



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 872 OF 2013

SHADRACK OTUOMA KHAMLA	1st CLAIMANT
GEORGE OBILO OYIER	2nd CLAIMANT
HENRY KUNANI SHEMEMA	3rd CLAIMANT
JACQUELINE LORNA OKACH	4th CLAIMANT
DAVID NZEKA KAMANI	5th CLAIMANT
BENARD OTIENO OTWAL	6th CLAIMANT
JOSEPH NZAU NDETO	7th CLAIMANT
ISSAC MUTIE KIMEU	8th CLAIMANT

V

ANIKET ENTERPRISES LIMITED	RESPONDENT
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JUDGMENT

1. This judgment was scheduled to be delivered on 12 April 2018 but because of an application by the Respondent after the close of the Claimants case, it had to be kept in limbo.
2. This Cause first came up for hearing on 14 October 2014. The Respondent was not ready and it successfully moved Court to grant an adjournment.
3. In granting the adjournment, the Court directed that a hearing date be taken on a priority basis in the registry.
4. The registry thereafter scheduled the Cause for hearing on 24 February 2015.
5. On that date, the Respondent indicated that it intended to file an application for security for costs while the Claimant sought another date.
6. The Court directed the Respondent to file the application within 7 days.
7. The application was filed on 3 March 2015 and in a ruling delivered on 23 April 2015, it was found unmerited and dismissed with costs.
8. On 23 November 2017, the Cause was fixed for hearing on 13 March 2018 and a hearing notice was served upon the Respondent on 27 November 2017.
9. The Claimants filed their *Proposed Issues* for determination on 9 March 2018.
10. When the Cause came up for hearing on 13 March 2018, the Court declined a request for adjournment by the Respondent due to the age of the dispute (Mr. Tariq counsel for the Respondent's was indicated as attending Malindi High Court Misc Cause No. 62 of 2016).
11. The 1st Claimant testified on behalf of the other Claimants after which the Court directed that the Respondent's case be deemed as

closed.

12. The Claimants filed their submissions on 3 April 2018 although they had been directed to file the submissions on or before 30 March 2018.

13. The Court will adopt the Issues as proposed by the Claimants as the Issues arising for determination.

Whether Respondent had a valid reason to terminate the Claimants employment

14. From the pleadings and testimony of the 1st Claimant, it is apparent that the termination of the Claimants contracts were for operational reasons (redundancy) as the reason given in the termination letters were *market economical effects on the company's business leading to drastic reduction of work*.

Substantive fairness

15. If proved in terms of sections 43 and 45(2)(b)(ii) of the Employment Act, 2007, the reasons given by the Respondent would have constituted valid reasons to bring the employment contracts to an end.

16. The Respondent having failed to attend Court to discharge the burden imposed upon employers by sections 43, 45 and 47 of the Act, the Court concludes that the terminations on account of redundancy were substantively unfair.

Procedural fairness

17. However, before bringing an employment contract to an end due to operational requirements, an employer is also under an obligation to comply with the conditions outlined in section 40 of the Employment Act, 2007.

18. The Respondent alleged in the Response that appropriate notices were issued and acknowledged by the Claimants.

19. The copies of notices issued have signatures purporting that they were received.

20. Assuming that the notices were received by the Claimants, there is still no evidence that the Labour Officer was also notified in advance in terms of section 40(1)(b) of the Employment Act, 2007 (records to suggest that the Kenya Glass Workers Union was consulted was filed).

21. The Court of Appeal stated in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* (2013) eKLR that

It is quite clear to us that *sections 40 (a) and 40 (b)* provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. *Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer* (my emphasis). *Section 40 (b)* does not stipulate the notice period as is the case in *40 (a)*, but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

22. With no evidence that the Labour Officer was informed, the Court finds that the termination of the Claimants contracts were procedurally tainted (Labour Office was only involved after the decision to terminate had been taken).

Appropriate remedies

23. The Claimants outlined several heads of claim/relief and the Court will address them seriatim

Pay in lieu of notice

24. In cases of redundancy, an employer is under a statutory obligation to pay the equivalent of 1 month wages in lieu of notice in terms of section 40(1)(f) of the Employment Act, 2007.

25. The Full and Final Settlement schedules filed by the Respondent indicate that the Claimants were paid the equivalent of 10 days' notice and not 1 month as contemplated by section 40(1)(f) of the Employment Act, 2007.

26. The Claimants are entitled to the balance.

Leave balance

27. The Schedules show that the Claimants were paid leave for the last year of service.

28. As to any other accrued leave, the 1st Claimant did not lay an evidential foundation as to the respective number of days and years for each of the Claimants.

Overtime/off duties

29. The contractually agreed working hours beyond which overtime became payable was not disclosed by the 1st Claimant.

30. He also did not draw the attention of the Court to the prescribed minimum working hours applicable to the sector/industry the Respondent was operating in.

31. The head of relief is declined.

House allowance

32. The 1st Claimant testified that the salaries did not include house allowance.

33. House allowance, by practice and tradition is usually 15% of the basic salary. Unfortunately, there was no evidence on the basic salaries for each of the Claimant.

34. This relief is also declined.

Underpayment of salaries

35. The 1st Claimant did not lead any evidence in respect of this head of claim such as the prescribed minimum wages for the occupations held by the Claimants.

36. Even the location where the contracts were performed were not disclosed (for purposes of minimum wages, locality of performance of contract is material).

Compensation

37. All the Claimants were paid what was referred to as service pay.

38. In consideration of those payments and the length of service of the Claimants which ranged from 2 years to 7 years, the Court is of the view that the equivalent of 2 months gross wages as compensation for each Claimant would be appropriate and fair.

39. Before concluding, the Court notes that no pay/terminal records for the 2nd and 3rd Claimants were produced and therefore their claims are dismissed.

40. The Court also notes that it has used the earnings/dues records filed in Court by the Claimants/Respondents for purposes of computation(s).

Conclusion and Orders

41. The Court finds and holds that the termination of the Claimants contracts on account of redundancy were unfair and awards them

1st Claimant

(a) Notice pay Kshs 10,000/-

(b) Compensation Kshs 20,000/-

TOTAL Kshs 30,000/-

4th Claimant

(a) Notice pay Kshs 9,500/-

(b) Compensation Kshs 19,000/-

TOTAL Kshs 28,500/-

5th Claimant

(a) Notice pay Kshs 10,000/-

(b) Compensation Kshs 20,000/-

TOTAL **Kshs 30,000/-**

6th Claimant

(a) Notice pay Kshs 10,000/-

(b) Compensation Kshs 20,000/-

TOTAL **Kshs 30,000/-**

7th Claimant

(a) Notice pay Kshs 10,000/-

(b) Compensation Kshs 20,000/-

TOTAL **Kshs 30,000/-**

8th Claimant

(a) Notice pay Kshs 10,000/-

(b) Compensation Kshs 20,000/-

TOTAL **Kshs 30,000/-**

42. The Respondent should deduct the portion of 10 days' notice which was already paid to the Claimants from the awards herein.

43. Claimants are denied costs for having filed their submissions outside the set date without tendering any explanation.

Delivered, dated and signed in Nairobi on this 18th day of May 2018.

Radido Stephen

Judge

Appearances

For Claimants Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates

For Respondent Tariq Khan & Associates Advocates

Court Assistant Lindsey