



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 68 OF 2014

- 1. FELISTER NANDITO EMIRI (FOR ESTATE OF CECILIA EMIRI – DECEASED)**
- 2. ISABELLA NKATHA**
- 3. MONICA KARIMI GICHURU**
- 4. SABINA KARIKIO**
- 5. NEWTON MURIUNGI KINYUA (FOR FLORENCE GACHERI – DECEASED)**
- 6. CHARITY MATHENGE**
- 7. MOSES KITHINJI**
- 8. JOSEPH MIANO**
- 9. SAMUEL K. MUTAI**
- 10. CHRIS KAMAU**
- 11. JOSEPH HUMBIRA**
- 12. BETTY CHEPKORIR**
- 13. JANE WANDIA**
- 14. RACHAEL NYAWIRA**
- 15. JOYCE GATAGIA**
- 16. TERESIA WAMBUI NDUNG’U**
- 17. PAUL WAIGANJO**
- 18. MWAHUNGA KALAMA**
- 19. MICHAEL MWANGI GIKARIA**
- 20. PATRICK TIUGU ERONDO**
- 21. LUMURISA NEGAMON**
- 22. STEPHEN MAINA MUGO**

23. ANOMA NGULUMO

24. JOHN NJOROGE.....CLAIMANTS

VERSUS

OL JOGI LIMITED.....RESPONDENT

JUDGMENT

1. The 24 Claimants who all assert employment with the Respondent sued it for unfair and unlawful termination from employment. The Claimants averred that they were wrongfully terminated by the Respondent on or about 7th July 2003 without any good grounds or basis causing them to believe that the termination was unfounded and malicious. The Claimants averred that the Respondent failed to pay them their rightful terminal dues entitlement and benefits as required before termination. The Claimants further averred that at the time of termination of their services, the Respondent owed them arrears in dues being the 3 months pay in lieu of notice, unwarranted deductions against the Claimants' rightful pay and seized cookers belonging to the Claimants which they alleged were seized from residential quarters each of which is valued at Kshs. 40,000/- only. The 24 Claimants particularized their claim against the Respondent specifically as follows:-

1. Cecil Emiri Kshs. 166,353.74,
2. Isabella Nkatha Kshs 53,610.28,
3. Monicah Karimi Gichuru Kshs. 6,028.44,
4. Sabina Karikio Kshs. 40,976.39,
5. Florence Gacheri Kshs. 45,542.10,
6. Charity Mathenge Kshs. 81,259.73,
7. Moses Kithinji Kshs. 65,946.99,
8. Joseph Miano Kshs. 160,717.50,
9. Samuel K. Mutai Kshs. 130,142.31,
10. Chris Kamau Kshs. 202,031.38,
11. Joseph Humbira Kshs. 193,438.96,
12. Betty Chepkorir Kshs. 35,876.49,
13. Jane Wandia Kshs. 97,785.68,
14. Racheal Nyawira Kshs. 50,184.89,
15. Joyce Gitagia Kshs. 51,897.98,
16. Teresia Wambui Ndung'u Kshs. 36,221.51,
17. Paul Waiganjo Kshs. 102,418.83,
18. Mwachunga Kalama Kshs. 149,669.43,
19. Michael Mwangi Gikaria Kshs. 180,792.32,
20. Patrick Tiugu Erono Kshs. 11,633.77,
21. Lomurisa Negamon Kshs. 69,510.65,
22. Stephen Maina Mugo Kshs. 71,492.35,
23. Anoma Ngulomo Kshs. 121,847.88,
24. John Njoroge Kshs. 640,000/-.

The total sum sought in these claims was amounting to Kshs. 2,003,531.72. Additionally, all the Claimants except for Monica Karimi Gichuru, Sabina Karikio, Betty Chepkorir, Patrick Tiugu Erondo, Lomuria Negamon and Anoma Ngulomo had a special claim for cookers valued at Kshs. 40,000/- each that were allegedly seized by the Respondent without basis which are now in irreparable state and for which they claimed damages. The Claimants additionally claimed for unpaid salary for the four days worked each month and not paid, increment arrears plus special days when permission sought and granted or when sick and not paid for. The Claimants also prayed for general damages for breach of contract plus costs of the suit and interest.

