



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE 312 OF 2015

IMMACULATE MBITHE MUTUNGA.....CLAIMANT

VERSUS

CHANDARIA INDUSTRIES LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE 808 OF 2015

JACKSON MUIINDI KIILU.....CLAIMANT

VERSUS

CHANDARIA INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

The Claimants, Immaculate Mbithe Mutunga, 1st Claimant (Cause 312/2015) and Jackson Muindi Kiilu, 2nd Claimant (Cause 808/2015), each filed their Claims dated 15th March 2015 and 11th May 2015 respectively for unfair and unlawful termination of their services against the Respondent, Chandaria Industries Limited.

The 1st Claimant avers that she was employed by the Respondent orally as a Wrapper in May 2005 and served it with diligence and loyalty until her services were unfairly terminated on 6th September 2013. That she was informed her department was producing surplus goods for the Respondent and thus her services were no longer required. She contends that the termination was on account of redundancy. She further contends that the Memorandum of Agreement between the Respondent and their union clearly provided for house allowance which she was never paid by the Respondent. That she demanded payment of her terminal dues but the Respondent refused to pay the same.

The 2nd Claimant avers that he was employed by the Respondent on or before 30th March 2005 as a Machine Operator at a monthly salary of Kshs.17,304/= but was not given an appointment letter as required by law. That he served the Respondent with loyalty and diligence for 8 years until 6th September 2013 when his services were wrongfully and unlawfully terminated. That the Respondent has failed to pay his dues.

The Claimants aver that their terminal dues are as follows:

Immaculate Mbithe Mutunga – 1st Claimant

- a) Two months' salary in lieu of notice..... Kshs.22,608.00
- b) Severance pay (11,304/30 x 15 x 8.4)..... Kshs.47,476.80
- c) Annual leave (11,304/30 x 21 x 8.4)..... Kshs.66,467.52
- d) Housing Allowance

(11,304 x 15/100 x 10 x 8.4)..... Kshs.142,430.40

Total **Kshs.278,982.72**

Jackson Muindi Kiilu – 2nd Claimant

a) One month's salary in lieu of notice.....Kshs.17,304.00

b) Severance pay (17,304/30 x 15 x 8.5 years).....Kshs.73,542.00

c) Annual leave (17,304/30 x 21 x 8.5)..... Kshs.102,958.80

d) House Allowance at 15% on the basic

(17,304 x 15% x 12 x 8.5 years)..... Kshs.264,751.20

Total **Kshs. 458,556.00**

The 1st Claimant prays that the Court do award her: a declaration that the said termination was unfair; an order directing the Respondent to pay the sum of Kshs.278,982.72 as particularised above and the costs of this suit with interest thereon at court rates. The 2nd Claimant on the other hand prays for the Court to award him the sum of Kshs.458,556.00 as particularised above; costs of this suit; interest and any other relief as the Court may deem just.

The Respondent filed Amended Statements of Response for each claim; For the 1st Claimant being undated and for the 2nd Claimant dated 1st February 2017. It admits that both Claimants were its employees but denies that it unlawfully and/or unfairly terminated their services stating that they were both paid their dues upon termination as per the contracts of employment. It avers that the 1st claimant was paid her full terminal dues of Kshs.65,00 and signed a discharge.

The respondent avers that the 2nd Claimant was paid a total of Kshs.64,962.30 made up of severance of Kshs.49,649, accrued leave and one week's pay in lieu of notice of Kshs.15,313/=. That the 2nd claimant was also paid for days worked in September 2013. That the 2nd Claimant duly executed a Final Dues Form confirming receipt of the said amount and affirming that he had no further claims whatsoever as far as his employment with the Respondent was concerned. That his signature was witnessed by the shop steward of the Kenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers Union. That all its actions were done in consultation and agreement with the Union and that the 2nd Claimant is not entitled to any of the prayers sought. It prays for both Claims to be dismissed with costs.

The Claimants both filed their replies to the amended statement of response dated 10th May 2017 with the 2nd Claimant stating that he signed the final dues form through coercion by the Respondent, as a condition before payment and that the Respondent cannot circumvent its obligation by waving a Form of discharge signed by him. The Claimants pray that the Respondent's Statements of Response be struck out with costs and judgment entered in their favour as prayed.

The Respondent also filed a Witness Statement dated 6th January 2018 by its Personnel Manager, Joash Mbulika who states that when the company had an issue with Kenya Bureau of Standards on their cotton production department where the Claimants worked, it had to do an overhaul of the whole machinery which would take time. That employees were granted leave during that period. That because it was going to take long, the employees demanded to be paid for severance pay so that they were free to look for employment elsewhere. That settlement of final dues was paid to 26 workers with full involvement of the union. He states that the dues were paid in accordance with the law and the CBA. The Respondent also filed another Witness Statement by a shop steward in the Respondent Company, John Ndithya who states that he witnessed and participated in the discussion of settlement of this matter. That the union was satisfied with payment of terminal dues after the workers demanded for payment and that he also witnessed the payment as evidenced in the final dues form signed by the Claimants.

Evidence

At the hearing the 2nd claimant, CW1, adopted his witness statement as his evidence and also asked the court to take his filed documents as part of his evidence. He stated that on 6th September 2013 while in morning shift, their supervisor told them to go to the personnel office where they were told not to report to work until they were called. That they were told that stock of products in the store were not moving and they were making goods in excess. That they were told the management had decided to terminate their employment. That they were told to report back on 16th September 2013, which said date they were told to return all uniforms and employer's property. That when they returned everything, they went to the office where they met the shop steward. That they were given a list with their names and amount payable and were not aware of negotiations of meetings of redundancy. That they were told by the union to take the money and follow up other compensation later. That he was paid an amount he was told was service but which was not according to his years of service. That he did not take leave nor was he paid in lieu of leave. That he was also not paid house allowance. He asked the Court to order that he be paid as set out in the claim. He testified that he was not told the company was overhauling machines.

