all the documents relating to salary increment filed by the Respondent did not refer to the implementation of the court award but to the review of CBA which covered all unionisable employees of the respondent, as opposed to the award which was specific to locomotive drivers.

No evidence was produced by the Respondent to prove that the Court award was ever implemented. I therefore find that the Court Award in Cause No. 72 of 1995 delivered on 4th May 1998 was never implemented by the Respondent. The award was as follows –

> *"Keeping in view the foregoing and taking into account the agreement between the parties ('Annexure 'A') and the nature of their job, I am of the opinion that the locomotive drivers deserve a reasonable salary adjustment in their salaries it and a separate scheme of service. The Court, however, finds that the demand by the Union is very much on a higher side. In the circumstances, I am inclined to award to the locomotive drivers' additional salary increase of 25%, across the board for the, period 1st January 1996 to 31st December 1997, and also recommend that a separate scheme of service for them be introduced forthwith. I so order."*

The claimants are therefore entitled to payment of an equivalent of 25% on the salaries they were earning on 1st January 1996 to cover the period 1st January 1996 to 31st December 1997. This was an increment specific to locomotive drivers to be paid over and above the wage increases arising from the CBA.

Conclusion

In conclusion, I make the following orders: -

1. I find thathe respondent did not implement the Court Award in Cause No. 72 of 1998.

2. The claimants are entitled to salary arrears of 25% loaded on their salary as at 1st January 1996 in addition to any increase of salary arising from CBA increments.

3. The dismissal of the claimants having been nullified in the ruling of the High Court delivered on 26th September 2013 and thereafter suspended by the Court of Appeal for 12 months from 8th May 2009, they are deemed to have been in employment up to 8th May 2010. The respondent is therefore directed to tabulate and pay salary arrears for the claimants from the date of termination on 30th April 2003 to 8th May 2010. This will be after factoring in the Court Award in Cause No. 72 of 1995.

4. In view of the fact that the Respondent refused to implement the Court Award in Cause No. 72 of 1995 as well as the court orders made on 26th September 2003 and the Court of Appeal decision made on 8th May 2009, the Respondent shall pay interest on decretal sum at court rates from the date of the decision of the Court of Appeal being 8th May 2009 until payment in full.

5. The respondent is directed to tabulate the amount payable and forward to the Claimants' Counsel for approval within 30 days from date of judgment.

6. The case will be mentioned on 16th December 2020 to confirm compliance.

7. The respondent shall pay claimants' costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 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, 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