2. The Respondent filed a response to the claim in which it contended that the claim is bad in law, incurably defective and that it ought to be struck off. The Respondent averred that it lawfully terminated the services of the Claimants and that all the terminal dues the Claimants were entitled to were paid in full. The Respondent averred that it is not aware of the alleged unwarranted deductions against the Claimants' rightful pay and denied that it seized cookers belonging to the Plaintiff's each stated to be valued at Kshs. 40,000/- and prayed that the suits be dismissed with costs.

3. The Claimants filed supporting affidavits in support of their claim and on its part, the Respondent filed a response confirming that the Claimants were its former employees save that Jane Wandia the 13th Claimant was erroneously included as she was still in employment with the Respondent at the date of filing suit. The Respondent averred that the Claimants were permanent and pensionable employees and through a letter dated 7th June 2003 which was to serve as notice until 30th June 2003, the Claimants were duly informed of the Respondent's intention to restructure and declare them redundant. The Respondent wrote to the Minister of Labour and Human Resources Development, through the District Labour Officer in Nanyuki informing them of its intention to declare the Claimants redundant on account of reduced funding from abroad and volatile economic conditions prevailing in the market. The Claimants sought reprieve through their former advocates on record who wrote a letter dated 13th June 2003 asserting that their services were unfairly and illegally being terminated. The Respondent averred that the District Labour Officer replied to the Claimants' advocate vide letter dated 8th June 2003 in which it was stated that the declaration of the redundancy of the Claimants was in accordance with the law and that the Respondent had discharged its legal obligations towards them. The Respondent asserted that the Claimants were paid one month's salary in lieu of notice, leave pay and service pay after being declared redundant on 7th June 2003 and that the Claimants signed in acknowledgement confirming receipt of cheques drawn in their favour in payment of their final dues. The Respondent averred that it followed the laid down procedure as envisaged in Section 40(1) of the Employment Act, 2007. The Respondent averred that the Claimants could not have afforded electric cookers and that the Claimants only had electric heaters in their houses as shown by their payslips. It denied that the electric heaters could cost Kshs. 40,000/- in 2003 and contended that the receipts attached were not genuine. It averred that the Claimants wanted to unjustly enrich themselves as a receipt produced by the 20th Claimant indicated the cost of an electric heater as Kshs. 1,995 as at 26th August 2002. The Respondent averred that the purported cookers were made by Jua Kali artisans in Nanyuki, and that none of the Claimants produced or attached a branded receipt from either a credible shop or a supermarket. The Respondent averred that the Claimants were paid all their dues and prior to payment they had visited the Labour Officer who narrowed their issues to include 4 days worked in the month, unpaid dues, issue of personal cookers and service pay. The Respondent averred that the Claimants hurriedly proceeded to court and deliberately ignored the conciliation proceedings and advice of the Labour officer. The Respondent averred that the present proceedings are an abuse of the court process and further asserted that out of the 24 Claimants who filed this suit, only 15 had signed verifying affidavits and filed their supporting affidavits as directed by the court. The Respondent thus contended the rest should have their names expunged from these proceedings and record. The Respondent averred that the Claimants claim is unfounded and should be dismissed as it was an abuse of the court process.

4. The 11th Claimant Joseph Humbira Muburia testified on behalf of 16 remaining Claimants stated that around April 2003, the Claimants joined KUDHEIHA which resulted in the Managing Director of the Respondent being unhappy. He testified that they were dismissed shortly thereafter and that there was no redundancy declared as the Respondent still operates and continues to employ others. He stated that at the time of the dismissal 24 other employees from his department were also stopped from working. He testified that their names were called out and they were informed that they have been dismissed. He confirmed that the Claimants received some payments after going to the Labour office but other Claimants were not paid as the Respondent rejected the claims. He stated that the Respondent used to pay salary for 26 days and deduct 4 days even after them working for those days. He added that the Respondent accused them of misusing generators and confiscated their electric cookers which were not returned even after their dismissal. In cross-examination the 11th Claimant confirmed that union dues were not deducted and that he did not have a member number or anything to show union membership. He testified that there was nothing to show that the dismissal was on account of joining a union. The 11th Claimant stated that he was not aware that he was declared redundant, he also confirmed that the employer could indicate 'absent' in the payslip even after the employee had sought for permission to go on off and the employer would deduct their salary even when they had sought for permission. He testified that the Respondent wanted to re-engage him and when questioned further confirmed that he did not have a letter of re-engagement from the Respondent but however maintained that there was no redundancy.

