



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 65 OF 2017

1. BEATRICE WANGU GORO

2. EUNICE WAIRIMA NGATIA

3. ALICE WANJIKU MURIITHI

4. VIRGINIA NYAKINYU WAMAI

5. WAHOME MUTUNGU.....CLAIMANTS

VERSUS

RUTUMA AMALGAMATED FARMERS

CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants sued the Respondent seeking to recover for the declaration of redundancy meted out on 1st November 2016 pursuant to a board resolution at a special general meeting. The Claimants who were a secretary, 2 factory clerks, an acting secretary manager and machine operator respectively averred that their termination vide the letters dated 8th December 2016 were unlawful, unfair and unprocedural. They averred that the Respondent did not notify the Claimants' trade union or the labour office of the reasons for and the extent of the redundancy before effecting the same or have regard to the seniority, skill, ability and reliability of the Claimants in the selection of employees to be declared redundant. They averred that the Respondent had to date not paid the severance pay. The Claimants thus sought the payment of the severance pay and damages for the unfair dismissal from employment plus the costs of the suit and interest. The Claimants also sought damages equivalent to 12 months for each claimant.

2. The Respondent stated in the defence denied that the termination was by mere redundancy or that it was unfair, unprocedural and unlawful. The Respondent averred that it followed the law and the terms and conditions of employment between the parties. It averred that the claim for severance pay was catered for through alternative methods of payments which the Claimants are aware of and that the Claimants were seeking double payments. The Respondent averred no demand notice was served and they thus sought the dismissal of the suit with costs.

3. The Claimants testified as did the chair of the Respondent Isaiah Wambugu Kahithu. The Claimants maintained that they were not notified of the intended termination prior to it being effected. The Respondent's witness testified that the contracts the Claimants had were terminated in accordance with the terms of the contract. He maintained that the Labour Officer was notified though in cross-exam he conceded that the notification was not prior.

4. The parties filed their submissions and in their submissions the Claimants submitted that their termination fits snugly into the definition of redundancy. They submit that the Annual General Meeting of 1st November 2016 is what resolved that they should be dismissed and that their services were rendered superfluous. The Claimants submitted that under Section 40 of the Employment Act there were conditions precedent on termination through redundancy. The Claimants submitted that under the authority of **Ignas Karingo Mghona & 4 Others v Star of Hope International Foundation [2016] eKLR** the Respondent had failed to observe the law on redundancy and that it plain the termination was unlawful and unfair. The Claimants submitted that severance pay is distinct from service pay under Section 35(5) of the Act and that under Section 41(1)(g) they were entitled to severance pay for the termination on account of redundancy. They submitted that they were therefore entitled to the severance pay sought.

5. The Respondent's submissions were to the effect that the Claimants testimony was inconsistent as they gave different figures from what

they earned and therefore their testimony was not credible. The Respondent submitted that the 1st Claimant's testimony was apposite her exhibit on pay as she claimed her salary was Kshs. 26,736/- whereas she earned Kshs. 19,737/- after deductions. The Respondent submitted that this was repeated for all the Claimants where they claimed more than they earned. It was submitted in respect of the Claimants that they received their terminal dues as tabulated and that there was no further payment due since their contracts provided that the contracts could be terminated by issuing a one month notice or payment in lieu thereof. The Respondent submitted that the Claimants were not entitled to service pay in terms of Section 35(6) as they were beneficiaries of a retirement benefits scheme and members of the National Social Security Fund thus disentitling the Claimants to any of the reliefs sought. The Respondent submitted that it complied fully with the provisions of the Employment Act Section 40(1) and that the Respondent duly considered the skills, ability and reliability of each of the Claimants before the redundancy was effected. The Respondent submitted that the reason for termination was a fair reason and therefore the claim was without merit and should be dismissed with costs.

6. In declaring a redundancy, an employer is required to abide by the provisions of Section 40 of the Employment Act. Section 40 provides as follows:-

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 to 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 month prior to the date of the intended date of termination on account of redundancy;

(b) where an 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.

The law is clear that where the employee is a member of a trade union, the employer must notify the union 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 one month prior to the date of the intended date of termination on account of redundancy. The employer must inform the employee personally in writing and the labour officer if that employee is not a member of a trade union. The employer has, in selecting the employees to be declared redundant taken into account seniority, the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. The employer is required to pay off the leave in cash the leave that is due to an employee declared redundant. The employer must give the employee declared redundant not less than one month's notice or one month's wages in lieu of notice. The employer is required to pay an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

7. The Claimants herein received notification that took effect immediately and thus qualified for the one month salary in lieu of notice, the payment of all leave dues in cash and the severance pay calculated as 15 days for each completed year of service. Severance pay is difference from service pay which is retirement benefits payable either under a scheme or under the rubric of the National Social Security Fund. Some employees such as the Claimants enjoy both the benefit under Section 35(6) and the defined benefit scheme. The Respondent made heavy weather about the amounts the Claimants sought. Each was taken labouriously through the payment computations and it was clear that the Respondent took the nett salary as the salary the Claimants earned. That is not so. The salary earned by an employee is the salary he is entitled to and is computed as the gross salary plus all allowances paid. The tax element is included in earnings as the net salary is not what is entered in the column for salary earned. The amount taken home is less deductions and taxes due. In the case before me the Claimants did not claim any amount as salary that was not their earnings. It is a question of the Respondent not appreciating what a salary is. In the final analysis I find that the Claimants termination was unfair in the circumstances as it did not follow the law in terms of Section 41(1)(g) of the Employment Act as well as not complying with the provisions of Section 40(1) of the Employment Act on redundancy. The Claimants are each entitled to judgment with an order for costs and the following specific reliefs for each Claimant:-

a. Beatrice Wangu Goro

i. Severance pay @15 days for the 6 years of service – Kshs. 80,214/-

ii. One month salary as compensation for unlawful termination – Kshs. 26,736/-

b. Eunice Wairima Ngatia

i. Severance pay @15 days for the 6 years of service – Kshs 45,030/-

ii. One month salary as compensation for unlawful termination – Kshs. 15,010/-

c. Alice Wanjiku Muriithi

i. Severance pay @15 days for the 6 years of service – Kshs 45,030/-

ii. One month salary as compensation for unlawful termination – Kshs. 15,010/-

d. Virginia Nyakinyua Wamai

i. Severance pay @15 days for the 6 years of service – Kshs 107,808/-

ii. One month salary as compensation for unlawful termination – Kshs. 35,936/-

e. Interest at court rates on the sums awarded from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 8th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar