



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC NO. 1278 OF 2017

(Formerly HCCC 515 of 2003)

(Before Hon. Justice Hellen S. Wasilwa on 24th January, 2019)

BENSON NDWIGA NJUE & 108 OTHERS.....CLAIMANT

VERSUS

CENTRAL GLASS INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claim herein was initially filed by the firm of Gitobu Imanyara & Co. Advocates in the High Court being Civil Suit No. 515 of 2003 on 29th May 2003. In their Amended Plaint filed on 29th November 2008, they allege that their early retirement was arbitrary, unlawful, discriminatory and amounted to cruel and other treatment forbidden under Section 82 of the then Constitution. The Claimants seek the following Orders:-

a. A declaration that the decision to cause their early retirement was unlawful and breached Sections 80 and 82 of the Constitution and was wrongful and a nullity.

b. An order that the Defendant do supply to the Plaintiffs and each of them audited statements of account detailing their dues.

c. An order that the Plaintiffs and each of them be paid all outstanding dues and other consequential entitlement pursuant to (b) above.

d. AND or ALTERNATIVELY, damages.

e. Costs of (b) and (c) above and of this suit with interest thereon at Court rates.

2. The Respondent filed its Amended Defence on 10th June 2010 in which it denied the Claimants' allegations as set out in the Plaint.

Claimants' Case

3. The Claimants aver that they were all employees of the Respondent whose terms and conditions of service were governed by Memoranda of Agreement dated 20th February 1991, 18th October 1994, 27th May 1997 and 13th November 2000.

4. The Claimants aver that they are members of the Kenya Chemical and Allied Workers Union, the Union, and that the Union and the Respondent had entered into a recognition and procedural agreement with the Respondent not to terminate the Claimants.

5. The Claimants aver that the Respondent unlawfully and contrary to the terms of the Memoranda sent them on compulsory leave. The Claimants further aver that the Respondent's Human Resource Manager, D. M. Muhia, wrote to each of them giving details of their computation of their benefits but the said benefits did not reflect what was due to each Claimant under the Memoranda of Agreement. The Claimants further aver that there was no provision for a re-engineering process under the Memoranda which would necessitate their early retirement.

6. CW1, Joseph Gathiaka Ndirangu testified on the behalf of the Claimants. He testified that he was employed by the Respondent as a Packer in the packaging Department after completing his probation period. He testified that in September 1999 he received a confidential letter

informing him of his early retirement.

7. He further testified that there had been no indication of an early retirement and no notice had been issued prior to their retirement. He further testified that they all expected to retire at the age of 60 years. It was his case that the Union was not involved in the decision by the Respondent to retire him.

8. In cross-examination CW1 testified that upon termination he was paid his dues, amounting to Kshs. 519,767 as stated in the confidential letter dated 20th September 1999. He further testified that his salary was Kshs. 20,485.

Respondent's Case

9. The Respondent admits that it entered into a recognition and procedural agreement with the Claimants' union but denies that it agreed or undertook not to terminate the Claimants. The Respondent avers that the decision to offer the Plaintiffs early retirement was discussed and agreed upon between the Claimants' Union. The Defendant avers that each Plaintiff accepted his/her terminal dues in full and final settlement and confirmed that they had no other claims against the Defendants.

10. DW1 Shadrack Karemu testified that he works for the Respondent. He testified that the Claimants were terminated in 1999 as the Company was undergoing some difficult times. He further testified that the Respondent operated its Plant but had low sales leading to a 6 months shut down. It was his case that the Respondent had to reopen on another operating model with a 3 shift but which could never be filled to capacity. Hence, the company had to go on a second restructuring leading to the Claimants termination. He testified that the Claimants were given a redundancy package as per the Memorandum of Agreement with the Union.

11. In cross-examination, DW1 stated that the competition in the market came towards the end of 1999 and that the Union was engaged before the Claimants were retired at shop floor level. He further testified that a notice must have been given to the Labour Officer.

Claimant's submissions

12. The Claimants submitted that early retirement results in the termination of contracts, which may become detrimental to an employee. It is the Claimants' submission that for the Respondent to decide to retire the Claimants before the retirement age it ought to have had a good cause.

13. The Claimants submitted that the Claimants were given details of the computations of their dues and this was done without the input of the Claimants. The Claimants therefore submitted that the power to retire the Claimants was done without any valid and or justifiable cause.

14. The Claimants submitted that the law stipulates that redundancy must not only be justifiable but must also be carried out in accordance with Section 40 of the Employment Act. The Claimant submitted that the conditions outlined in Section 40 of the Employment Act are mandatory.