5. The Respondent's first witness was Catherine Njoki Nyoike, the finance manager and she testified that the Respondent's general manager wrote a letter to the Ministry of Labour and Human Resources copied to the Labour Officer and the Agricultural Employer Association and informed them of the redundancy. She stated that the reason for redundancy was reduced funding that led to reduction in the Respondent's operations. She stated that the redundancy affected 2 senior managers, 5 junior managers and 53 other employees. She testified that the employees were not members of a union that is why they were addressed directly on the issue of notice pay, leave pay and severance pay and the letter was copied to the District Labour Officer. She stated that employees were paid as per the letters issued to them and no one complained. She testified that the Claimants' electrical cookers were not confiscated by the Respondent and asserted that the Claimants used electrical coils for cooking and the Respondent had requested them to stop using them but they were not confiscated. She stated that the Respondent complied with the law on redundancy and prayed the court dismisses the suit. In cross examination, she confirmed that the Claimants were terminated on 7th June 2003 and the letter to the Ministry of Labour was dated 9th June 2003 after the termination. She also confirmed that the termination took effect immediately and that is why the Claimants were given notice pay. She further testified that she was not aware of the illegal deductions as the payslips showed deductions for absenteeism and no evidence of 'absent with permission' was availed. In re-examination, she stated that redundancy did not preclude future hiring if there was a vacancy. She stated that only one employee named Jane Wandia was rehired. She testified that all employees stayed in employment till 30th June 2003 after receiving the termination letter on 7th June 2003 as there was a redundancy exercise that was going on. She stated that all the employees were paid all their dues and denied having made illegal deductions. She maintained that deductions were made if an employee was absent without reason and with no permission.

6. The second witness for the Respondent was Moses Kirera a Labour officer based in Laikipia County and he testified that due procedure was followed in declaring the Claimants redundant in accordance with Section 40 of the Employment Act. He stated that under Section 40 the law provides that when an employer intends to declare employees redundant he should notify the union and in case there is no union membership it should inform the employees in writing. He stated that the employer must pay all earned leave and also give no less than one month notice or pay the one month salary in lieu of notice, severance pay for 15 days for each completed year of service. He testified that due procedure should be followed and secondly, last one in first one out should be followed. He stated that the Labour Office was informed of the matter and the reasons for redundancy. He testified that the criteria of redundancy was given and dues paid in full. He stated that the tabulation in the letters that were sent to the Claimants was done in accordance to the law. He confirmed that the letter to the Ministry of Labour dated 9th June 2003 was sent through the Provincial Labour Officer and was copied to the Agricultural Employers Association as at the time Laikipia was under Rift Valley Province. He stated that the Labour Office was aware of the redundancy being undertaken. He maintained that the redundancy was in conformity with the law and that all the provisions of Section 40 were adhered to. In cross-examination he stated that he was conversant with the law on redundancy. He stated that the letters on redundancy were dated 7th June 2003 and that the termination took effect the same day. He was referred to the letter of redundancy and read it out loud and confirmed that the reason for termination is not stated in the letter. He testified that the employees were entitled to severance pay. He stated that the letter to the Ministry of Labour appeared to have been issued 2 days after termination of the employees. He agreed that it was a report of what had happened and not an expression of an intent. He testified that the letter should come in good time to enable the Ministry to take action and that the letter gave information but action had already been taken. In re-examination he testified that there was a letter on service pay and that the employees were to stay in the company houses as a gesture of goodwill until 30th June 2003 when they had to vacate. He stated that the employees did not leave immediately but at the end of the month. He confirmed that the DLO was copied in and notified on 7th June 2003. He stated that the notification to the Minister of Labour, Provincial Labour Officer Nakuru and the Agricultural Employers Association was after notification to DLO. He testified that it was true they were notified before the report was made. He stated that the Respondent complied with Section 40 and that the letters were on 7th June 2003 while notification to Ministry was on 9th June 2003. That marked the end of oral testimony and parties were to file written submissions.

7. The Claimant's submissions were to the effect that the Claimants came to know of the termination vide a letter dated 7th June 2003 that was also copied to the District Labour Officer. It was submitted that they had no prior notification that they were undergoing a redundancy and that the only mention of redundancy was in the letter dated 9th June 2003 that was sent to the Ministry of Labour two days after termination had taken place. It was submitted that the Respondent violated Section 40(1)(b) of the Employment Act on notice as the letter to the Minister was simply a point of information and not a notice of intention to cause a redundancy. The Claimants submitted that none of them received severance pay which showed a breach of Section 40(1)(g) of the Employment Act by the Respondent. They urged the court to find that the termination of their employment unfair as the Respondent failed to comply with the provisions of Section 40 of the Employment Act. They relied on the authority of **Kenya Airways Limited v Aviation and Allied Workers Union & 2 Others [2014] eKLR** where the court found that the termination was unfair as Section 40 of the Employment Act was not complied with and ordered compensation of 6 months' salary plus other terminal dues. The Claimants submitted that they were not paid severance pay as shown by the payslips that were produced in court by the Respondent and urged the court to order it to pay each Claimant severance pay in accordance with the law. The Claimants further submitted that the Respondent admitted to having deducted the Claimants' salary for absenteeism. The Claimant submitted that however, there was no evidence of absenteeism or any disciplinary action taken by the Respondent against the Claimants and that the deduction of their money was therefore without basis and illegal. The Claimants urged the court to order that the Respondent pays the Claimants all monies deducted and for payment of KShs. 40,000/- to each Claimant for the confiscated cookers. It was submitted that the Claimants had proved their case on a balance of probabilities and urged the court to find that their employment was unfairly terminated and that they ought to be awarded 12 months' salary as compensation for unfair termination, payment of their terminal dues, severance pay, costs and interest of the suit.

8. The Respondent's submissions were to the effect that the claim is in respect to 16 Claimants after 8 of the Claimants were expunged from the record. The Respondent submitted that the 8 now excluded from the suit were Jane Wandia 13th Claimant, Chris Kamau 10th Claimant, Betty Chepkorir 12th Claimant, Sabina Karikio 4th Claimant, Mwashunga Kalama 18th Claimant, Teresia Wambugu Ndung'u 16th Claimant, John Njoroge 24th Claimant and Limurisa Negamon 21st Claimant. The Respondent submitted that the Claimants were lawfully declared redundant and correct procedure followed. The Respondent submitted that all their terminal dues were paid as shown in the acknowledgement signed by all the Claimants. The Respondent submitted that there is no evidence that the claimants disputed the contents of the acknowledgement and any claim to the contrary is an afterthought meant for unjust enrichment by the Claimants. The Respondent submitted that on the said acknowledgements, the Claimants had admitted that they had personal coils and not cookers as purported in the claim and witness statements and the purported special damages for cookers are not proved and should be rejected. The Respondent submitted that the Claimants did not provide any evidence of confiscation and/or the name of the person who confiscated the items. The Respondent submitted that they removed their coils and went away with them. The Respondent submitted that one heater was going for KShs. 1,995/- and not KShs. 40,000/- as alleged and that the Claimants' claim for cookers is exaggerated, baseless and in bad faith to portray the Respondent in bad light. The Respondent submitted in addition, the Claimants failed to provide valid receipts to prove this claim and the same should be rejected. The Respondent submitted that according to the payslips and vouchers produced in court, the Claimants were paid their final dues and that the payslips and vouchers were not received by the Claimant under protest or rejected which shows that they were duly paid their entitlements. The Respondent submitted further that the Claimants were aware of the redundancy and that is why they did not challenge the same in their amended plaint. The Respondent submitted that the Claimants had sought for general damages for breach of contract and not a declaration that their redundancy was unfair, unlawful, illegal and unprocedural. The Respondent submitted that since each party is bound by its pleadings, the Claimant should not run away from what they sought from the court as the court cannot award what was not pleaded. The Respondent submitted that the Claimants also failed to give the particulars of breach of contract and to strictly prove the same as required by law, hence their claim must fail on that ground as well. On the issue of illegal deductions, the Respondent submitted that the issue of absenteeism was dealt with as per the internal procedures for the affected employees who did not turn up to work on particular days and failed to seek or show proof of permission to be away. The Respondent submitted that the Claimants had failed to prove that the Respondent's position in this matter was not true. The Respondent submitted that since the Claimants failed to prove their case to the required standards as provided for under Section 107 of the Evidence Act and also failed to challenge the redundancy that was done in accordance with Section 40 of the Employment Act, the court should dismiss the claim with costs to the Respondent.

9. The claim is in respect of Claimants No. 1, 2, 3, 5, 6, 7, 8, 9, 11, 13, 14, 15, 17, 19, 20, 22 and 23. The 17 Claimants dispute their termination as pleaded in their amended plaint filed on 25th January 2018. In their pleadings they did not challenge the redundancy expressly

in their pleadings though it is common ground that they were aggrieved by the abrupt loss of employment. The Respondent and the Labour Officer who testified on its behalf assert that Section 40 of the Employment Act was complied with. That is far from the truth. In declaring a redundancy, the employer is required to follow the provisions of Section 40(1) which is reproduced herebelow for the benefit of the Respondent and the Labour Officer. Section 40(1) of the Employment Act provides:-

40. (1) 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 of 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 the 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 fifteen days pay for each completed year of service.

10. The Respondent ought to have complied fully with this provision. The notice was too short being less than the statutory one month, the labour officer was informed after the fact and the employees were not paid their leave dues in cash. Be that as it may, the parties who commenced this suit at the High Court at Meru did not articulate the claim as presented in evidence before me. Unfortunately, however strong their evidence, it did not accord with their pleadings. In the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR** the Court of Appeal held as follows:-

The appellants contention is that the learned Judge overstepped her mandate in crafting a new issue not brought by the parties and basing it to nullify the 1st respondent's election thereby essentially assisting the petitioner in an impermissible manner. The 1st respondent in submissions filed in this Court supported this argument by the appellant and cited to us two decisions of the Nigerian Supreme Court. In the first, ADETOUN OLADEJI (NIG) LTD vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

To the above submissions by the appellant and the 1st respondent through its learned counsel Mr. Kiugu, which are by no means insubstantial, we have been unable to find any answer by the 2nd to 4th respondents both in their written submissions and in the address before us by Mr. Laichena, their learned counsel.

As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score. (Underline mine)

11. I would be falling in error if I held that the Claimants are entitled to recover for the unlawful redundancy. In regard to the termination, each was given notice and allowed to stay on the Respondent's premises until 30th June 2003. The notice however fell short of the contractual notice which is 30 days and they would therefore be entitled to recover for the 30 days notice unpaid. The Respondent agreed that the notice took effect immediately. Each Claimant sought special damages such as the sums due on the cookers alleged to have been confiscated by the Respondent. No proof was availed as to who, when and how these cookers were confiscated. From the evidence tendered, it was clear there were no cookers worth Kshs. 40,000/- taken from any of the Claimants before the court. The court takes judicial notice that the cookers displayed in evidence were merely heating coils fabricated into an electric stove of sorts incapable of qualifying as a cooker. The Claimants claim for severance pay were not proved as each Claimant produced payslips showing service pay was made. In the final analysis

the 17 Claimants will only recover their unpaid notice pay as well as the costs of the suit to scale. These are my orders.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of September 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar