



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NUMBER 950 OF 2016**

**[Consolidated with Cause Number 88 of 2017 and Cause Number 754 of 2017]**

**BETWEEN**

- 1. IBRAHIM TWAHIR MWANGAZI**
- 2. SAID CHOMBO DZIWE**
- 3. PATRICIA NJOKI WANGO**
- 4. FATUMA HAMISI JABU**
- 5. HAMAD MASUDI MWARASI**
- 6. OMAR KASSIM SHEE**
- 7. NDUNYU MWATELA KAMWANZA**
- 8. SEFU KASSIM MWANGADZA**
- 9. MASUDI MWANGOMBE**
- 10. MASSUDI SALIM RIMO**
- 11. MASUDI KASSIM BAKARI**
- 12. SULEIMAN BAKARI ABDALLA**
- 13. MOHAMMED OMAR MWANYEGE**
- 14. DAWA SALIM MWADZIWI**
- 15. SHUKURANI NGALA**
- 16. BAKARI ALI BAKARI**
- 17. NGALA NYONGO GOMWE**
- 18. DOTE SALIM SHEHE [CAUSE 88/2017]**
- 19. EUNICE LEWA KITI ‘**
- 20. ALI MWANTAKA GOBO ‘**

21. MOHAMED ALI MOHAMED “

22. NYOTA JILLO YONAH [CAUSE 754/2017].....CLAIMANTS

VERSUS

KENYA BIXA LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimants [Cause 950/2016]

Nyakoni Ratemo & Company Advocates for the Claimants [Cause 88 of 2017 and Cause 754 of 2017]

Federation of Kenya Employers [F.K.E] for the Respondent

---

**JUDGMENT**

1. Three separate Claims were filed by former Employees of the Respondent. They were consolidated and heard under Cause Number 950 of 2016.

2. A majority of the Claimants were employed as Poultry Attendants. The Respondent was involved in chicken and bixa farming. It was explained to the Court by the Respondent, that bixa farming involves extraction of plant colours, used in food and cosmetic industries.

3. Two of the Claimants, were not Poultry Attendants. Dote Salim Shehe [18] was a Machine Operator. Nyota Jillo Yonah [22] worked as a Security Guard. The rest were Poultry Attendants. They were all employed on diverse dates, and received varying rates of monthly pay.

4. The Claimants, except Claimant [22], aver, their contracts were terminated by the Respondent on 31<sup>st</sup> July 2016 on account of redundancy. Claimant [22] gives the date his contract was terminated, as 31<sup>st</sup> August 2016. He too, left on redundancy. The Claimants seek Judgment against the Respondent for:-

- a. Notice pay.
- b. Gratuity.
- c. Severance.
- d. Salary for the balance of the contract period.
- e. Compensation for unfair termination.
- f. Leave pay.
- g. Arrears of salary [Jillo Yonah] from the date of termination to the date of filing the Claim.
- h. Declaration that termination was unfair.
- i. Costs.
- j. Interest.
- k. Any other suitable relief.

In total, the Claims under the heads above are computed at **Kshs. 8,228,436.**

5. The Respondent filed Statements of Response in all the files. The common position of the Respondent is that following loss of business in its poultry section, spanning over several years, the Respondent's Board of Directors resolved to close down the poultry section altogether. The Claimants' positions became redundant. Redundancy law under Section 40 of the Employment Act 2007 was followed to the letter. There was consultation and agreement between the Respondent and Claimants' Trade Union, Kenya Union of Commercial Food and Allied Workers, on redundancy process. The Claimants received requisite notices, and were advised on payable terminal benefits which included: salary up to end of July/August 2016; 1 month salary in lieu of notice; accrued leave where applicable; and gratuity/severance pay, all less

any obligations owed to the Respondent. The Claimants were paid terminal dues. They received Certificates of Service. They worked on fixed term contracts and were paid gratuity in accordance with, and upon expiry of, these contracts. They were in the end paid gratuity of 37 days' salary for every complete year of service. The Respondent prays the Court to dismiss the Claims.

6. Masudi Kassim Bakari [11], and Nyota Jillo Yonah [22] gave evidence for the Claimants, and rested Claimants' case, on 6<sup>th</sup> March 2019. Human Resource Manager, Christopher Kipyegon Kiptis, gave evidence for the Respondent on 6<sup>th</sup> March 2019, and on 1<sup>st</sup> July 2019 when the hearing closed.

7. Speaking for all the Claimants, Bakari told the Court, the Claimants were involved in poultry attendance. Some left on 31<sup>st</sup> July 2016, others on 31<sup>st</sup> August 2016. The Respondent cultivated bixa, which is used in making of beauty products. The Respondent also reared chickens. The Claimants were not given reason for termination. They were issued redundancy letters. It was stated that poultry business had gone down. This was not true. Some Employees remained in employment. Bakari was paid terminal dues at Kshs. 41,046. He was paid through Kenya Commercial Bank. His salary bank was Equity. He had a loan with KCB. All Employees were directed to KCB. They ended up receiving less than they merited.

8 The Employees were not given the selection criteria. They asked to be absorbed in bixa section. They were not absorbed. Gratuity was paid to Bakari under contract. He was not satisfied with what was paid. The Claimants were members of KUCFAW. They were not aware if the Union was notified about redundancy. Employees were not aware about a meeting and agreement involving their Employer and Union. Bakari was senior and had worked for 6 years. KCB Loan was guaranteed by the Respondent. The Claimants were not advised about the implication of being paid terminal dues through KCB.

9. Cross-examined, Bakari told the Court his loan amount was Kshs. 90,000. He did not have documents detailing the loan transaction. His colleagues also had loans. There were no documents to show this. He did not know the reason for termination. He was a member of KUCFAW. He was not aware that notice issued to KUCFAW. He received a letter itemizing payable benefits. He was paid gratuity. He expected it would be based on the whole period worked. He was not aware that the CBA provided for gratuity at the rate of 30 days' salary for every complete year of service. He was not aware that the Respondent adopted a more favourable rate of 37 days' salary. Bakari did not request to move to bixa. There were other Employees at bixa. The Claimants did not know how the number of Employees to leave on redundancy was arrived at. They were not privy to discussions between their Union and Employer. Redirected, Bakari told the Court that there was a provision for internal transfer of Employees. He did not have to apply in writing to be moved to bixa. He was not paid gratuity based on rate of 37 days' salary. He expected gratuity based on the full 6 years worked.

10. Nyota Jillo Yonah worked as Security Guard from 1<sup>st</sup> July 2009. He guarded all sections. He left employment on 31<sup>st</sup> August 2016. Bakari and other Claimants were his colleagues. He was not aware of notice issued by the Respondent to the Union. He was not made aware about the selection criteria. Payments made upon the Claimants were unsatisfactory. He was paid Kshs. 74,661 through a cheque. He banked with Equity Bank.

11. On cross-examination Yonah told the Court he guarded the whole area. Redundancy notice referred to poultry section. He used to spray the poultry section in his role as a General Worker. The notice to the Union gave the effective date as 31<sup>st</sup> July 2016. Yonah left on 31<sup>st</sup> August 2016. He had notice of 2 months. Terminal dues paid to Yonah included gratuity and severance. He did not know why he prays for gratuity and severance in his Claim. Redirected, Yonah told the Court he did not work exclusively at the poultry section. He was not advised by the Union on the effective date of termination. He cleared with the Respondent in order to be paid terminal dues.

12. Christopher Kipyegon Kiptis confirmed, all the Claimants were employed by the Respondent. They worked under fixed term contracts. The Respondent had 2 units- bixa and poultry.

13. Poultry business experienced financial loss for 4 years. Management decided to close down the unit. Claimants were all members of KUCFAW. The Respondent issued notice of redundancy to KUCFAW on 24<sup>th</sup> June 2016, received on 27<sup>th</sup> June 2016. The Ministry of Labour was notified. Termination would take effect on 31<sup>st</sup> July 2016. A total of 97 Employees would be affected. They included support staff, including Security Guards.

14. The Respondent and the Union held a consultative meeting on 21<sup>st</sup> June 2016. The Branch Secretary and 2 Shop Stewards attended the meeting. The number was scaled down to 75 Employees. 60 of them would leave on 31<sup>st</sup> July 2016. The rest would leave afterwards.

15. Parties agreed to have redundancy benefits paid, in accordance with the prevailing CBA. Redundancy letters issued advising on the payments. The letters were received by the Claimants on diverse dates. Terminal dues were tabulated and paid as shown on the pay slips on record. Payment was effected in September 2016. The Claimants were required to clear. It took time for them to clear, considering their number.

16. Gratuity was paid at the end of every contractual period. This is shown in the payrolls for different years, exhibited by the Respondent. The Respondent did not pay gratuity for the last contract, but rather, paid severance. The CBA stipulated once severance was paid, gratuity was not payable.

17. The Claimants were affected by redundancy once- under the last contract. Severance was paid based on the contract which was running. There was consultation between the Respondent and the Union, even before the notices issued. No Employee sought transfer to bixa. The Respondent did not guarantee any loan to the Claimants. The Respondent expected the Union to communicate to its members.

18. Cross-examined, Kiptis told the Court that there was no vacancy at bixa section. No financial statements have been availed to the Court, to confirm the presence of economic reason, justifying redundancy. Redundancy was discussed with the Union. Redundancy letter is dated 29<sup>th</sup> July 2016. Termination was effective 31<sup>st</sup> July 2016- a period of 4 days. Page 16 of Respondent's documents shows the particular

Claimant received redundancy letter on 1<sup>st</sup> August 2016, after the effective date. The minutes of the meeting held between the Respondent and the Union, on 21<sup>st</sup> June 2016, were not availed to the Court. Employees left on 31<sup>st</sup> July 2016, and received their redundancy cheques, only in September 2016. They were paid after they cleared. Selection criteria, is not captured in the agreement reached between the Respondent and the Union.

19. Redirected, Kiptis told the Court, the entire poultry section closed. Claimants worked in this section. The Union was notified on 24<sup>th</sup> June 2016. Effective date was 31<sup>st</sup> July 2016. Every contract had a clause on payment of gratuity. Gratuity was paid at 20% of the monthly salary, later revised to 37 % of the monthly salary. The cheques were released after the Employees cleared. They had to return uniforms. They cleared on diverse dates. The Claimants did not protest redundancy process.

#### **The Court Finds:-**

20. The Claimants were employed by the Respondent Company on diverse dates. They worked mainly as Poultry Attendants. The Respondent operated poultry and bixa farming. 2 of the Claimants worked in the poultry section in different capacities. One was a Security Guard, the other a Machine Operator.

21. They were members of the Kenya Union of Commercial Food and Allied Workers [acronym KUCFAW]. KUCFAW had a Recognition Agreement with the Respondent. The Respondent and the Union had concluded a CBA, which was binding upon the Claimants.

22. On 24<sup>th</sup> June 2016, the Respondent wrote to the Union and the Labour Office, Kwale County, informing them that the Respondent intended to terminate the contracts of the Claimants, on account of its inability to sustain its poultry business. The effective date was given to be 31<sup>st</sup> July 2016.

23. Thereafter the Respondent and the Union held consultative meeting on 29<sup>th</sup> July 2016. It was disclosed in this meeting that the 2 had previously met on the same subject on 21<sup>st</sup> June 2016. At the meeting of 29<sup>th</sup> July 2016, it was decided that the number of affected Employees is reduced from 97 to 75. It was decided also, that the Claimants are paid redundancy packages commensurate with the redundancy clause in the CBA. The benefits included: July 2016 salary; notice pay; annual leave; and gratuity/ severance – less any obligation owed to the Respondent.

24. Consequently the Claimants were paid their dues as tabulated, in the month of September 2016. Delay in payment was explained by the Respondent. The CBA, clause 6 on redundancy, stipulated that: *payment of benefits shall only be made upon clearance*. It took the Claimants the period between termination and payment of redundancy packages to clear.

25. The Union did not complain about the redundancy procedure or justification, in any of the meetings with the Respondent. The benefits paid to the Claimants were not contested by the Union. There was consultation between the Respondent and the Union. Although actual termination notices may have issued late, some 4 days before the effective date, and another after the effective date, the Union was aware of termination date from 24<sup>th</sup> June 2016. The Respondent also paid notice to the Claimants and therefore made up, for the insufficiency of individual notices of termination. Certificates of Service issued.

26. Terminal benefits were tabulated and paid, in conformity with the CBA. If there was a shortcoming with the CBA, such as the Court would find there was on when redundancy benefits should be paid, it is for the Respondent and the Union to rectify the redundancy clause to fully reflect the requirements of Section 40 of the Employment Act, on payment of redundancy benefits. Termination takes effect when notice pay is received by the Employee. Termination on account of redundancy happens only after the Employer has complied with the conditions listed under Section 40(1) of the Employment Act 2007. It is absurd to issue notice of termination after the effective date, or pay notice and other redundancy benefits, long after termination. The Claimants were effectively Employees of the Respondent until they received their notice pay and other benefits in September 2016. They ought to have earned salaries until September 2016. The clearance requirement would seem to the Court, not consistent with Section 40 of the Employment Act.

27. Having observed this, the Court does not think there was fundamental departure from the law on redundancy. Gratuity was paid to the Claimants at the end of their periodic contracts. The CBA distinguished gratuity payable under clause 19, from redundancy benefits payable under clause 8. Severance was paid based on the last contracts, when it became apparent that the poultry business could not be sustained, and the Claimants could not serve out their remaining contractual periods. Gratuity had been paid at the end of every contract, except the last contract, when severance pay clause kicked in. The Claimants entrusted the entire process and their destiny, as they were bound in law to do, to their Union. They cannot ask the Court to offer to them more than was negotiated by their Union, and granted by the Respondent, based on a CBA executed by the Union and the Respondent. They were adequately represented at the consultative forum by their Union Branch Secretary, the Chief Shop Steward, and the Shop Steward. If they owed loans to KCB, which impacted on their overall redundancy packages, that is not an issue which calls for the intervention of the Court. KCB is not a party herein, and there is no loan dispute with KCB in this Claim.

28. The 2 Claimants who worked as Machine Operator and Security Guard were part of the support staff at the poultry section. There were other Employees discharging their roles at bixa. It was not possible to assist these particular Claimants by lateral transfer.

29. In the end the Court is satisfied, that redundancy was a negotiated process, carried out in accordance with the industrial relations machinery applicable to the Parties, and basically, in adherence to the tenets of redundancy law enshrined in Section 40 of the Employment Act. The Claimants were adequately represented throughout, by their Union. They received redundancy packages based on the CBA. Termination was based on a fair reason under Sections 40 and 45(2)(b)(ii) of the Employment Act. The Claimants' Union did not, at any one time, contest the presence of a genuine redundancy situation. **The Consolidated Claims are dismissed, with no order on the costs.**

**Dated and delivered at Mombasa this 31<sup>st</sup> day of October 2019.**

**James Rika**

**Judge**