



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 274 OF 2015[consolidated with 276 and 279 of 2015]

(Before Hon. Justice Mathews N. Nduma)

JACKLINE ATUVUKHA MUSHIEFI.....1ST CLAIMANT

EMMANUEL SIMIYU WANYONYI.....2ND CLAIMANT

MARY KEMUNTO NGARE.....3RD CLAIMANT

VERSUS

ELDORET MATTRESS LIMITED.....1ST RESPONDENT

DANIEL NGUGI.....2ND RESPONDENT

J U D G M E N T

1. The suits aforesaid, being causes No. 274, 276 and 279 of 2015 arose from similar set of circumstances. They were heard together though no order of consolidation was sought by the parties. The claimants are different but the respondents are the same.
2. The 1st, 2nd, and 3rd claimants relied on the various witness statements filed as their evidence in chief and counsel for the respondent Mr. Odhiambo cross examined each one of them.

Facts common to the three cases

3. The 1st, 2nd and 3rd claimants' employment were terminated on 14th February 2015 on grounds of redundancy in terms of Section 40 of the Employment Act, 2007.
4. The claimants state that they were summoned by one Mr. Alex Kamau, a manger to his office on the morning of 14th February 2015 and they were told that their services were no longer required by the respondent.
5. The claimants state that they were not issued with any notice prior to this summon nor was the labour office informed of the intended termination.
6. The claimants state that they were not paid terminal benefits upon termination and that there was no valid reason to terminate their employment. The claimants seek the following reliefs:

Jackline Atuvuka Mushifi – 1st claimant

- (a) 12 months compensation for unlawful termination of employment.
- (b) One month salary in lieu of notice – Kshs 23,885.5.
- (c) 15 days arrears salary for February 2015 – Kshs 11,942.26.
- (d) Service pay for 6 years worked at 15 days salary for each completed year of service – Kshs 67,310.

(e) Overtime @ 45 hours per week for 30 months – Kshs. 621,180.

(f) Costs and interest.

Less amount paid – Kshs 51,186.

Emmanuel Simiyu Wanyonyi 2nd claimant

(a) 12 months compensation.

(b) One month salary in lieu of notice – Kshs 23,885.

(c) Service pay at 15 days for 15 years worked – Kshs 155,775.

(d) Overtime @ 45 hours per week for 36 months – Kshs 621,180.

(e) Costs and interest

Less amount paid – Kshs 193,780.

Mary Kemunto Ngare

(a) 12 months compensation.

(b) One month salary in lieu of notice – Kshs 14,011.60.

(c) Arrears salary for 15 days in February – Kshs 9,289.

(d) Leave due for 2015 – Kshs 11,317.

(e) Service pay at 15 days salary for 11 years worked – Kshs 102,179.

(f) Overtime at 45 hours a week for 36 months – Kshs 197,208.

Less amount paid – Kshs. 356,737.

7. The three claimants testified under oath and relied on their recorded witness statements and supporting documents annexed to the memorandum of claim in which they all state their dates of employment by the respondent. That they were registered with NSSF and the deductions on their salary were made in respect thereof. That they were never paid medical allowance, house allowance, travelling allowance and overtime.

8. That at the time of termination, the 1st claimant earned Kshs 17,100 per month, 2nd claimant earned Kshs 15,500 per month and 3rd claimant earned Kshs. 15,500 per month. The three claimants testified that they were paid service pay upon termination. The claimants pray that the suit be allowed as prayed.

Defence

9. The respondents filed replies to the memorandum of claim by the claimants. The respondents called RW1 to testify in defence of the claims. RW1, Daniel Ngacha Ngugi, the 2nd respondent stated that he recruited the claimants on behalf of the 1st respondent. That in the year 2013, the 1st respondent which was a whole sale and Retail supermarket experienced severe financial problems and the Director of the 1st respondent decided to close all the three(3) shops in Eldoret and one (1) shop in Kapsabet. That they called all the workers including the claimants and informed them of the intended action to lay them off. They also informed the ministry of labour of the intended action.

10. That all the workers including the claimants, were paid their dues in terms of Section 40 of the employment Act 2007 and they signed documents acknowledging the payment by the respondent. That payment included payment in lieu of notice; in lieu of leave and severance pay.

11. They were paid at the end of the day they were laid off. That the claims made by the claimants have no basis and they be dismissed with costs. The 2nd respondent stated under cross examination that he was a registered labour agent and had recruited the claimants to work for the 1st respondent. That each employee got an individual notice of retrenchment but they tore them. That the payment also included arrear salary. The 2nd respondent stated he was not their employer but 1st respondent was.

Determination

12. The issues for determination are:

(i) Whether the declaration of redundancy was for a valid reason and done in terms of a fair procedure as set out under *Section 40 of the Employment Act 2007*.

(ii) Whether the claimants are entitled to the reliefs sought.

Issue i

13. The 1st respondent has demonstrated that the three (3) supermarkets it operated in Eldoret and One (1) in Kapsabet were closed due to financial difficulties. The 1st respondent therefore had a valid reasons to declare their employees including the claimants redundant.

14. Upon closure of business the services rendered by the claimants had become superfluous and could not be retained.

15. The respondents did not however give the claimants and the ministry of labour one month notice before retrenching the claimants. This was a procedural mistake. The respondents however have demonstrated that they paid each claimant one month salary in lieu of notice; 15 days salary for the number of years served; 15 days salary for the days worked in February 2015 and payment in lieu of leave days not taken.

16. The court is of the considered view that the respondent complied substantially with the requirements under *section 40 of the Employment Act*. The same was for a valid reason but the respondents retrenched the claimants on the same day they were made aware of the retrenchment. The respondent failed the procedural test therefore in the circumstances of the case.

Issue ii

17. As to whether the claimants are entitled to the reliefs sought, following the finding that the declaration of redundancy was for a valid reason but the respondent failed the procedural test, the claimants are entitled to compensation under *Section 49(1) (c) and (4) of the Employment Act*.

18. The respondent has demonstrated that it paid the terminal benefits mandated under *Section 40 of the Employment Act 2007* upon declaring the claimants redundant.

19. The claims made in respect of notice pay; arrear salaries in lieu of leave days and severance pay have no merit and are dismissed.

20. The claimants have also failed to prove on a balance of probabilities that they were entitled and were not paid overtime for 36 months. These claims are dismissed.

Compensation

21. The court relies on the court of Appeal decision in **Civil Appeal No. 46 of 2013, Kenya Airways Limited vs Aviation workers union of Kenya and 3 others** where the court held in its majority decision that:

“Termination of employment on account of redundancy is justified if there is substantive justification for declaring redundancy and there is procedural fairness in the consequent retrenchment. Given the fact that for a period of about five years the appellant’s profits had continuously dipped, I find that the appellant was justified in declaring redundancy. The appellant, however failed to meet that statutory threshold of procedural fairness in the implementation of its redundancy decision in that it failed to give notice to labour office and a proper and adequate notice to the affected employees or their union”

22. This is the case in the present matter. The respondent had substantive justification to declare the workers redundant. The claimant complied partly with the requirement of *Section 40* by making the payments of terminal benefits. However, the respondent did not give a proper and adequate notice to the affected employees or their union. Accordingly, the respondent failed the test for procedural fairness.

23. The claimants in the Kenya Airways case were awarded equivalent of six (6) months’ salary in compensation.

24. The respondent in this case mitigated the circumstances of the case by paying the terminal benefits to the claimants including severance pay and notice pay. Accordingly, the court considering the requirements under *Section 49(4) of the Employment Act*, including the inconvenience suffered due to severance on the same day they were made aware of the retrenchment. The claimants served 6 years; 15 years and 11 years respectively. The court awards the claimants compensation as follows:

1st claimant – Equivalent of five (5) months salary in compensation.

2nd claimant – equivalent of 10 months salary and

3rd claimant – equivalent of 8 months salary.

25. In the final analysis judgment is entered in favour of the claimant as against the 1st respondent as follows:

(a) 1st claimant – Kshs 143,310.

2nd claimant – Kshs 238,850

3rd claimant – Kshs 112,092.80

(b) Interest at court rates from date of judgment till payment in full.

(c) Costs of the suit.

Judgment Dated, Signed and delivered this 21st day of February, 2019.

Mathews N. Nduma

Judge

Appearances

Mr. Chepkwon for Claimant

Mr. Odhiambo for Respondents

Chrispo – Court Clerk