



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 350 OF 2015

SUSAN MUMBUA.....1st CLAIMANT

LORNA TSISIGA 2nd CLAIMANT

TIVENDER KAUR JUTTILA.....3rd CLAIMANT

JOHANNES OLUOCH.....4th CLAIMANT

JOAN WANGUI KARIUKI..... 5th CLAIMANT

HARRISON NDWIGA MURIITHI.....6th CLAIMANT

DANIEL MUEMA MUTANGILI7th CLAIMANT

v

NAVITAS LIMITED.....1st RESPONDENT

AUSTRALIAN UNIVERSITY STUDIES

INSTITUTE (AUSI) 2nd RESPONDENT

AUSEDKEN LIMITED.....3rd RESPONDENT

JUDGMENT

1. This Cause as heard on 24 July 2018, 6 March 2019 and on 8 April 2019. Tivender Kaur (3rd Claimant) testified on behalf of all the Claimants.
2. The Respondents opted not to lead any evidence/call witnesses.
3. The Claimants filed their submissions on 17 May 2019 while the 1st and 2nd Respondents filed their submissions on 31 May 2019. The 3rd Respondent filed its submissions on 2 July 2019.
4. The Court has considered the pleadings, evidence on record and the submissions.
5. Although the Court on 30 April 2018 directed the parties to file *Agreed Issues* before 18 May 2018, the order was not complied with.
6. The Claimants filed their proposed Issues on 20 June 2018 while the 1st and 2nd Respondents filed their version of Issues on 22 June 2018.

Whether Claimants had contract of service(s) with the 1st, 2nd or 3rd Respondents

7. Issues 1 and 2 as raised by the Respondents related to the contractual relationship between the Claimants and the Respondents.
8. It was asserted that the 2nd Respondent was not a *juristic person* capable of being sued, and that the 1st Respondent was merely a

shareholder in the 3rd Respondent, and therefore was a distinct entity which could not be liable for the legal obligations of the 3rd Respondent.

1st Claimant's employer

9. No formal contract of employment was filed in respect of Susan Mumbua (1st Claimant), but a notice of termination of employment dated 3 February 2015 was on the letterhead of the 1st Respondent.

10. The notification advised the 1st Claimant that her last day of work would be 31 March 2015, and that her terminal dues would be paid by the 2nd Respondent.

11. The Court, therefore, finds that the 1st and 2nd Respondents were employers of and would be liable for any contractual and legal entitlements due to the 1st Claimant.

2nd to 7th Claimants employers

12. Lorna Tsisiga (2nd Claimant) was offered employment as a Receptionist by the 2nd Respondent through a letter dated 25 April 2012.

13. Tivender Kaur Juttla (3rd Claimant) entered into an employment agreement with the 3rd Respondent on 25 April 2005 to serve as Chief Accountant.

14. Johannes Oluoch (4th Claimant) was confirmed into employment as a Cleaner by the 2nd Respondent through a letter dated 1 August 2005, while Joan Wangui Kariuki (5th Claimant) was confirmed as a Students Record Officer by the 2nd Respondent on 19 January 2010.

15. Harrison Ndwiga Muriithi (6th Claimant) was on his part offered employment as Admissions Records Officer by the 2nd Respondent through a letter dated 15 September 2000.

16. Daniel Muema Mutangili (7th Claimant) was offered employment by the 2nd Respondent as a Cleaner through a letter dated 1 March 2006.

17. Despite having contracts as stated above, it is the 1st Respondent which notified the Claimants through letters dated 3 February 2015 of their final dues. The notification letters informed the Claimants that the terminal dues would be received from the 2nd Respondent.

18. An employer is defined in section 2 of the Employment Act, 2007 as any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

19. In paragraph 3 of the 1st and 2nd Respondents *Amended Statement of Response* filed in Court on 10 May 2018, it was admitted that the 3rd Respondent, a *juristic person* fully owned, controlled and run the 2nd Respondent, a college. It was also contended that the 2nd Respondent was not a *juristic person*.

20. It is not clear to the Court, and no explanation was offered by the Respondents why the 1st Respondent was informing the Claimants that their dues would be settled by a non-existent entity.

21. The 1st Respondent did also not offer any explanation why it was writing the letters notifying the Claimants of their dues, if its relationship with the 3rd Respondent was only that of a shareholder.

22. The 1st Respondent although claiming that it had no legal obligations on behalf of the 3rd Respondent conducted itself beyond what would ordinarily be expected of a shareholder, noting that it did not even purport it was a director of the 3rd Respondent.

23. In the view of the Court, the conduct of the 1st Respondent brought it within the realm of an employer within the contemplation of section 2 of the Employment Act, 2007.

24. The Court so finds that the 1st Respondent was a *putative* employer as envisaged under the Act.

25. The 1st Respondent notified the 3rd Claimant that her dues would be paid by the 2nd Respondent. There was no explanation from the 1st Respondent under what authority it was writing the letter, and therefore in the view of the Court, it also qualified as an employer of the 3rd Claimant for purposes of the Employment Act, 2007.

26. In so far as the 1st Respondent conducted itself outside the normal scope of a shareholder without tendering any explanation, and considering that the 3rd Respondent issued contracts to the Claimants using the letterheads, and under the name of the 2nd Respondent (save for 3rd Claimant), the Court finds that they were employers of these Claimants.

