



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 141 OF 2017

(Before Hon. Justice Mathews N. Nduma)

RONO CHERUIYOT.....	1 ST CLAIMANT
PAUL KIPRONO.....	2 ND CLAIMANT
KIRUI EDWARD KIPLAGAT.....	3 RD CLAIMANT
HILLARY K. BOR.....	4 TH CLAIMANT
DENNIS KIBET.....	5 TH CLAIMANT
DANIEL MADAFU CHUMA.....	6 TH CLAIMANT
GEORE GITAU CHIRA.....	7 TH CLAIMANT
EDWARD KEMEL.....	8 TH CLAIMANT
PETER MWANGI NJAGUA.....	9 TH CLAIMANT
FRANCIS MUTUKU MUTUA.....	10 TH CLAIMANT
KIPKORIR KOECH.....	11 TH CLAIMANT
BENARD KIPKOECH.....	12 TH CLAIMANT
ERIC KIPSANG KIRUL.....	13 TH CLAIMANT
REUBEN KIBET KOSGEL.....	14 TH CLAIMANT
KOPRONO FREDRICK KOECH.....	15 TH CLAIMANT
CATHERINE KINANU KIRERA.....	16 TH CLAIMANT

VERSUS

S.B.I INTERNATIONAL HOLDING (AG) LTD.....RESPONDENT

JUDGMENT

1. The suit is a legal challenge on the declaration of redundancy of the 16 claimants by the respondent by a letter dated 1st July 2015 to the Labour Officer, Ministry of Labour Kericho. The letter of notification cited completion of the project known as Rehabilitation of Mau Summit – Kericho Road (BI) contract No. 0421 0422 and Rehabilitation of Kericho – Nyambare Road (ABI) Contract No. 0583 as the reason for rendering redundant the claimants.

2. The respondent attached a list of 60 employees who were affected by the intended redundancy and that the redundancy was to take place from July to November in batches until such time that the respondent would hand over the project to the government.
3. The claimants further challenge the computation of final dues stating that the increment of salary negotiated in the CBA for the period 1st January 2015 to 31st December 2016 was not reckoned in the final tabulation and therefore claim salary arrears for the period.
4. In addition, the Claimants pray for one month salary in lieu of notice, severance pay at 17 days pay for every year worked and maximum compensation for unlawful and unfair termination of employment in that the declaration of redundancy did not satisfy the requirement under *Section 40 of the Employment Act, 2007* and therefore was unfair labour practice under *Article 41 of the constitution of Kenya 2010*.
5. That the claimants remain unemployed despite having a valid employment contract with the respondent. That notices of demand have been served but not heeded to by the respondent.
6. In response to the claim, the respondent denies the particulars of claim and the grounds thereof stating that the government project under which the claimants were employed was to be completed in three (3) years and the claimants were at all material times aware of the completion date of the project.
7. That notices were issued when the project was nearing its end to the claimants and to the Labour Office Kericho. That claimants were paid all their terminal benefits as envisaged under the *Employment Act, 2007*. That the claimants signed a discharge Agreement upon receipt of the terminal benefits and discharged the respondent from any further liability arising from the employment relationship.
8. That claimants were promised to be considered once a new project was secured and claimants number 15 and 16 are already in Employment of the Respondent. Wherefore, respondent prays that the suit be dismissed and in fact, the 1st claimant lacks authority to institute the suit on behalf of other claimants.
9. A labour report was filed on 20th May 2018 pursuant to orders of Justice Maureen Onyango dated 28th July 2017. The Labour officer upon conducting investigations found that the claimants worked for the respondent for the stated periods under the named project. That the respondent filed a notice of intended redundancy with the Ministry of Labour on 1st July 2015 which was received on 3rd July 2015. That individual employees were served with letters of intended redundancy with varying dates which notified them of the intended termination on grounds of redundancy. That the union was not notified since the claimants were not members of the union and their pay slips do not reflect deduction of any union dues.
10. That records produced show that the claimants were paid their terminal dues including, 1 month salary in lieu of notice, salary for days worked, leave days earned and not taken and gratuity dues. That copies of pay off preview payment vouchers, payment cheques and discharge vouchers were produced. The Labour officer stated that he was satisfied that terminal dues were paid.
11. On the claim for payment of salary arrears arising out of the CBA, the labour officer stated that the respondents are members of Kenya Association of Building and Civil Engineering Contractors (KABCEC) who have a recognition agreement with the Kenya Building Construction Timber and Furniture Industries Employees Union. That the Association and the union have negotiated Collective Bargaining Agreements the latest having been signed on 15th October 2015 but the effective date was 1st January 2015. The CBA was registered by Employment and Labour Relations Court on 16th November 2015 as RCA No. 200 of 2015.
12. In view of the above, based on the dates of termination only two claimants would qualify for the arrears arising out of the CBA aforementioned i.e Reuben Kibet Kosgei and Kiprono Fredrick Koech since they were terminated on 20th November and 23rd November 2015 respectively.
13. That it is true that the claimants were not paid severance pay in terms of the law and the CBA. Only gratuity was paid. The claimants are therefore entitled to severance pay at the rate of 17 days salary for each completed year of services as per clause 17 (v) of the CBA.
14. The labour officer provided a schedule of dues owed to the claimants at page 2 of the report in terms of the arear salary and severance pay. The Labour Officer recommended an award to the claimants in the total sum of Kshs. 845, 193.
15. The parties filed their respective final submissions and the issues for determination are as follows:
 - (a) Whether the declaration of redundancy of the claimants by the respondent was for a valid reason and in terms of a fair procedure.
 - (b) Whether the claimants are entitled to the reliefs sought.

