



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 230 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF DOMESTIC,

HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS

AND ALLIED WORKERS (KUDHEIHA).....CLAIMANT

VERSUS

BOARD OF GOVERNORS,

SIGALAGALA POLYTECHNIC.....RESPONDENT

JUDGMENT

Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers is a trade union registered under the Labour Relations Act to represent workers in the sectors covered by its constitution, among them educational institutions.

The respondent is the Board of Governors of Sigalagala Polytechnic, a public educational institution registered under the technical and Vocational Education and Training Act (TVET) under the Ministry of Education, Science and Technology.

The claimant filed the present suit on behalf of its members Antony A. Muteshi, a headman, Eric Ingoi Isalambo, a librarian and Patrick Shitsama Ichingwah, a security officer whom the claimant avers were declared redundant and/or terminated unfairly.

The claimant was on 5th February 2016 served with a letter from the respondent's Mushiangubu Campus informing the claimant that it intended to lay off four (4) employees due to low student enrolment. The names of the four employees were not disclosed.

On 13th April 2016 the campus issued letters of redundancy to four employees who were by the letters informed that the redundancy was to take effect immediately. The claimant avers that the redundancy was unlawful. It reported a dispute to the County Labour Officer but only the case of one grievant was sorted out leaving the case of the three grievants herein unresolved.

The claimant avers that the grievants were originally working at the main campus, that eight employees among them the grievants were transferred to Mushiangubu Campus but later four were transferred back to the main campus while four were declared redundant.

The claimant avers that the selection for redundancy was opaque and discriminatory, therefore in contravention of Section 5 of the Employment Act. It is further the claimant's averment that the redundancy did not comply with Section 40 of the Employment Act and is thus unlawful. It is further the claimant's averment that it was never invited to discuss the terms of the redundancy nor was the shop floor union officials invited to discuss the same.

The claimant prays for reinstatement of the grievants or in the alternative payment of the following –

1. 12 months compensation for unlawful loss of employment under provisions of Section 15 of Labour Institutions Act 2007.
2. Accrued underpayments of wages, unpaid and underpaid house allowance.
3. Severance pay at the rate of 15 days for the years worked.

4. Pay in lieu of notice.
5. Days worked in the month of April.
6. And accrued leave days if any
7. The respondent do bear costs of this suit.
8. The court issue and order any award it deem fit, just and expedient.

The claim was filed together with an application seeking the following orders–

1. The application be certified urgent and heard ex-parte in the first instance.
2. The court to issue temporary stay orders maintaining status quo and restraining the respondent from permanently executing the intended termination on account of redundancy until this matter is fully heard and determined.
3. The court to issue temporary stay orders restraining the respondent from conducting further interviews in its institution (Sigalagala Polytechnic) alongside its satellite Town Campus on positions touching on the posts previously held by the three (3) affected employees until this matter is fully heard and determined.
4. The court to issue and award any other better relief it may deem just, fair and expedient.
5. That the costs of this application be borne by the respondent.

The respondent filed a replying affidavit of BERNADETTE CANUTE the Chief Principal of Sigalagala Technical Training Institute who avers that she was authorised by the Board of Governors to swear the affidavit sworn on 12th October 2016. The respondent filed a further affidavit of FRED CARTER, Human Resource Manager of Sigalagala National Polytechnic.

In the affidavits it is admitted that the grievants were employees of the respondent who were deployed at Mushaingubu Campus that the campus closed down due to low student enrolment leading to unsustainability of the campus, that prior to closing down all the employees were called to a meeting where they were informed of the financial strain of the respondent and the impending decision to close down the campus. It is further deposed that the respondent and County Labour Officer were notified in accordance with the law and all procedures complied with.

The replying affidavits were deemed to be the defence of the respondent. The case was disposed of by way of written submissions.

Claimant's Submissions

It is the submission of the claimant that for redundancy to be lawful the reason must be valid and the exercise must be guided by the provision of Section 40 of the Employment Act. It is submitted that although the respondent had valid reason to declare the employees redundant and the letter dated 5th February 2016 notified the claimant of the impending closure of Mushiangubu Campus, no reason was advanced for the closure and no date was given for the closure. It is submitted that the letter did not qualify as notice under Section 40(1) of the Act.

It is the claimant's submission that no notice was given to the labour officer.

The claimant prays for remedies as prayed.

Respondent's Submission

It is submitted for the respondent that the campus was closed down since the respondent could not sustain its management due to low student enrolment, that prior to closing down the affected employees were called for a meeting and informed of the financial strain and the impending decision to close down the campus and further that the claimant and labour officer were informed.

Determination

I have considered the pleadings and submission of parties. The issue arising for determination is whether or not the redundancy was unlawful.

Section 40(1) of the Employment Act sets out the procedure for redundancy as follows –

40. Termination on account of redundancy

(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.

The claimant herein admits that is was notified of the redundancy by letter dated 5th February 2016, a copy of which is appended as appendix KW4 in the claimant's bundle of documents. A similar letter was issued to the County Labour Officer setting out the particulars of the four employees to be declared redundant and the reasons for redundancy.

Upon being declared redundant the grievants were paid for days worked, one month's salary in lieu of notice, severance pay at the rate of 15 days per year worked and any accrued leave days.

The claimant's averments are therefore baseless at it was informed on 5th February of the full extent and reasons for redundancy and the redundancy was carried out more than two months after the notice.

The law does not expressly provide for the personal notification of the employees to be declared redundant where the union has been notified. In this case it is not denied that the employees were notified in a meeting well in advance of the actual redundancy.

I find no merit in the claim of the union with the result that it is dismissed with no orders for costs.

DATED AND SIGNED AT NAIROBI ON THIS 21ST DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE