REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 893 OF 2012

(Formerly HCCC No. 65 of 2009 at Nairobi)

HUDSON MWALUDA MWASHUMBE.....1ST PLAINTIFF

JACKSON NDUNGA MUKEWA.....2ND PLAINTIFF

JAMES MICHIRA MASIRA.....3RD PLAINTIFF

PETER KIHUYU KARANJA.....4TH PLAINTIFF

- VERSUS -

TELKOM KENYA LIMITED.....1ST DEFENDANT

DOMININIQUE SAINT – JEAN.....2ND DEFENDANT

J.K.TANUI.....3RD DEFENDANT

PAUL BONGO JILANI.....4TH DEFENDANT

P.K.KIBET.....5TH DEFENDANT

THE COMMUNICATION WORKERS

UNION OF KENYA (COWU).....6TH DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday 18th May, 2018)

JUDGMENT

The plaint was filed for the plaintiffs on 16.02.2009 through Kanchory & Company Advocates. The plaintiffs prayed for judgment against the defendants for:

a. A declaration that the purported termination of their employment was wrongful, unfair, unprocedural, illegal, null and void ab initio.

b. A finding that the plaintiffs are and continue to be in the lawful employment of the 1st defendant and are entitled to all their respective employment dues and benefits from and after 06.09.2007 until such time when the proper termination procedure and process might be followed by the 1st defendant or employer.

c. An order of specific performance compelling the 1st defendant to lawfully terminate the employment of the plaintiffs pursuant to the terms of the collective bargaining agreement entered on 04.11.2004 and staff rationalization agreement dated 12.04.2006 (as reinforced and clarified by that of 20.12.2007) between the union and the 1st defendant.

d. Payment of special damages for 1st plaintiff Kshs. 1, 387, 415.00; for 2nd plaintiff Kshs.924, 780.00; for 3rd plaintiff Kshs. 2, 512, 904; and for 4th plaintiff Kshs. 911, 444.00.

e. General damages for defamation, mental distress and anguish caused to plaintiffs; and the embarrassment and inconvenience caused to plaintiffs.

f. Exemplary or aggravated damages for the pain, humiliation, suffering, embarrassment and inconvenience visited upon the plaintiffs by the illegal, malicious, unreasonable, unwarranted, appallingly and unjustified conduct of defendants.

g. Costs of the suit and interest.

h. Interest on (d), (e), (f) and (g) above at such rate as the Court may deem fit.

i. Such other or further relief as the Honourable Court may deem just or expedient to grant.

The 1st to 5th Defendants filed the defence on 25.03.2009 through Kiptui Mbabu & Company Advocates. They prayed that the plaintiffs' suit be dismissed with costs.

The 6th defendant filed the statement of defence on 18.05.2009 through J.A. Guserwa & Company Advocates. The 6th defendant prayed that the plaintiffs' case against it be dismissed with costs and interest.

The plaintiffs were employed by the 1st defendant on diverse effective dates of appointment. It is not in dispute that in 2004 the 1st defendant determined to undertake a restructuring programme which, amongst other things, included the retrenchment of thousands of its employees across its many branches countrywide.

The plaintiffs' case is that the retrenchment was subject to consultation clause in a collective agreement concluded between the 1st and 6th defendants on 04.11.2004 that the 1st defendant would consult the 6th defendant before undertaking the retrenchment or staff rationalisation exercise or early retirement. It is the plaintiffs' further case that by an agreement dated 12.04.2006 and reinforced and clarified by a further agreement of 20.12.2007 between the 1st and 6th defendants, the criteria upon which the employees of the 1st defendant were to be retrenched or prematurely retired was laid out. The plaintiffs' case is that the 6th defendant entered into the agreements on behalf of the employees including the plaintiffs.

The plaintiffs' case is that on 06.09.2007 each of them received a letter signed by the 3rd defendant terminating each plaintiff's employment with loss of all terminal benefits and without according them the agreed sent-off benefits. The plaintiffs' case is that the termination amounted to breach of the collective agreement and the staff rationalization agreements which were binding and applicable at all material time. The letter dated 06.09.2007 addressed to each of the plaintiffs stated as follows:

"**TERMINATION OF SERVICE**

The Management of Telkom Kenya has decided to terminate your services with effect from the date of this letter. You shall be paid one month's salary in lieu of notice as provided in your terms of service with the Company.

Please make arrangements to surrender your employment identity card and other Company property and records in your possession to your controlling officer on receipt of this letter.

Also liaise with the Pensions and Retirement Section Extelcoms House 4th floor for any dues relevant to you.

Acknowledge receipt of this letter by date and signature on the associated copy.

Signed

J.K. TANUI

For: CHIEF HUMAN RESOURCES OFFICER"

The plaintiffs' case is that the termination was calculated to deny them the agreed retrenchment benefits and the termination was possibly part of a callous and malicious scheme to deny targeted individual employees of the 1st defendant their terminal and other benefits.

The plaintiffs' case against the 6th defendant is that the trade union has failed to pursue their claims in view of their said termination.

The plaintiffs' further case is that the 1st defendant wrote a letter on 28.02.2008 addressed to the plaintiffs' advocates, Kanchory & Company Advocates and stated thus, **"....your clients were terminated from service of the company due to their involvement in the company's cable vandalism in Karuri area of Nairobi North...."**. The plaintiffs' case is that the allegation was false, malicious, and defamatory of each of the plaintiffs and was calculated to injure, discredit, damage, and destroy the plaintiffs' personal and professional reputation as it was clearly actuated by malice, contempt and spite.

The 1st to 5th defendant denied the plaintiffs' allegations and states as follows:

a. Any agreements signed between the 1st and 6th defendants did not apply and were not binding as between the plaintiffs and the 1st defendant's employment contracts.

b. The claimants were terminated in accordance with their terms and conditions of service.

c. The letter addressed to the plaintiffs' advocate was written in response to the advocates' letter.

d. The suit is misconceived and should be dismissed with costs.

e. The 2nd, 3rd, 4th and 5th defendants acted in the matter as employees of the 1st defendant and cannot be held personally liable.

The 6th defendant denied that the plaintiffs had a valid claim against the trade union.

Parties' witnesses testified and submissions were filed for the parties through their respective advocates.

The **1st issue** for determination is whether the collective agreement and the staff rationalisation agreements were binding and applicable to the plaintiffs.

The 6th defendant's witness testified that he was currently serving as the 6th respondent's Industrial Relations Officer and prior to that he served at the 1st defendant's Human Resource Department from 1986 to 2008. He recalled that in 2007 the 1st defendant terminated the plaintiffs' employment without a reason being assigned. The 1st to 5th defendants' witness was the 4th defendant, the 1st defendant's legal advisor. His evidence was that the formula agreed on between management and the union in regards to retrenchment was applicable to all members of staff regardless of whether one was unionisable or not. The agreements were the ones dated 4.04.2006 and 12.04.2006.

Taking that evidence into account the Court returns that the agreements of 04.04.2006 and 12.04.2006 on the 1st defendant's staff rationalisation exercise applied to the plaintiffs.

The **2nd issue** for determination is whether the termination of the plaintiffs' employment amounted to breach of the staff rationalisation agreements of 04.04.2006 and 12.04.2006. The 1st to 5th defendants' case is that the plaintiffs were dismissed on account of gross misconduct and having been found culpable, they were dismissed with immediate effect. The witness for 1st to 5th defendants stated thus, "**That phase 2 of the retrenchment took place in December 2007. The plaintiffs' disciplinary case was not pending when the exercise took place as they had been dismissed 6th September 2007. Indeed the circumstances surrounding the plaintiffs' exit were that they were found culpable of gross misconduct that necessitated an immediate termination of their contracts of service in accordance with the policy and the law at the time.**"

The 1st defendant's case was that the plaintiffs were the main suspects in high occurrence of cable vandalism in Karuri and that they had facilitated theft of the 1st defendant's cables. The 1st defendant relies on a purported investigation report dated 30.08.2007 which is not signed by the alleged author one P. Ochieng, Security Coordinator. The report makes unverified allegations in the nature of mere suspicions against the plaintiffs. Thus, the Court returns that the 1st defendant has failed to establish that as at the time of the termination, the plaintiffs were culpable of gross misconduct. In any event the purported report was not signed and the Court returns that its evidential value was diminished both in content and form.

Clause 4 of Chapter 17 of the 1st defendant's discipline policy provides that an employee will be liable for dismissal if after investigation the employee is found guilty of, amongst others, the offence of gross misconduct. While purporting to have dismissed the plaintiffs under that provision, the Court finds that the 1st defendant in fact terminated the plaintiffs' employment with immediate effect on 06.09.2007 with payment of one month's salary in lieu of notice and as per the terms and conditions of service. Thus, the Court returns that the plaintiffs were not dismissed from employment but they were terminated under a clause entailing pay in lieu of termination notice. If the plaintiffs had engaged in gross misconduct, it is the Court's opinion that the 1st defendant would be obliged to undertake the relevant and proper disciplinary investigations and, as would be appropriate, impose a dismissal or other punishment in accordance with its disciplinary policy and procedures. The Court returns that the 1st defendant failed to do so and was not entitled to purport to accord the plaintiffs a soft landing as it appears to have been the case through the termination as was done.

While making that finding the court upholds its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus, **"The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination."**

It is the 1st to 5th defendants' case that the 2nd phase of the retrenchment was to take place in December 2007 and the plaintiffs' employment was terminated on 06.09.2007. There was no dispute that the plaintiffs were entitled to the retrenchment but for the termination. The Court

has found that the termination was unfair and further returns that as per the plaintiffs' case, the termination was in breach of the terms of the agreements of 04.04.2006 and 12.04.2006 on the 1st defendant's staff rationalisation exercise.

The **4th issue** for determination is whether the plaintiffs are entitled to payment of the retrenchment package as per the terms of the agreements of 04.04.2006 and 12.04.2006 on the 1st defendant's staff rationalisation exercise. The Court has found that had the plaintiffs not been terminated on 06.09.2007, they would be eligible to the retrenchment package. The 1st defendant has not objected to the computation of the dues as particularised for the plaintiffs in line with the terms of the retrenchment agreements of 04.04.2006 and 12.04.2006. Thus the plaintiffs are awarded as claimed and prayed for thus: the 1st plaintiff **Kshs.1, 387, 415.00**; the 2nd plaintiff **Kshs.924, 780.00**; the 3rd plaintiff **Kshs.2, 512, 904.00**; and the 4th plaintiff **Kshs.911, 444.00**.

The **5th issue** for determination is whether the plaintiffs have established their claim in defamation. It is not in dispute that the 1st defendant wrote to the plaintiffs' advocate and it is not in dispute that the letter was copied to the 1st respondent's Chief human resources office. The Court returns that even if the alleged words might have been defamatory one way or the other, the same were not published. The plaintiffs had appointed the advocates and the advocates were not such a third party as to constitute a publication for purposes of sustaining an action in defamation. Similarly, copying to the 1st defendant's chief human resource office did not amount to publication for purposes of an action in defamation because the office was part of the 1st defendant's establishment as an employer and company so that the office did not amount to a third party. Thus the Court returns that the plaintiffs have failed to establish defamation in the circumstances of the case.

The **6th issue** for determination is whether the 6th defendant failed as a trade union to further the plaintiffs' grievances following the termination. The 6th defendant's evidence and which is not disputed is that the trade union wrote a protest letter to the 1st defendant about the plaintiffs' termination and before the matter could be addressed in the appeals committee, the plaintiffs wrote to the union on 29.10.2008 withdrawing their representation. The Court holds that in such circumstances, the plaintiffs could not allege deprivation of that which they asked to be denied to them by the trade union. The claims against the 6th defendant will therefore fail.

To answer the **6th issue** for determination, the court returns that the plaintiffs are not entitled to general damages or exemplary or aggravated damages as there was no submission made to guide such award and the Court returns that the claims and reliefs in that regard were unjustified.

The Court returns that the plaintiffs will each pay the 6th defendant's partial costs of the suit at **Kshs.20, 000.00** per plaintiff making a sum of **Kshs.80, 000.00**. The 1st defendant will pay the plaintiffs' costs of the suit and the 2nd to 5th defendants will bear their own costs of the suit.

In conclusion, judgment is hereby entered for the plaintiffs against the 1st defendant and for the 6th defendant against the plaintiffs for:

a. The 1st defendant to pay the 1st plaintiff **Kshs.1, 387, 415.00**; the 2nd plaintiff **Kshs.924, 780.00**; the 3rd plaintiff **Kshs.2, 512, 904.00**; and the 4th plaintiff **Kshs.911, 444.00** by 01.08.2018 failing interest at court rates to be payable thereon from the date of the suit till full payment.

b. Each plaintiff to pay the 6th defendant **Kshs.20, 000.00** making a sum of **Kshs.80, 000.00** in partial costs of the suit.

c. The 1st defendant to pay the plaintiffs' costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 18th May, 2018.**

BYRAM ONGAYA

JUDGE