Unfair termination of employment

27. Issues 3, 4, 5 and 6 as identified by the Respondents and Issues 1 and 2 as proposed by the Claimants addressed the question of fairness of the separation between the parties.
28. The Claimants cause(s) of action as advanced in paragraphs 5, 6, 7, 8, 9 and 10 and 16 was *wrongful termination of employment on account of redundancy*.
29. The Respondents did not expressly deny that the separation with the Claimants was on account of redundancy.
30. The Court will therefore assume and find that the separation was as a result of operational requirements.
31. Pursuant to section 40(1) of the Employment Act, 2007, the Respondents were under an obligation to comply with certain conditions before and during the redundancy process.
32. There was no evidence that the Respondents notified the Labour Office 1 month in advance of the intended redundancies. The 3rd Respondent admitted as much in paragraph 11 of its submissions but urged the Court to disregard the omission.
33. There was also no proof that the Claimants were notified 1 month in advance (or their Union, if at all) of the redundancies.
34. Further, there was no evidence or disclosure as to the criteria used to select the Claimants positions for redundancies.
35. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR, the Court of Appeal held that the notice to the employee and Labour Officer in situations of redundancy was mandatory, and the Court, therefore, finds no merit in the submission to disregard the failure to formally notify the Labour Officer and the Claimants.
36. The Court, therefore, has no hesitation in concluding that the termination of the Claimants contracts on account of redundancies did not meet the statutory test.
37. There was not only wrongful dismissal but unfair termination of employment.

Breach of contract

38. The parties did not identify breach of contract as an Issue for the Court's determination, but it is an Issue which clearly arose from the pleadings because the Claimants contended that there was discrimination on payment of house allowance (alleged some employees were paid house allowance while others were not paid).
39. An employer's first obligation under section 31(1) of the Employment Act, 2007 is to provide housing accommodation for its employees and where unable to provide the accommodation, to pay an allowance to cover rent.
40. Where the employer does not provide housing or pay an allowance to cover housing, the contract should be explicit on whether the salary is consolidated or not.
41. The 2nd, 4th, 5th, 6th, and 7th Claimants contracts indicated that they would be earning a gross salary (ies).
42. The Court is, therefore, unable to find a breach of contract/statute or discrimination in respect of house allowance.
43. No records or evidence was led as to whether the 1st Claimant's remuneration included house allowance (basic or gross), and the Court is unable to determine whether there was a breach.
44. The 3rd Claimant's contract provided for a basic salary and was silent on housing. There was no evidence that she was provided with housing.
45. The Respondents were therefore in breach of statute but because this head of claim was not specifically proved as is required of special damages, relief will be declined (there was a reference to the housing allowance at the rate of 30% in the pleadings without evidence to back the same up).

Whether 1st Respondent's Policy and Procedures for redundancy - Australia applied to the Claimants

46. The 1st Respondent was a shareholder in the 3rd Respondent. The 1st Respondent was domiciled in Australia.
47. The Claimants contended that the 1st Respondent's Policy on redundancy applied to them. Only an extract of the Policy was produced in Court.
48. Clause 1.1 of the policy provided that it applied to the 1st Respondent's *Australian business units or colleges* and not to *individual*

business unit(s) owned or partially owned by the 1st Respondent.

49. Without any direct evidence that the policy was incorporated into the terms and conditions of service of the Claimants, the Court can only conclude that the Claimants cannot successfully assert any terminal dues under the Policy.

Appropriate remedies

Failure to pay terminal dues

50. The Claimants sought the terminal dues which had been promised in the letters dated 3 February 2015.

51. The Respondents did not provide any evidence that the dues had been paid, and the Court will allow the same.

Compensation

52. All the Claimants sought the equivalent of 12 months wages as compensation (they referred to it as damages).

53. The Claimants served for different lengths of time, and it is the view of the Court that the length of service should be a relevant and material factor in assessing compensation which the Court assesses as equivalent to 6 months gross wages for each Claimant (Court will use salaries as indicated in copies payslips filed on 27 April 2018).

Costs

54. A demand before action was sent to the 1st Respondent's Mr. John Wood. The Claimants advocate was also in communication with and exchanged correspondences with him severally.

55. Unlike under the Civil Procedure Act/Rules, costs do not follow the event in disputes before this Court. The statute merely enjoins the Court to make a costs order which is fair.

56. The Respondents herein were the authors of the rigmarole of the true employer of the Claimants. They generously made references to liability for the Claimants entitlements without a bother.

57. It is the view of the Court that they should bear the Claimants costs.

Conclusion and Orders

58. The Court finds and declares

(a) 1st, 2nd and 3rd Respondents were legally employers of the Claimants.

(b) The termination of the Claimants contracts on account of redundancy was unfair.

59. The Claimants are awarded

(a) The equivalent of 6 months gross wages as compensation as follows:

Susan Mumbua Kshs 102,000/-

Lorna Tsisiga Kshs 144,000/- Tivender Kaur Juttla Kshs 3,801,066/-

Johannes Oluoch Kshs 96,000/-

Joan Wangui Kariuki Kshs 415,800/-

Harrison N Muriithi Kshs 1,934,292/-

Daniel M. Mutangili Kshs 129,000/-

(b) Terminal benefits (outstanding) in terms of letters dated 3 February 2015.

60. Claimants to have costs.

Delivered, dated and signed in Nairobi on this 19th day of July 2019.

Radido Stephen

Judge

Appearances

For Claimants	Mr. Kirimi instructed by Kinyanjui Kirimi & Co. Advocates
For 1 st and 2 nd Respondents	Mr. Ayisi instructed by LJA Associates Advocates
3 rd Respondent	Mr. Ochwo instructed by Ochwo & Co. Advocates
Court Assistant	Lindsey