In cross-examination, Jackson stated that he was not given a breakdown of the service payment of Kshs.64,962/=. He confirmed that he was paid weekly. He denied that he was paid consolidated salary and stated that he worked for 6 days a week. He further denied that at times he worked on Sundays and was paid overtime. That the company closed once every week when they carried out cleaning and maintenance of machines. He reiterated that he was not aware that he was paid leave in the final pay. That they did not break for leave when the machines were undergoing maintenance. He admitted that they asked for off days whenever they wanted a day off. He confirmed that the union was

present when they were paid and that they were not issued with letters of termination or given option of working in another department.

The 1st Claimant, CW2 stated that she signed a witness statement which she wished adopted as her evidence together with her filed documents. She testified that the Personnel Manager told them sales were down and they should take one month leave. That they asked for loan because there was no notice. That they were told to go back on 9th September 2003 to get a report and when they reported, they were told they would be paid service. They were about 30 employees. She corroborated the 2nd Claimant's testimony and further stated that she signed the final dues form because she is the breadwinner of the family. She also confirmed that she was paid weekly. She testified that she never took leave and they were not paid house allowance or notice pay.

In cross-examination, she stated that they were not told there was wrapping jobs in the paper mill department of the Respondent. She confirmed that she was paid Kshs.65,000/= which she was told was for service. She denied being paid a consolidated salary. She stated that she worked for 6 days a week and did not work on Sundays. She confirmed that she was a member of NSSF and NHIF. She confirmed that she was given a certificate of service. In re-examination, she confirmed that her payslip has no payment of house allowance and leave allowance.

RW1, JOHN NDITHYA adopted his statement as his evidence in chief and testified that he was involved in the termination of the Claimants' employment as the shop steward. He testified that the union explained to them what was happening. That the shop stewards were involved in the tabulation of their payments but each of the Claimants signed on their own. That in this case, there were 30 people who refused to take leave or go to another section. That both Claimants got notice which was not written. That there was a meeting and discussions. He testified that they are not involved in notification of labour offices. That the notice is given to the union and not the shop stewards and that he cannot recall the date the notice was issued. That this was not a redundancy but a termination because the Claimants refused to take leave or work in another department.

RW2, JOASH MBULIKA adopted his witness statement and the attached CBA and Wages Order of 2013 as his evidence. He testified that the termination would have been a dismissal if there was no involvement of union. He testified that the company operated on seasons and sometimes had operational problems owing to standardization. He testified that the respondent was supposed to dismiss the workers who disobeyed lawful orders to either take leave or work in different departments but after engaging with the union, they agreed to pay them off according to the CBA and issued them with certificates of service. He prayed for the case to be dismissed.

In cross-examination, he stated that they had no documents to prove the employees went on leave. He denied that the termination was on account of redundancy. He further denied that they colluded with the union officials to give false evidence. He stated that when an employee is terminated under *Clause 20* he is supposed to be paid notice according to years of service and the notice for 6 years' service is 2 months. He testified that the respondent paid the workers 22 days per completed years of service as per evidence in the schedule attached to the defence which was filed on 22nd October 2015. In re-examination, he confirmed they relied on the retirement clause in the CBA, which provides for 22 days per each year of service since this was not redundancy.

Claimants' Submissions

The Claimants submit that the main issue is whether they were declared redundant or not and if so, whether the right procedure in terminating their employment was followed. That redundancy is defined in **Section 2 of the Employment Act** as "*the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous and the practices commonly known as abolition of office job or occupation.*" That with this definition, it is safe to say they were declared redundant. They relied on the case of **Krystalline Salt Limited –v- Kwe Kwe Mwakele & 67 others [2017] eKLR** where the Court of Appeal held:

"Whereas the respondents argued that their services were terminated without any reason being assigned the appellant contended they refused to work demanding to be paid. We are not convinced that this was the true reason for termination. There was no evidence that the Respondent had been paid to warrant their refusal to work. The probable cause for termination of their service was the reduced operations at the Chagamwe Plant. This clearly borne out in the evidence of two witnesses who testified...they confirmed that the production in Mombasa had reduced with the establishment of a new plant..."

That the Respondent's allegations that they asked to be paid their monies and leave is not backed by any evidence as the documents it has produced clearly state that the same was a termination. That the procedure as laid down in **Section 40 of the Employment Act** was not followed and that this was admitted by the respondent witness Joash Mbaluka in his evidence in chief. That there was also a requirement that the Union together with the labour office were to be notified and the employees to receive written notices 30 days in advance but this did not happen. That the Respondent together with the union official used undue influence to cause the workers to sign final dues acknowledgments and that if the court clearly examines the said documents, it will notice that there is no signature showing the Claimants agreed to the unacceptable calculations. They submit that the Respondent's calculation of their dues with an agreed number of 6 years is laughable since they completed 8.4 and 8.5 years respectively.

The claimants urged the Court to declare that they were indeed declared redundant with the right procedure not having been followed thus the termination of their employment was unfair. That they should be awarded damages for the unfair termination. That the salaries and number of years they worked for the Respondents have not been disputed and the Court ought to order payment based on the same. They urged the Court to allow their claim together with costs of the suit and interest thereon.

Respondent's Submissions

The Respondent submits that the final dues form signed by the 2nd Claimant attached in its Statement of Response confirms he was paid one month's notice, service pay and annual leave when he left employment. That the 2nd Claimant's prayers for one month's notice pay, severance pay and annual leave must fail as he was paid the same. That the claim for house allowance must fail since he earned consolidated