15. The Claimant submitted that it is settled law that in declaring redundancy, an employer is required to issue two separate notices of at least 1 month each. The first being the communication to employees notifying them of the impending redundancy and the other being a specific notice to the intended employees. The Claimants relied on the decisions in **Thomas De La Rue v David Opondo Omutelema [2013] eKLR** and in **Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR**.

16. The Claimant further submitted that the notice issued to the labour officer serves a dual purpose being to elicit advice to the employer and a control measure to curb unlawful terminations as held in **Bernard Misawo Obora v Coca Cola Juices Kenya Limited [2015]eKLR**.

17. The Claimants submitted that the positions held by the Claimants still exist to date and the Respondent employed new persons to fill the positions. Therefore, the positions held were not regarded as redundant and therefore there was no justification as to why the Respondent terminated the Claimants' employment.

18. The Claimants submitted that an award of 2 months notice pay will be proper compensation as the termination was unprocedural and unlawful. The Claimants further submitted that they are entitled to an award of damages being the equivalent of 12 months salary due to the loss suffered upon their unlawful termination and unjustifiable redundancy. The Claimants also submitted that they are also entitled to their salaries for the remainder of their employment term to their retirement age based on their legitimate expectation.

Respondent's Submissions

19. The Respondent submitted that in determining the justification of redundancy the Courts consider the definition of the term redundancy as defined under Section 2 of the Trade Disputes Act. It relied on the decision of **Loice Rose Obengo v Nyanza Reproductive Health Society [2013]eKLR**.

20. It submitted that the letters addressed to the Claimants revealed that their termination was as a result of termination due to the re-engineering process caused by 50% of the reduction of the Company's production. It therefore submitted that its decision to retire the Claimants was to reorganise its operations. It relied on the decision in **G.N.Hale & Sons Ltd v Wellington Caretakers** in submitting that an employer has a right to reorganise its business to run it sufficiently.

21. The Respondent further submitted that the Claimants' termination was justified since the offices held by the Claimants were abolished. It relied on the Court of Appeal decision in **Kenya Airways v Aviation Allied Workers Union & 3 Others**.

22. In respect of the procedural fairness, the Respondent submitted that it was RW1's testimony that the Claimants' union representative and the labour officer were notified of the intended redundancy. It submitted that it not only paid due regard to the Claimants' seniority in time but also made the process transparent and inclusive. Hence, its compliance with Section 16A of the Employment Act Cap 226 (now repealed).

23. The Respondent submitted that the prayers b and c should be dismissed as the same comprises a detailed account of the Claimant's terminal dues which was produced in the Respondent's list and bundle of documents dated 29th April 2011. The Respondent further submitted that the Claimants are not entitled to damages while the prayer for salary to the retirement age is not only unfounded in law but is also unconscionable.

24. The Respondent submitted that the Claims are time barred since at the time of instituting the Complaint on 29th May 2002 no authority to act had been filed as required under Order 1 Rule 13 (2). The Respondent relied on the case of **Andrew Ileri Njeru – Embu Nyangi Ndiiri Proposed Society Chairman & Others v Daniel Nganga Kangi & Another [2015] eKLR.**

25. The Respondent submitted that the filing of the authority to Act years after claims became statute barred under the Limitations of Actions Acts is an unconscionable attempt to circumvent the provisions of the Act. The Respondent finally submitted that the claim be dismissed with costs as it has undergone trouble defending the suit and relied on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another.**

26. I have examined all the evidence and submissions of both parties. The issues for this Court's determination are as follows:-

1. Whether this Claim is time barred.

2. Whether the Claimants' redundancy was valid, based on proper reasons and whether due process was followed.

3. Whether the Claimants are entitled to the remedies sought.

27. On the first issue, the Respondent submitted that this claim is time barred due to the fact that at time of filing this suit on 29.5.2001, notice to act had not been filed under Order 1 Rule 13(2).

28. The Complaint dated 29th May 2002 listed 30 Plaintiffs who were suing on their own behalf and on behalf of an additional 120 persons. The Respondent aver that at time of instituting suit, no authority under Order 1 rule 13(2) had been filed.

29. Order 1 Rule 13 actually provides for a situation where there are one or more Plaintiffs and others may authorize any of them to appear, plead or act for them in the proceedings.

30. The rule is not coached in mandatory terms as pleaded by the Respondents in terms of time when the authority may be given. However, it is true that where no authority has been filed, the effect would render the suit a non-starter in respect of such a Claimant who has not given authority.

31. In the case of the Claimants, herein they filed authority to act on 14.9.2015 and signed by 55 Claimants. Another Authority is dated 19.12.2017, and signed by 13 Claimants and filed on 16.1.2018. There are 68 Claimants who gave authority. So long as the authority was given before the hearing commenced and the witnesses prosecuting the claim on behalf of the others stated so, the authority is valid and the submission that this makes the claim time barred is not valid.