Issue (a)

16. Section 40(1) of the Employment Act, 2007, provides:

“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”.

17. The court is satisfied that the claimants have not proved on a balance of probabilities that they were members of a union. The respondent correctly notified the Labour office Kericho and the individual employees of the intended redundancy not less than a month prior to the date of intended date of termination on account of redundancy. The court is also satisfied that the claimant’s were paid one month salary in lieu of notice in the computation of terminal benefits.

18. The claimants have not demonstrated that there was no valid reason to terminate their employment on grounds of redundancy. The allegations by the claimants have been sufficiently rebutted by the respondent and the Labour Officer in his report filed before court that the claimants were aware that they were to serve in a Road Construction Project that was to last for three years. That indeed the named project came to an end and the claimants and other employees totaling about sixty (60) were declared redundant and laid off.

19. The respondent also paid the claimants in lieu of leave days not taken in terms of *Section 40(1) (d)*; paid the claimants not less than one month’s salary in lieu of notice in terms of *subsection 40(1) (f)* but did not pay the claimant’s severance pay in terms of *Section 40(1) (g)* and *clause 17(v)* of the outgoing CBA calculated at 17 days salary for each completed year of service. The respondent however paid gratuity to the claimants.

20. The respondent further complied with *Sub-section 40(1) (d) of the Act* by paying the claimants terminal dues in terms of the CBA negotiated between the claimants and the union even though the claimants were not union members. The only issue in dispute on this item is whether the CBA that was signed on 1st July 2015 but registered on 16th January 2015 was applicable to the claimants whose employment came to an end after the CBA was signed but not yet registered.

21. Only claimants number 14 and 15, left employment after the last CBA was registered. These two are automatically entitled to arrear salary as per the salary increment in the new CBA. *Section 59(1) of Laobur relations Act, 2007*. Provides:

1. A collective agreement binds for the period of the agreement,

(a) The parties to the agreement.

(b) All unionable employees employed by the employer’s group of employers or members of the employer’s organization party to the agreement; or

(c) The employers who are or became members of an employer’s organization party to the agreement to the extent that the agreement relates to their employees.

2. The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.

3. A collective agreement becomes enforceable and shall be **implemented upon registration** by the industrial court and **shall be effective from the date agreed upon by the parties.**

22. It is clear that the operative date of a CBA is not the date it is registered by the court but from the date agreed upon by the parties.

23. The effective date agreed upon by the parties in this suit was 1st July 2015. It follows that all unionsable employees who were in employment of the respondent as at 1st July 2015, and whose termination came after the effective date were entitled to the salary increment provided in the CBA up to the date of their respective termination.

24. It is without doubt therefore, the respondent and the labour officer were both wrong on this point. All the claimants left employment after the CBA, for the period 2015-2016 had become effective and they are entitled to salary arrears and terminal benefits calculated on the basis of the new salary applicable to them in terms of the last concluded CBA.

25. Accordingly, the court finds that the respondent adhered to the procedural requirements under *Section 40* in declaring the claimants redundant but the labour officer did not offer proper advice to the respondent with respect to the effective date of the CBA whose effective date was 1st July 2015.

26. The reason for the declaration of redundancy was valid and in terms of *Sections 40, 43 and 45 of the Employment Act*. The court therefore declares that the declaration of redundancy of the claimants was lawful and fair.

Issue (b)

27. With regard to terminal benefits due to the claimants, the respondent was in error, though not intentionally in computing the terminal benefits due to the claimants. The claimants are entitled and the court awards them further terminal benefits as follows:

(a) Salary arrears from 1st January 2015, to 31st December 2016, in terms of the last concluded CBA, as follows:

1st claimant – Kshs. 28,080
2nd claimant – Kshs. 28,080
3rd claimant – Khss. 28,080
4th claimant – Kshs. 11,440
5th claimant – Kshs. 14,440
6th claimant – Kshs. 27,040
7th claimant – Khss. 40,560
8th claimant – Kshs. 27,040
9th claimant – Kshs. 27,040
10th claimant – Kshs. 22,620
11th claimant – Kshs. 27,040
12th claimant – Kshs. 27,040
13th claimant – Kshs. 14,040
14th claimant – Kshs. 11,440
15th claimant – Kshs. 27,040
16th claimant – Kshs. 26,640

(b) Severance Pay

28. The claimants are also entitled to severance pay in terms of Section 40(1) (g) of the Employment Act, as read with clause 17(v) of the last CBA as follows:

1st claimant – Kshs. 18,556
2nd claimant – Kshs. 18,558
3rd claimant – Khss. 22,270
4th claimant – Kshs. 36,176
5th claimant – Kshs. 9,044
6th claimant – Kshs. 107,100
7th claimant – Khss. 22,270
8th claimant – Kshs. 21,420
9th claimant – Kshs. 85,680
10th claimant – Kshs. 54,060
11th claimant – Kshs. 85,680
12th claimant – Kshs. 85,680

13th claimant – Kshs. 33,252

14th claimant – Kshs. 33,252

15th claimant – Kshs. 107,100

16th claimant – Kshs. 15,768

29. The claims in respect of one month salary in lieu of notice lack merit. The same was paid to all claimants. Similarly, the court having declared that the redundancy was for a valid reason and followed a fair procedure, dismisses the claim for compensation.

30. The award in respect of salary arrears and severance pay is payable with interest at court rates from the date of termination of each claimant till payment in full.

31. The respondent to pay the costs of the suit.

Judgment Dated, Signed and delivered this 15th day of July, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Kirwa for claimants

Prof. Albert Mumma for respondent.

Chrispo – Court Clerk