



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1643 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th October, 2019)

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

SANPAC AFRICA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimants filed a Memorandum of Claim on 11th October 2013. It avers that as they negotiated the review of the Collective Agreement between the Respondent and itself, the Respondent paid its 65 employees their October 2012 on condition that they sign a list revoking their union membership. It avers that all 65 employees who signed the list were declared redundant and thereafter re-engaged on contractual basis.

2. The Claimant therefore seeks the following reliefs:-

(i) The Court finds that the redundancy was unlawful and unjustified as the parties Collective Bargaining Agreement and the law were not observed.

(ii) The Court finds that the list purported to be the resignation of Union members was illegal and irregular.

(iii) Orders the re-engagement of all the 85 employees on permanent terms as before.

(iv) Orders the respondent to commence a deduction and remittance of union dues from 61 employees who have not resigned from the Union.

(v) In the alternative and where re-engagements are not possible, the Respondent be ordered to observe the terms of the Collective Bargaining in calculating the benefits due to redundant employees and;

(vi) That each of the employees, declared redundant, be paid twelve months gross wages as compensation arising from the unlawful and unjustified action taken against them.

(vii) Orders the Respondent to pay union dues which they would have deducted and remitted from October 2012 to-date, an make payments, this payments being made from the Respondent's funds.

(viii) Costs of this suit be provided for in favour of the Claimant/Applicant.

3. The Respondents filed its Memorandum of Response to the claim on 3rd September 2014. It avers that there were no pending CBA negotiations as it had terminated the Recognition Agreement on 5th November 2012. It denies having compelled the grievants to sign the list prior to payment of their October 2012 salary. It further denies that its employees were declared redundant and contends that they are still in the Respondent's employments.

4. Each of the parties called three witness to testify on their behalf and thereafter only the Claimant filed written submissions.

Claimants Case

5. Thomas Nzioka, CW1, testified that he was employed by the Respondent on 1st May 2004 as a General Worker in the Glow Moulding Department.

6. He testified that on 30th October 2012, between 5pm and 6pm, they were issued with a letter of redundancy and were told to join contractual employment from 1st November 2012. He testified that he served the Respondent on contractual basis for 2 years and was later laid off with 15 other employees. He further testified that the contract was not renewed.

7. He testified that at the time of termination of his permanent employment, he was a member of the Claimant, Union. However, the Respondent did not inform the Claimant of the redundancy. He testified that the Respondent did not want its employees to join the Union. He testified that they involuntarily signed the list withdrawing their union membership.

8. He testified that upon his termination on 30th October 2012 he was paid Kshs.66,823 as severance pay and was not paid any notice pay. He testified that the matter was referred to the Ministry of Labour which recommended their reinstatement without loss of benefits or be paid 6 months salary for unlawful redundancy. However, the Respondent did not do as recommended.

9. In cross-examination, he testified that the authority to act dated 30th May 2019 is not signed by all grievants and that it does not have a date beside the signatures. He denied that the signatures were forged. He testified that he wrote a note stating that he had resigned from the Union to avoid losing his job.

10. He further testified that his contract was not renewed in 2015 though he was declared redundant in 2012 and that he did not seek to introduce new matters in his Witness Statement by stating that his contract was not renewed.

11. In re-examination, he testified that they were neither given a reason for their termination nor a tabulation of the monies paid to them.

12. Boniface Mutuku Malobe, Cw2, adopted his Witness Statement filed on 8th July 2015 as his evidence in chief. He testified that he was employed on 1st July 2002 as a machine attendant until his termination on 31st October 2012. He testified that he was re-engaged on contractual basis, which was to commence on 1st November 2012.

13. In cross-examination, he testified that he did write a letter dated 25th October 2012 resigning from the Union. However, they were forced to write the resignation letters or else they would be sacked. He testified that he was paid his terminal dues but he never resigned from his job.

14. Boniface Kinja Weru, Cw3, testified that he was employed as a general worker on 1st May 2004 until 31st October 2012, but was later placed on contract.

15. He testified that he was paid Kshs. 66,823 as his terminal dues but no tabulation was given to him. He testified that he was the shop steward representing the employees in the union and that the relationship between the Respondent and the Union was very bad. He testified that all workers were forced to resign from the union.

16. In cross-examination, he testified that he was not paid his dues because he resigned from the Union. He however testified that he was paid some amount. He testified that he worked for the Respondent on contractual basis but he had never resigned from the Respondent. He testified that he earned a higher salary after he was placed on contract.

Respondent's case

17. Joshua Otieno Okongo, RW1, adopted his Witness Statement filed in Court. He testified that in his letter dated 12th April 2018 addressed to the Union's Secretary he informed him of his resignation from the position of Shop Steward on 9th October 2012.

18. He testified that he resigned as they were mistreated. He testified that in the letter dated 18th September 2012 from the Claimant to the Respondent, the Claimant stopped the shop steward from directly dealing with the Respondent. He testified that he voluntarily resigned from the union and he continued working for the Respondent on contract. He testified that he still works for the Respondent.

19. In cross-examination, he testified that as Secretary of shop Stewards he got complaints against the Claimant. He testified that he resigned from the Union for different reasons and that he is a grievant in this claim.

20. In re-examination, he testified that he never authorised the Union to have him as a grievant and that he had issues with the Union.

21. Simon Aura Indakwa, RW2, adopted his Witness Statement filed in Court. He testified that he resigned from the union as he had issues with it. He testified that the employees and the Union had wrangles, which affected the employees. He testified that he resigned from the Union in order to safeguard his job. He testified that after his resignation, his employment on permanent basis was terminated and is now employed on contractual basis.

22. In cross-examination, he testified that he raised his issues with the Claimant but this was not done in writing. He testified that they were not given reasons for the termination of employment on permanent basis.

23. Peter Anyanzwa Ogola, RW3, adopted his witness Statement filed on as his evidence in chief.

24. He averred that on 30th October 2012 he received letters from the Union officials informing them of their resignation from the Union. He averred that they did not coerce the Union officials to resign from the Union. He averred that at the time they were having the CBA negotiations and two days after the officials resigned, other employees resigned.

25. He testified that they informed the NLB of the employees' resignation. He further testified that the matter was referred to Conciliation but they did not agree with the Conciliator's report. He further testified that when the workers left the Union they decided to give them new employment terms. He testified that as at June 2014 the grievants were working for the company and that the Respondent did not entice them to resign from the union.

26. In cross-examination, he testified that there was a meeting between the Union, FKE and the Respondent but they disagreed on certain clauses in the CBA. However, the disagreement was outside the meeting. He testified that the minutes of the meeting were not produced in Court.

27. He testified that the workers did not resign from employment and that they decided to give them new employment terms. He testified that they did not comply with the recommendations in the Report by the Ministry of Labour and that they paid their works some monies.

Claimant's submissions

28. The Claimant relied on the definition of redundancy under section 2 of the Employment Act and submitted that the termination of the grievants' permanent employment was initiated by the employer thus there was a redundancy situation. It submitted that the employees did not resign or terminate their employment.

29. It submitted that contrary to the provisions of section 40 of the Employment Act, the Respondent did not inform the labour officer, union or the employees of their termination on account of redundancy.

30. It submitted that there was no compliance with Section 41 of the Employment Act, as the employees were not given prior information of the change in their employment terms. It submitted that the redundancy was contrary to Section 40 of the Employment Act as well as clause 20 of the CBA.

31. It submitted that the Respondent did not indicate how it calculated the severance pay. It further submitted that the prayers sought in the claim are in accordance with Sections 49 and 50 of the Employment Act and therefore urged the Court to grant the prayers sought.

32. I have examined all the evidence and submissions of the Parties. The Claimant's contention is that their members were asked to resign from the Union and they did and it is on the basis of this that their permanent and pensionable jobs were terminated and were therefore issued with contract positions.

33. The fact that members of a Union resigned from a Union, cannot be a basis of change of their terms of employment from permanent and pensionable to contract. This is tantamount to a termination without following due process.

34. Section 10(5) of Employment Act 2007 states as follows:-

“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

35. Indeed the Respondents could not have altered the terms of employment of the grievants to contract terms without consultations as envisaged herein. If for any other reasons the Respondent sought to change these terms, they were also expected to give notice and subject the grievants to a fair disciplinary process if the situation warrant it.

36. It is on the basis of this that I find that the grievants were unfairly terminated by being moved from permanent and pensionable terms without any process and being placed on contractual terms without any consultation or notice.

37. I therefore find for the grievants and I award each one of them 10 months' salary as compensation for the unlawful termination. I also award each of them 1 months' salary in lieu of notice. These will be calculated and be included as an addendum to this judgement.

Dated and delivered in open Court this 11th day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyumba for Claimants – Present

Ghilam holding brief Muumbi for Respondent