**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1766 OF 2016**

**SAMWEL MWINAMI.....CLAIMANT**

**- VERSUS -**

**SOCIAL SERVICES LEAGUE M.P.SHAH HOSPITAL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 6th July, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 31.08.2016 through Nchogu, Omwanza & Nyasimi Advocates. The amended memorandum of claim was filed on 13.04.2018. The claimant prayed for judgment against the respondent for:

a) A declaration that the termination of the claimant by the respondent on grounds of redundancy is null and void.

b) Reinstatement or in alternative:

c) 8 months' pay in lieu of notice Kshs.499, 696.00.

d) Damages or compensation under section 49 of the Employment Act for unfair termination (62, 462 x 12) Kshs.749, 544.00.

e) Outstanding 60 leave days Kshs. 124, 924.00.

f) Outstanding travel allowance for 2015, 2016, 2017 and 2018 Kshs.22, 000.00.

g) Severance pay at 19(20) days pay for each year worked for 33.5 years Kshs.1, 394, 984.70.

h) Compensation under clause 18(c) of the collective bargaining agreement dated 23.04.2014 and 25.01.2017 Kshs.1, 046, 238.50.

i) A declaration that the retirement notice dated 21.11.2017 is null and void.

j) A declaration that right retirement age for the claimant is 60 years as provided for in the respondent's employee handbook.

The claimant's case is that he was employed by the respondent on 01.02.1985 as a physiotherapy assistant. The claimant was a member of the Kenya Union of Domestic, Hotels, Educational, Institutions and Allied Workers (KUDHEIAW) which had concluded the relevant recognition and collective agreements with the respondent.

By the letter dated 26.07.2016 the respondent notified the claimant's union and the District Labour Officer as follows:

"**RE: REDUNDANCY – SAMUEL M. MWINAMI**

**In accordance with Section 40(1) of the Employment Act, 2007 'Termination on account of redundancy' and Clause 15, 'Redundancy' of our current Collective Bargaining Agreement, we wish to notify you of our intention to declare the above mentioned redundant since the position of Physiotherapy Attendant is no longer required in the organisation. This is occasioned by the fact that the Hospital wants to improve the efficiency, safety and quality of services being offered to our patients by use of qualified, certified and skilled Physiotherapists. In his place, there are trained and certified medical staffs to assist Physiotherapists when needed.**

**Physiotherapy Department has one Physiotherapy Attendant and therefore Samuel will be the only one declared redundant.**

**As such we intent to declare him redundant effective 31st August, 2016 which is sufficient notice to meet the 1 month notice stipulated in the Employment Act, 2007 and the currently operative CBA.**

**The employee has served the Institution for thirty one (31) years, five(5) months and will therefore receive the following on redundancy:**

- **8 months salary in lieu of notice as per section 18(a) of the CBA as currently operative.**
- **Severance pay at the rate of nineteen days for each completed year of service per section 15 (d) of the CBA as currently operative.**
- **Salary up to 31st August, 2016.**
- **Encashment of 40.5 accrued and unutilised leave days.**
- **Leave Travel Alloawance for the year 2016.**
- **Entitled to gratuity vide clause 21 of the CBA at page 15.**

**The above payments will be processed less statutory deductions and any monies owed to the Hospital.**

**Yours faithfully,**

**Signed**

**FALGUNI CHUDASAMA**

**HEAD OF HUMAN RESOURCES**"

The claimant's case is that the redundancy was unfair due to the following grounds:

a) Clause 15 of the CBA of 23.04.2014 provided that the respondent and the union meet within 30 days from the date the union was informed about the redundancy but such meeting never took place. The union and the respondent met on 29.08.2016 and they failed to agree on whether the redundancy was justifiable or not and the meeting ended without a resolution. On that date the respondent's human resource officer summoned the claimant and gave him the termination letter and never to appear at the respondent's premises. The claimant declined to receive the letter and demanded the same be channelled through his union. It is his case that the employment ended on that 29.08.2016 prior to the scheduled date of 31.08.2016.

b) The reasons for redundancy were not plausible and were a smoke screen to cover the respondent's intention to get rid of the claimant due to his work as a shop steward in the interest of the respondent's unionisable staff. Further the claimant had not been given a chance to improve his skills. His long experience of over 31 years was ignored. The claimant was not paid his terminal dues.

c) Under the respondent's Employee Handbook, the claimant was required and legitimately expected to retire from employment on attaining 60 years of age and he would attain such age on 20.07.2012.

d) By the letter of 21.11.2017 the respondent has issued the claimant with a notice of retirement requiring him to retire on 20.07.2018.

