



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 2002 OF 2014

AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT

VS

AMAZON MOTORS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This action is brought by Amalgamated Union of Kenya Metal Workers, on behalf of its members, against Amazon Motors Limited. The claim is documented by a Memorandum of Claim dated 2nd October 2014 and filed in court on 11th November 2014. The Respondent filed a Response to Claim on 24th March 2015.
2. By its ruling delivered on 31st March 2017, the Court declined to grant interlocutory prayers sought by the Claimant Union and directed that the matter proceeds to full hearing.
3. When the matter came up for hearing, the Claimant chose not to call any witnesses. The Respondent called its Human Resource and Administration Manager, Thomas Kiamba. Both parties filed written submissions.

The Claimant's Case

4. The Claimant states that on 31st July 2013, the Respondent notified the following employees that their employment would cease by 2nd August 2013;

- a) Paul Njuguna Kiarie
- b) Stephen Muola
- c) Joseph Nchore
- d) Peter Muchoki
- e) Ruth Atemi Munala
- f) Charles Otonde
- g) Onesmus W. Kavyu
- h) Njagi Fedis K
- i) Benard Gichia Kinuthia
- j) Mercy Waithera Muriuki

k) Peter W. Wandaka

l) Martin L. Ofwindi

5. The Claimant further states that the terminal dues payable to the affected employees, as tabulated by the Respondent, did not include service gratuity as provided in the Collective Bargaining Agreement (CBA).

6. The Claimant engaged the Respondent in negotiations towards resolving the matter but no agreement was reached. The Claimant therefore reported a dispute to the Cabinet Secretary for Labour, under Section 62 of the Labour Relations Act. A Conciliator was duly appointed but the Respondent requested and the Claimant agreed that the dispute be referred back to the parties' level.

7. At a meeting held on 13th May 2014, the parties agreed on a reduced figure in terminal dues which the Respondent undertook to settle by the end of August 2014. The Respondent however failed to honour its undertaking, thus nullifying the agreement between the parties.

8. The Claimant submits that the Respondent is in breach of Article 41 of the Constitution, Section 40 of the Employment Act as well as Clauses 20 and 21 of the CBA.

9. The Claimant now seeks the total sum of Kshs. 4,898,879, payable to the affected employees as follows:

a) Paul Njuguna Kiarie.....	Kshs. 919,995
b) Stephen Muola.....	650,918
c) Joseph Nchore.....	431,523
d) Peter Muchoki.....	365,396
e) Ruth Atemi Munala.....	442,880
f) Charles Otonde.....	152,535
g) Onesmus W. Kavyu.....	102,510
h) Njagi Fedis K.....	313,523
i) Benard Gichia Kinuthia.....	487,627
j) Mercy Waithe Muriuki.....	364,514
k) Peter W. Wandaka.....	511,121
l) Martin L. Ofwindi.....	156,337

The Respondent's Case

10. In its Response to Claim dated 21st March 2015 and filed in court on 24th March 2015, the Respondent pleads that the affected employees were served with a notice of intention to terminate their employment on account of redundancy on 31st July 2013.

11. The Respondent denies breaching Article 41 of the Constitution, Section 40 of the Employment Act or the CBA. At any rate, the Respondent submits that the issue in dispute is on quantum as outlined in the Claimant's Memorandum of Claim as the Claimant does not contest the process, procedure or criteria of the redundancy.

12. The Respondent admits that there were negotiations between the parties towards resolution of the dispute at hand. The Respondent maintains that it has always been willing to settle the matter and states that the employees were paid part of their redundancy dues made up of the following:

- a) Severance pay at the rate of 18 days' for each year worked;
- b) Prorata leave;
- c) Two days worked in August;
- d) Notice pay (depending on the period of notice for each employee);
- e) Baggage allowance;

f) Monthly arrears.

13. In this regard, the Respondent states that the dues payable to the affected employees were subject to mandatory statutory deductions and adds that out of the total net amount of Kshs. 3,281,394, Kshs. 2,130,151 had been paid, leaving a balance of Kshs. 1,151, 243 applicable as follows:

Name	Total Amount Due (Kshs.)	Amount Net of Statutory Deductions (Kshs.)	Amount Paid (Kshs.)	Balance Due (Kshs.)
Paul Njuguna Kiarie	820,461	579,930	410,574	169,356
Stephen Muola	598,783	424,756	300,104	124,652
Joseph Nchore	404,424	288,704	195,711	92,993
Peter Muchoki	337,720	241,952	153,602	88,350
Ruth Atemi Munala	409,154	292,015	187,077	104,938
Charles Otonde	143,405	105,991	66,614	39,377
Onesmus W. Kavyu	109,654	82,359	34,899	47,460
Njagi Fedis K	309,668	222,375	135,275	87,100
Benard Gichia Kinuthia	439,021	331,816	210,340	121,476
Mercy Waithera Muriuki	352,346	252,250	144,093	108,157
Peter W. Wandaka	468,249	354,444	232,172	122,272
Martin L. Ofwidi	141,705	104,801	59,690	45,111

Findings and Determination

14. From the pleadings and submissions filed by the parties, the following issues emerge for determination by the Court:

- a) Whether the declaration of redundancy by the Respondent was in compliance with the law;
- b) The make up
- c) and level of redundancy dues payable to the affected employees;
- d) Whether interest is payable on the said dues.

The Declaration of Redundancy

15. The dispute in this case was triggered by termination letters issued to the Claimant's members on 31st July 2013, stating as follows:

“RE: TERMINATION OF SERVICE ON RESTRUCTURING

As you might be aware, the Company has been operating under very difficult financial constraints. Though the management has tried to hold on the status quo, it has become increasingly unbearable. Accordingly, it has been decided that the Company's

operations be restructured. Among other areas, the restructuring involves staff rationalization.

In this regard, this is to inform you that you have been affected by the staff reduction programme. Consequently, your services with the Company will cease with effect from 2nd August, 2013.

You are advised to hand over to your head of section all company documents and property within your possession after which you will clear with all the Departments before the Accounts Department pays your terminal dues as follows:

a) Salary up to and including 2nd August 2013.

b) Gratuity @ 18 days per each completed year.

On behalf of the management and the entire Amazon Motors staff, I take this opportunity to thank you for the dedication and devotion with which you have served this company and wish you the very best in your future endeavors.

Yours faithfully,

For; Amazon Motors Limited

(Signed)

T.M. Kiamba

Human Resource and Administration Manager

16. From this letter and further evidence placed before the Court, the Claimant's members lost their jobs through redundancy. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy 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 and loss of employment.”

17. While the law recognizes redundancy as a legitimate mode of termination of employment, there are stringent conditions to be observed. In this regard Section 40 of the Employment Act, 2007 sets out the following conditions precedent to be met by the employer:

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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

18. By the time this matter was filed in court, the dispute had gone through a lengthy conciliation process between the parties directly and later with the intervention of the Ministry of Labour. From the pleadings and evidence availed to the Court, it would appear that the issues of notice and selection criteria had been dealt with. At any rate, no claim was made by the Claimant on this account. The Court therefore reached the conclusion that the reason for and declaration process of the redundancy were not issues before the Court.

19. In my estimation, the only issue was the makeup and level of redundancy dues payable to the affected employees and this is what I will now deal with.

Make up and Level of Redundancy Dues

20. According to the Respondent, the Claimant's members were entitled to the following dues:

- a) Severance pay;
- b) Leave pay;
- c) Salary for 2 days in August 2013;
- d) Notice pay;
- e) Baggage allowance;
- f) Salary arrears.

21. The Claimant on the other hand, maintains that the employees were entitled to all these plus gratuity as provided in Clause 20(2) of the obtaining CBA. It is not in contest, that having been declared redundant, the affected employees were entitled to severance pay as provided under Section 40(g) of the Employment Act, 2007. The question is whether they were entitled to gratuity as well.

22. Clause 20(2) of the subject CBA provides as follows:

“An employee who is terminated or resigns after completing one year’s service shall be entitled to payment of gratuity at the rate of 15 days per completed year of service provided that an employee who is terminated on disciplinary grounds shall not be entitled to gratuity.”

23. The succeeding Clause is No 21 and it deals with redundancy. Sub clause (1) thereof refers to ‘*termination of employment through redundancy*’ and Sub clause (7) thereof provides that an employee declared redundant is entitled to 18 days’ salary for each completed year of service, in addition to appropriate notice pay as set out in Clause 20(1).

24. In ***County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR***, the Court of Appeal restated the well-known rule that construction of instruments should accord with the intention as expressed. The phrase ‘*termination of employment through redundancy*’ in Clause 21(1) of the CBA could not have been accidental. It is my view that, by placing the words ‘*termination*’ and ‘*redundancy*’ in the same phrase, the parties to the CBA, understood and intended that redundancy was a form of termination of employment, to which gratuity was applicable.

25. Further, if the parties had intended payment of gratuity to be excluded in cases of termination by redundancy, they would have expressly made such exclusion under Clause 20(2) of the CBA, much like they had done with termination on disciplinary grounds.

26. Finally, Section 26 of the Employment Act, 2007 provides that the provisions of the Act are basic minimum conditions of employment. The effect is that an employee cannot be denied negotiated enhanced terms just because the law has been complied with.

27. In light of the foregoing, the Court finds and holds that the Claimant's members, who were declared redundant, were entitled to both severance pay and gratuity.

Interest

28. On the issue of interest, I have this to say; both parties appear to have prevaricated on speedy conclusion of this matter. I will therefore not order prejudgment interest.

Final Orders

29. In the end, I make the following orders:

- a) The Respondent is directed to re-tabulate the dues payable to the affected employees, taking into account the finding by the Court on payment of gratuity, within the next fifteen (15) days from the date of delivery of this judgment;
- b) The said dues shall be paid in full, less statutory deductions, to each employee within the next thirty (30) days from the date of delivery of this judgment;
- c) Any amount remaining unpaid after the said thirty (30) days will attract interest at court rates from the date of delivery of this judgment until payment in full.
- d) Each party will bear their own costs.
- e) These are the orders of the Court.

DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF FEBRUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF MARCH 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mr. Odiege (Union Representative) for the Claimant

Ms. Mueni Nyokabi for the Respondent