



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2228 OF 2017 AS CONSOLIDATED WITH CAUSE NO. 2335 OF 2017; 2336 OF 2017 AND 2431 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

HENRY KAMAU NYAGA.....1ST CLAIMANT

STEPHEN OTIENO.....2ND CLAIMANT

SIMON MUNGAI.....3RD CLAIMANT

JOHN KIARIE ING'ANGI.....4TH CLAIMANT

VERSUS

WAIGANJO INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

The Claimant's were all employees of the Respondent Company having been employed on various dates in different capacities as a legal officer, cleaner, driver and artisan respectively. On 11th September 2017, the employment services were summarily terminated by the issuance of termination letters dated 8th September 2017 on account of redundancy. The Claimants being aggrieved filed their individual claims which are consolidated herein, seeking the issuance of a certificate of service, payment of their terminal dues and compensation for wrongful dismissal.

The Respondent contends that the Claimants were retrenched after consultation with stakeholders. Since the Claimants were not members of a trade union, the Respondent also served the labour officer with the 30-day redundancy notice. The Claimants were paid their severance pay save for the 1st Respondent who rejected the offer.

The matter proceeded by way of documents and written submissions.

Analysis and Determination

The issues for determination are whether the Claimants were unfairly dismissed and if they are entitled to the reliefs sought.

Section 40(1) of the Employment Act provides as follows:

“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 15 days' pay for each completed year of service."

The Court in ***Bernard Misawo Obora vs. Coca Cola Juices Kenya Limited [2015] eKLR*** observed that:

"The procedures applicable in a redundancy are therefore set out in law and are mandatory... Such provisions being mandatory, an employer has to meet them and where not met, in their element, by an act of omission or commission, the resulting action that disadvantages the employees is inherently and procedurally unfair."

From the evidence on record, the claimants were all declared redundant due to the respondent's financial status. The evidence on record is that each of them were issued with a 30 days' notice and asked to take leave.

The letter of termination only gives termination notice provided for under Section 40(1)(f). No notification was given under Section 40(1)(a) as read with (b).

In the case of ***Thomas De La Rue (K) Limited –VS- David Opondo Omutelema (2013) eKLR***, the Court of Appeal held that –

"It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer...."

The claimants were also to be paid all leave due in cash as provided in Section 40(1)(e).

For the foregoing reasons the claimants were entitled to the following –

Notification not less than one month

Termination notice not less than one month

Salary for days worked

Leave due payable in case

Severance pay

The respondent did not adduce any evidence that the notification for redundancy was reported to the local County Labour Officer. This was therefore a violation of the mandatory provisions of Section 40(1)(a) and (b). The redundancies were irregular and unlawful to the extent of the violations of Sections 40(1)(a), (b) and (e).

For these reasons, I award each of the claimants the following –

1. One month's salary in lieu of the notification
2. Pay in lieu of leave
3. Severance pay
4. Each claimant will be paid two months' salary as compensation for unlawful redundancy, that is failure to notify them of the redundancy at least one month in advance, and failure to notify the Labour Officer as well as failure to pay them leave in cash.

I thus award each of them the following –

1. Henry Kamau Nyaga

Salary Kshs.63,948

No of years worked – 1 year

AWARD

Notification..... Kshs.63,948

Leave..... Kshs.63,948

Severance Pay..... Kshs.31,974

Compensation..... Kshs.127,896

Total Kshs.287,766.00

2. Stephen Otieno

Salary Kshs.14,084

No of years worked – 10 years

AWARD

Notification..... Kshs.14,084

Leave..... Kshs.14,084

Severance Pay..... Kshs.70,420

Compensation..... Kshs.28,168

Total Kshs.126,774.00

3. Simon Mungai

Salary Kshs.18,000

No of years worked – 34 years

AWARD

Notification..... Kshs.18,000

Leave..... Kshs.18,000

Severance Pay..... Kshs.306,000

Compensation..... Kshs.36,000

Total Kshs.378,000.00

4. John Kiarie Ing'angi

Salary Kshs.20,000

No of years worked – 2 years

AWARD

Notification..... Kshs.20,000

Leave..... Kshs.20,000

Severance Pay..... Kshs.20,000

Compensation..... Kshs.40,000

Total Kshs.100,000.00

From the above payments the respondent will recover what it paid to each employee.

Interest shall accrue from date of judgment respondent shall pay the costs of the claimants

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE