



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1239 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th June, 2018)

HAMISI MWINYI NYERERE & 18 OTHERS.....CLAIMANT

VERSUS

UCHUMI SUPERMARKET.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 24th June 2016 through the firm of Karen & Associates Advocates and was later amended on 19th January 2017 seeking damages for unlawful and unfair redundancy as well as refusal to pay terminal dues by the Respondent.
2. The Claimants aver that they were at all material times employees of the Respondent having been employed on various dates and working in some of the Respondent's departments and that they worked faithfully and diligently until on or about 20th March 2016; 29th March 2016 and 7th April 2016 respectively when the Respondent unfairly and unlawfully declared the Claimants redundant where they were served with the redundancy letters on or about 20th March 2016; 29th March 2016 and 7th April 2016 and asked not to report to work the following day.
3. They further aver that they were not served with redundancy notice as contemplated by the provisions of Section 40 of the Employment Act and that since they had worked for the Respondent for periods ranging between 5 to 25 years they are entitled to a notice period of at least 8 weeks and be paid time off in order to be able to sustain themselves and their dependants while looking for new jobs.
4. They state that there was no genuine redundancy situation in the Respondent's company as the Respondent employed new members of staff over the last one year increasing the wage bill and holding the Claimants the casualties of its irresponsible decisions. This was a manifestation of unfair labour practices.
5. They further state that they instructed their advocate who wrote a letter dated 30th May 2016 and took issue of the Respondent's decision and asked the Respondent to pay the Claimants their terminal dues and 12 months gross salary compensation as per Section 49 of the Employment Act.
6. The Claimants also aver that the Respondent replied to the letter and stated that the Claimant's employment was terminated following the redundancy procedures provided for under the law and that the issue of compensation for unfair termination did not arise and hence the Claimants were not paid any terminal benefits.
7. The Respondents filed a response to the claim where they denied each and every allegations in the Claimant's Amended Statement of Claim and aver that the Claimants were aware that the Respondent went into receivership in the year 2009 and their employment was extended by operation of the receivership.
8. They also state that the Claimants were employees of the Respondent stationed at the branches which were closed down as a matter of public notoriety during the reconstructing and as such there was no need to apply the criteria suggested by the Claimants.
9. They further aver that they remain committed to paying the Claimants all their benefits as indicated in the notice issued to them as soon as the amounts are available to it and admits to be indebted to the Claimants only to the extent highlighted in the notice of redundancy issued to the Claimants which they intend to comply with and ask the Court to dismiss the claim with costs to the Respondent.
10. The Claimants replied to the Response to Amended Claim where they averred that they had worked for the Respondent for periods ranging from 5 to 25 years under the same employment number and contracts of employment issued by the Respondent and their contacts

have never been terminated before, on or after the receivership period, they also state that the Respondent did not have a genuine redundancy situation as it continued employing new staff for the Claimant's positions.

11. They further aver that the Respondent has never bothered to address substantive issues such as payment of terminal dues and issuance of certificate of service and hence they are unable to meet their financial obligations as they are out of employment. They therefore urge the Court to strike the Respondents response out with costs and judgement be entered as prayed for them in the Amended Statement of Claim.

Submissions

12. The Claimants filed their submissions where they submit that the employer ought to notify the employee, the union and the labour officer in charge of the area where the employee is employed, of the intended redundancy and of the reasons for and the extent of the redundancy hence the Claimants should have been notified in good time to respond which the Respondent failed to do which was in bad faith and unfair which means that any resultant redundancy process without compliance with the law is unprocedural and a breach to the Employment contract. They relied on the case of **Kudheihia Workers Vs The Aga Khan University Hospital Nairobi [2015] Eklr**. This means that the Respondent in this case wrongfully and unfairly dismissed the claimants without prior notice or consultation with the affected employees in contravention of section 40 [1] [b] of the Employment Act.

13. The Claimant also submit that the Respondent did not pay their terminal dues including gratuity upon termination of their service. This also includes house allowance which they are entitled to and ask the court to find it prudent that the Respondent be ordered to pay the accrued house allowances together with interest at the rate of this Court.

14. The Claimants further aver that the decision made by the employer was an issue as they were recruiting new employees to work in some of its operational branches meaning that the redundancy was not genuine. They therefore state that it would be in the interest of justice that the Court find for the Claimant in terms of their prayers in the statement of claim.

15. The Respondent filed their submissions where they submit that they issued the termination notices on the basis that the Claimants had become redundant following the closure of their TAJ MALL Branch where all the Claimants were serving in the management team.

16. They further state that they have made considerate efforts to ensure they comply with the provisions of Section 40(1) of the Employment Act and state that the issues were substantially addressed by this Court's ruling delivered on 19th December 2016 where the Court found that indeed the Respondent had complied with the provisions of Section 40 (1) (c) and (d) of the Employment Act.

17. They further submit that the Claimant's principle of last in first out does not apply in the case as the branch which all the Claimants were stationed was closed down and all the employees could not be reinstated or deployed to other branches as the said positions had already been occupied even before the Claimants were declared redundant. On the issue of house allowance, the Respondent aver that all the Claimant's employment contracts do not make provisions of house allowance hence they are not entitled to it as they had stated in the amended statement of claim.

18. In conclusion, they state that the claimants have not proved their case and as such the same should be dismissed.

19. I have examined the evidence and submissions of both parties. I will start by putting the record straight that contrary to the submissions of the Respondent, in its ruling of 19.12.2016, this Court at paragraph 17 of its ruling indicated that it's not apparent whether the Respondents adhered to provisions of Section 4(1) (c) and (d) herein....".

20. Thus the issue of whether the Respondents complied with the law in issuance of redundancy notices must therefore be determined.

21. As indicated by the Claimants and from their notices of redundancy, the Claimants were served with redundancy notices indicating that the redundancy would be effective 1 month later. However, the Claimants were asked not to report back to work the following day. The Claimants were expected to be on duty until the 1 month expected as notice but that was never to be. In essence the "notice" envisaged in the law was cosmetic. Why do I say so?. Section 40 of the Employment Act states as follows:-

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 a 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.*

22. The above parameters must be met if a redundancy situation exists and if the redundancy has to be lawful.

23. In the Court of Appeal **case Civil Appeal No. 46 of 2013 Kenya Airways Limited vs Aviation and Allied Workers Union Kenya and Others**, the Learned Judge discussed issues of redundancy at length. The Court found that an employer has a right to declare redundancies where it is convinced that circumstances requiring redundancies have arisen”

24. The Claimants have submitted that there was no redundancy situation. I had however made a finding in this matter in my ruling of 19.12.2016 that it was a matter of public notoriety that the Respondent was struggling in the business and as such a redundancy situation did exist.

25. In this case then, this Court cannot stand in the way of the Respondent in their decision to declare the Claimant's redundant. The only issue for the Court to determine is whether the redundancy was carried in a legal and lawful manner.

26. In the above case, the learned JA Maraga, (as he then was) when considering the notice period required before redundancy had this to say:-

“49 I agree with Mr. Mwenesi that both the notices themselves and their duration of 30 days under this provision are mandatory. Section 40(1) of our Employment Act does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made. On my part I find the requirement of consultation provided for in our law and implicit in the Employment Act itself.

50. As I have said, besides this Convention, the requirement of consultation is implicit in the principles of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the Labour Relations Act, 2007, which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultation is implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st Respondent that consultation is an imperative requirement under our law.....”

27. In the current case, there is no indication that consultation did take place. Although a 'notice' was given, the same was given to the employees who were asked not to come to work the following day. This notice period as stated in the above decision of **Kenya Airways** (supra), notice is not meant to be for information alone. It is meant to prepare the employees for the redundancy and even give them an opportunity to seek for alternative employment where the redundancy is inevitable.

28. In this case therefore, it is my finding that the manner in which the redundancy was effected fell below the requirements of the law and was therefore an unfair redundancy.

29. The Respondents have admitted their willingness to pay the Claimants their terminal dues when their finances improve being as follows:-

1. *1 month salary in lieu of notice for redundancy*

2. *1 month salary in lieu of notice.*

3. *Salary earned.*

4. *Accrued leave.*

5. *Accrued off day.*

6. *Accrued overtime.*

7. *20 days severance pay for each completed year of service.*

8. Pension contribution as per the Retirement Benefits Authority (RBA) Regulation.

9. Any payments that may have accrued.

10. Certificate of Service.

30. It is my finding that each of the Claimants are entitled to their benefits as enumerated above. In addition however the Claimants are each entitled to payment of 6 months salary as damages for unlawful redundancy. I therefore find for each Claimant as follows:-

1. Hamisi Mwinyi Nyerere

1. 1 months salary in lieu of notice = 66,370/=.

2. Salary for March to May 2016 not paid = 199,110/=.

3. 6 months salary as damages for unlawful termination = $6 \times 66,370 = 398,220/=$.

4. Severance pay equivalent to 20 days salary for each year worked = $20/30 \times 13 \times 66,370/= = 578,082.7$

TOTAL = 1,241,783/=

5. Certificate of Service

2. John Wangai Nderitu

1. 1 months salary in lieu of notice = 53,408/=.

2. Salary unpaid for March to May 2016 = 160,224/=.

3. 6 months salary as damages for unfair termination = $6 \times 53,408=320,448/=$.

4. Severance pay equivalent to 20 days salary for each year worked = $20/30 \times 9 \times 53,408= 322,050/=$

TOTAL = 856,130.24/=

5. Issuance Certificate of Service

3. Francis Musyoki Mutwita

1. 1 months salary in lieu of notice = 57,714/=.

2. Salary for March to May 2016 = 173,142/=.

3. Service pay for 22 days at 20 days for each year worked = $20/30 \times 22 \times 57,714 = 850,704.36/=$.

4. 6 months salary as damages for unfair redundancy = $6 \times 57,714=346,284/=$.

TOTAL = 1,427,844/=

5. Issuance of Certificate of Service

4. Emily Wambui Njogu

1. 1 months salary in lieu of notice = 53,408/=.

2. Salary unpaid for March to May 2016 = 160,224/=.

3. Severance pay for 9 years at 20 days for each year worked = $20/30 \times 9 \times 53,408= 322,050/=$.

4. 6 months salary as damages for unfair redundancy = $6 \times 53,408=320,448/=$.

TOTAL = 856,130/=

5. Issuance of Certificate of Service

5. Samson Mungai Muchoki

1. 1 months salary in lieu of notice = 66,485/=.

2. Salary for April to May 2016 = 132,970/=.

3. 6 months salary as damages for unfair redundancy = 6 x 66,485 = 398,910/=.

4. Severance pay for 20 days for each year worked = 24 years = $20/30 \times 24 \times 66,485 = 1,069,078.8$ /=.

TOTAL = 1,667,443.8/=

5. Issuance of Certificate of Service

6. James Taabu Owiti

1. 1 months salary in lieu of notice = 66,370/=.

2. Salary for April to May 2016 = 132,740/=.

3. 6 months salary as damages for unfair redundancy = 6 x 66,370=398,220/=.

4. Severance pay at 20 days salary for each year worked = $20/30 \times 22 \times 66,370 \times 15 = 667,019$ /=.

TOTAL = 1,264,348.5/=

5. Issuance of Certificate of Service

7. Rachel Ndunge Anne

1. 1 months salary in lieu of notice = 44,461/=.

2. Salary for March to May 2016 = 133,383/=.

3. 6 months salary for unfair termination = 6 x 44,461=266,766/=.

4. Severance pay at 20 days salary for each completed year of service = $20/30 \times 7 \times 44,461 = 208,522.09$ /=.

TOTAL = 653,132.09/=

5. Issuance of Certificate of Service

8. Doreen Ateyu Akhaule

1. 1 months salary in lieu of notice = 40,729/=.

2. Salary for March to May 2016 = 122,187/=.

3. 6 months salary as damages for unfair termination = 6 x 40,729 = 244,374/=.

4. Severance pay at 20 days salary for each year of service = $20/30 \times 10 \times 40,729 = 272,884.3$ /=.

TOTAL =680,174.3/=

5. Issuance of Certificate of Service

9. Francis Muturi John

1. 1 months salary in lieu of notice = 57,710/=.

2. Salary unpaid for March to May 2016 = 173,130/=.

3. 6 months salary as damages for unfair redundancy = 6 x 57,710=346,260/=.

4. Severance pay for 20 years at 20 days for each year of service = $20/30 \times 20 \times 57,710 = 773,314/=$.

TOTAL = 1,350,414/=

5. Issuance of Certificate of Service

10. Rose Adhiambo Owino

1. 1 months salary in lieu of notice = 40,729/=.

2. Salary for March to May 2016 = 122,187/=.

3. 6 months salary as damages for unfair redundancy = $6 \times 40,729 = 244,374/=$.

4. Severance pay at 20 days salary for each year of service = $20/30 \times 19 \times 40,729 = 515,901/=$.

TOTAL = 923,191/=.

5. Issuance of Certificate of Service

11. Winnie Nkirote Murungi

1. 1 months salary in lieu of notice = 52,600/=.

2. Salary for April to May 2016 = 105,200/=

3. 6 months salary as damages for unfair redundancy = $6 \times 52,600 = 315,600/=$.

4. Severance pay at 20 days salary for each year worked = $20/30 \times 52,600 \times 9 = 317,178$

TOTAL = 790,578/=

5. Issuance of Certificate of Service

12. Catherine Wanjiru Munene

1. 1 months salary in lieu of notice = 44,310/=.

2. Salary for April to May 2016 = 132,930/=.

3. 6 months salary as damages for unfair redundancy = $6 \times 44,310 = 265,860/=$.

4. Severance pay at 20 days salary for each completed year of service = $20/30 \times 9 \times 44,310 = 267,189.3$.

TOTAL = 710,289.3/=

5. Issuance of Certificate of Service

13. Susan Wanja Mwitwari

1. 1 months salary in lieu of notice = 40,729/=.

2. Salary for March to May 2016 = 122,187/=

3. 6 months salary as damages for unfair redundancy = $6 \times 40,729 = 244,374/=$

4. Severance pay at 20 days salary for each year worked = $20/30 \times 40,729 \times 5 = 136,442.15$

TOTAL = 543,730.15/=

5. Issuance of Certificate of Service

14. Benedict Kitavi Musau

1. 1 months salary in lieu of notice = 37,800/=.
2. Salary for March to May 2016 = 113,400/=.
3. 6 months salary as damages for unfair termination = $6 \times 37,800 = 226,800$ /=.
4. Severance pay at 20 days salary for each year worked = $20/30 \times 37,800 \times 6 = 151,956$ /=.

TOTAL = 529,956/=

5. Issuance of Certificate of Service

15. Lucy Kasyoka Mutua

1. 1 months salary in lieu of notice = 37,800/=.
2. Salary for March to May 2016 = 113,400/=.
3. 6 months salary as damages for unfair redundancy = $6 \times 37,800 = 226,800$ /=.
4. Severance pay at 20 days salary for each year worked = $20/30 \times 37,800 \times 5 = 126,000$ /=.

TOTAL = 503,000/=

5. Issuance of Certificate of Service

16. James Njau Mutua

1. 1 months salary in lieu of notice = 53,408/=.
2. Salary for April to June 2016 = 160,224/=
3. 6 months salary as damages for unfair redundancy = $6 \times 53,408 = 320,448$ /=
4. Severance pay at 20 days salary for each year worked = $20/30 \times 40,729 \times 17 = 608,317.12$ /=

TOTAL = 1,142,397.12/=

5. Issuance of Certificate of Service

17. Mary Kanini Kyenze

1. 1 months salary in lieu of notice = 53,408/=.
2. Salary unpaid for April to June 2016 = 160,224/=.
3. 6 months salary as damages for unlawful redundancy = $6 \times 53,408 = 320,448$ /=.
4. Severance pay at 20 days salary for each year worked = $20/30 \times 16 \times 53,408 = 572,533.76$ /=

TOTAL = 1,106,613.76/=

5. Issuance of Certificate of Service

18. Caroline Karambu Kinugu

1. 1 months salary in lieu of notice = 40,729/=.
2. Salary unpaid for April to June 2016 = 122,187/=.
3. 6 months salary as damages for unfair redundancy = $6 \times 40,729 = 244,374$ /=
4. Severance pay for 20 days salary for each completed year of service = $20/30 \times 40,729 \times 8 = 218,307.44$ /=

TOTAL = 625,597.44

5. Issuance of Certificate of Service

19. Ambrose Mituki Mutua

1. 1 months salary in lieu of notice = 58,985/=.

2. Salary unpaid for April to June 2016 = 176,955/=.

3. 6 months salary as damages for unlawful redundancy = 6 x 58,985=353,910/=

4. Severance pay at 20 days salary for each year worked = 20/30 x 58,985 x 8 = 316,159.6.

TOTAL = 906,009.6/=

5. Issuance of Certificate of Service

31. Other than the above computation, the parties are free to compute any leave days pending and pension contribution and these be made part of this judgement as admitted by the Respondents in their redundancy notice issued to the Claimants.

32. The Respondents will pay costs of this claim and interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 11th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Agina for Respondent – Present

Claimants – Absent