32. Under Rule 21 of the ELRC (Procedure) Rules 2016, Parties may agree to proceed on documentary evidence, on pleadings, affidavits and submissions made by them. If this can be the position, what would make one of the Claimants giving evidence on behalf of the others state so?.

33. On the 2nd issue, it is the Claimants' case that they were arbitrarily early retired by the Respondents without valid reasons and without following due process. Joseph Gathiaka Ndirangu testified in Court and stated that he was representing the other Claimants. His claim was that they were permanent and pensionable employees of the Respondents but in 1999 September, he was on duty early morning and as he left after night shift, he was given a letter indicating that he had been retired early.

34. He contended that the Union was not involved in this decision. He avers that he was 35 years then. All the Claimants were retired in the same fashion and no notice was served upon them before this retirement. He prays for compensation for the wrongful and illegal redundancy.

35. The Respondents contended that the redundancy was done fairly as they were going through a down turn and that there was even a shut down for 6 months.

36. The Respondents have not denied retiring the Claimants early. They have not also denied they did not issue the Claimants with any notices before the redundancy.

37. The Respondents have explained their justification for the redundancy by stating that the company was doing badly. This fits in the legal definition of redundancy which is ***“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 due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant”*** - Section 2 of Trade Dispute Act.

38. Whereas a redundancy situation did exist or not may not be clear at the moment given that the Respondents did not submit any evidence to show how the company was performing at the time the decision to declare the Claimants redundant was made.

39. The Respondent have however indicated the measure to declare Claimants redundant was made as an operation by abandoning unprofitable activities so as to make the enterprise economically viable.

40. The right of an employer to reorganize his business and run it more efficiently and profitably has been upheld by the Courts (see New Zealand Court of Appeal in G.N. Nalle and Son Limited vs Wellington Caretaker IVW.4).

41. Back home in C.A No. 46/2013 Githinji JA stated as follows:-

“The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment”.

42. This being true, even if there is a true redundancy situation the same must be carried out procedurally. From the Claimants’ case. They were terminated without notice. The Claimants stated that the termination was effected on the day the letters of redundancy were served upon them.

43. Under Employment Act (Cap 226) repealed Section 16A:-

“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”.

44. The Respondent have not demonstrated that the Claimants were issued with any notice before the redundancy as provided under (d) above. There is no indication that the Respondent also explained the criteria they were employing to declare some employees redundant as opposed to others in terms of (b) above.

45. It is therefore my finding that the redundancy effected on the Claimants was unfair and unjustified.

46. In terms of remedies, I noted that the Claimants were paid some redundancy dues including notice. I will therefore award each of the Claimants herein 12 months’ salary as compensation for the unlawful redundancy plus costs and interest of this suit which translates as follows:-

1. Joseph G. Ndirangu Kshs.20,495 x 12 months = Kshs.245,940
2. William M. Thuo Kshs.15,355 x 12 months = Kshs.184,260
3. Francis M. Kinyanjui Kshs.19,607 x 12 months = Kshs.235,284
4. Johannes Anyazwa Kshs.17,467 x 12 months = Kshs.209,604
5. Rhoda Wangari Kshs.19,051 x 12 months = Kshs.228,612
6. Peter M. Mugo Kshs. 15,542 x 12 months = Kshs. 186,504
7. John N. Muchiri Kshs. 28,910 x 12 months = Kshs. 346,920
8. Henry N. Kihuna Kshs. 23,549 x 12 months = Kshs. 282,588

9. Arthur Mbuthia Kshs. 28,597 x 12 months = Kshs. 343,164
10. Rogers N. Mwadime Kshs. 24,060 x 12 months = Kshs. 288,720
11. Josiah Itindi Kshs. 34,690 x 12 months = Kshs. 416,280
12. Francis M. Kageche Kshs. 19,478 x 12 months = Kshs. 233,736
13. John Ngungu Kshs. 25,462 x 12 months = Kshs. 305,544
14. James K. Macharia Kshs. 28,035 x 12 months = Kshs. 336,420
15. Charles Muita Kshs. 18,390 x 12 months = Kshs. 220,680
16. Raphael Kimathi Kshs. 19,685 x 12 months = Kshs.236,220
17. Charles Nyasiio Kshs. 18,968 x 12 months = Kshs. 227,616
18. Beneus Bitange Kshs. 78,406 x 12 months = Kshs. 940,872
19. Peter Musau Kshs. 27,753 x 12 months = Kshs. 333,036
20. George Mbugua Kshs.19,295 x 12 months = Kshs. 231,540
21. Kenneth K.Kahi Kshs. 28,561 x 12 months = Kshs. 342,732
22. Benson Gichinga Kshs. 50,580 x 12 months = Kshs. 606,960
23. George Ritho Kshs. 19,607 x 12 months = Kshs. 235,284
24. Harriet K. Aseneka Kshs.30,191 x 12 months = Kshs.362,292
25. Robert Musau Kshs.25,462 x 12 months = Kshs.305,544
26. Peter Kamanga Kshs. 15,905 x 12 months = Kshs. 190,860
27. Gideon Masya Kshs.33,407 x 12 months = Kshs.400,884
28. Arthur Kamau Kshs.21,945 x 12 months = Kshs.263,340
29. Michael Dindi Kshs. 19,945 x 12months = Kshs.239,340
30. Francis N. Muturi Kshs.23,251 x 12 months = Kshs. 279,012
31. Catherine Kihara Kshs. 30,191 x 12 months = Kshs.362,292
32. Rosemary W.Wachira Kshs.35,316 x 12 months = Kshs.423,792
33. Paul Ngure Kshs.13,020 x 12 months = Kshs.156,240
34. Morrice Njoroge Kshs.19,945 x 12 months = Kshs.239,340
35. John Waweru Kshs.19,607 x 12 months = Kshs.235,284
36. Onesmus Wanyoike Kshs. 19,607 x 12 months = Kshs.235,284
37. Charles Njuguna Kshs. 16,131 x 12 months = Kshs. 193,572
38. Benson Njue Kshs. 19,607 x 12 months = Kshs.235,284
39. Rogers Mkolwe Kshs. 24,612 x 12 months = Kshs.295,344
40. David Githire Kshs. 27,753 x 12 months = Kshs.333,036

41. Anthony Busani Kshs.24,094 x 12 months = Kshs. 289,128
42. John Aura Kshs.28,910 x 12 months = Kshs.246,920
43. Patrick Wachira Kshs. 26,880 x 12 months = Kshs.322,560
44. Peter G. Murige Kshs.24,060 x 12 months = Kshs.288,720
45. John M. Mathenge Kshs.19,051 x 12 months = Kshs. 228,612
46. Anthony M. Gituru Kshs.50,580 x 12 months = Kshs. 606,960
47. Eric Oburu Orongo Kshs.24,661 x 12 months = Kshs. 295,932
48. Paul Mwaura Kshs.18,940 x 12 months = Kshs. 227,280
49. Thomas Oduor Kshs.19,051 x 12 months = Kshs. 228,612
50. John Muravi Kshs.19,051 x 12 months = Kshs. 228,612
51. William Ouma Kshs.20,495 x 12 months = Kshs.245,940
52. Muka Sope Kshs.11,955 x 12 months = Kshs.143,460
53. Joshua Agaro Kshs.24,612 x 12 months = Kshs.295,344
54. Monica Njoki Kshs. 12,594 x 12 months = Kshs.151,128
55. Enock L. Wamakeya Kshs.15,715 x 12 months = Kshs.188,580
56. Major Kibutu Kshs.43,277 x 12 months = Kshs.519,324
57. Joseph Majisu Kshs.20,495 x 12 months = Kshs.245,940
58. Stephen Marete Kshs.20,495 x 12 months = Kshs.245,940
59. Ann M. Mwangi Kshs. 24,612 x 12 months = Kshs.295,344
60. Andrew Ngui Kshs. 15,150 x 12 months = Kshs.181,800
61. James Wainaina Kshs. 27,753 x 12 months = Kshs.333,036
62. Gabriel Yego Kshs. 19,607 x 12 months = Kshs. 235,284
63. Hashim Ali Mohamed Kshs. 26,880 x 12 months = Kshs.322,560
64. Joseph Amani Kshs. 15,355 x 12 months = Kshs.184,260
65. Emillius Muthaura Kshs. 24,612 x 12 months = Kshs. 295,344
66. Jane Wamuyu Kshs. 15,355 x 12 months = Kshs.184,260
67. Allan Anyonge Kshs. 24,612 x 12 months = Kshs.295,344
68. John Muli Kshs. 19,607 x 12 months = Kshs.235,284
69. Zainabu Njeri Kshs. 19,295 x 12 months = Kshs.231,540
70. Ann Kimani Kshs. 30,191 x 12 months = Kshs.362,292
71. Mutiso Kilonzo Kshs. 24,612 x 12 months = Kshs.295,344
72. Daniel Njuguna Kshs. 19,051 x 12 months = Kshs.228,612

73. Solomon Munyao Kshs. 19,478 x 12 months = Kshs.223,726

Dated and delivered in open Court this 24th day of January, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okeyo for Respondents – Present

Mugure holding brief Ouna for Claimants – Present