The response to the claim was filed on 13.06.2017 and an amended memorandum of defence and counterclaim was filed on 17.04.2018 through the Federation of Kenya Employers. The respondent prayed that the claimant's suit be dismissed with costs and the Kshs. 1, 029, 600.00 already paid to the claimant as at the date of the amended defence and counterclaim and any further amounts paid to the claimant in form of salaries up to the determination of the suit. The respondent's case is as follows:

a) The respondent employed the claimant as an orderly on 01.02.1985 and later on 05.05.1995 appointed the claimant as a Physiotherapist Assistant or Attendant. As at the end of August 2016, the claimant earned Kshs. 51, 480.00.

b) The termination of the claimant's employment was justifiable and lawful as it was in accordance with section 40 of the Employment Act, 2007 and clause 15(a) of the Collective Bargaining Agreement.

c) By letter of 26.07.2016 the respondent notified the claimant's trade union and the area labour officer of its intention to declare the claimant redundant because the position of Physiotherapy Attendant or Assistant was no longer required and was thereby abolished by the respondent. Clause 15(a) of the CBA provided that the respondent and the union meet within 30 days from the date the union is informed of the reasons and extent of the redundancy to discuss the matter. The parties, by agreement, met belatedly on 29.08.2016 and discussed the matter. At the meeting, the respondent explained to the union that the Medical Director had in writing (on 06.06.2016) required the respondent to become compliant with the laid down regulations for physiotherapy practice. The

position was that the claimant as a Physiotherapy Attendant or Assistant could not work in absence of a qualified Physiotherapist. The claimant lacked qualifications of such Physiotherapist and could therefore not work on his own as per regulations. The respondent's board approved the abolition of the office the claimant held in circumstances whereby the claimant also earned double as much as qualified Physiotherapists earned.

d) The claimant was not targeted because he was a member of the trade union or for being a shop steward. In any event the claimant had been a union member since 1985 and had never suffered discrimination or adverse targeting.

e) On 29.08.2016, the respondent issued the claimant with a termination letter on account of redundancy dated 29.08.2016 in presence of the works Committee and human resource officer (copied to the union and the area labour officer) but the claimant declined to acknowledge receipt of the same. The redundancy package was computed per section 40 of the Act and the CBA making Kshs.955, 370.17 less statutory deductions.

f) The relevant certificate of service was prepared. The claimant opted to file the present suit.

g) The claimant is a member of the trade union and under the CBA he was due to retire at 57 years' of age.

h) There is no agreement that the claimant retires at the age of 60 years.

i) The claimant was retired on 31.08.2016 and he has not been working but by virtue of the interim Court orders, he has been earning a salary.

j) The claimant was indeed issued with a notice to retire as provided under the CBA and he was to retire upon attaining 57 years of age.

The parties testified to support their respective cases and filed final submissions. The Court has considered the material on record and makes the following findings on the matter in dispute.

**First**, the Court finds that the reason for the redundancy was valid and genuine. The respondent has proved, as per section 43 and 47 (5) of the Employment Act, 2007. The respondent has established that the claimant did not have the qualifications for a physiotherapist and that the claimant earned about the same pay or more pay than that given to qualified physiotherapists in the respondent's service – yet he could not work independently or alone as the qualified physiotherapists could do. Further it has been shown that the respondent was required to professionalize the physiotherapy service. On the other hand, the claimant did not show that he had been adversely targeted for being a member of the union or a shop steward. The notes of the meeting held on 29.08.2016 between the union and the respondent did not mention a grievance that the claimant was being targeted because of his union activities and the Court finds that there was no such adverse targeting and for a long time including in 2012 he had been a shop steward – and despite a misconduct in 2012, his apology had been accepted by the respondent and he continued in employment. Thus, the respondent has established that the reason for the redundancy was to achieve better economy and efficiency in service delivery and that reason is found to have been valid as at the time of termination. Whereas the office of Physiotherapy Assistant or Attendant may not have been abolished as submitted for the claimant, the respondent has established that towards better economy, efficiency and effective service delivery, it was necessary to render the claimant's service redundant.

The Court has considered the definition of "**redundancy**" in section 2 of the Act thus, 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. The Court returns that abolition of office is one instance whereby the employee may be rendered redundant and it may be independent or in merger with the loss of employment on account of redundancy due to the employer's need for better economy, efficiency or effectiveness in service delivery. Thus, in appropriate cases like the instant case, the Court holds that loss of employment on account of employer's need for better economy, efficiency or effectiveness in service delivery is a valid and genuine reason for redundancy even in absence of abolition of the office held by the employee.

**Second** is whether the procedure for the redundancy was fair. There is no dispute that the respondent served the one month notice upon the area labour officer and the trade union as per section 40 of the Act. The evidence is also clear that the union was notified by the letter of 26. 07.2016 but at the instance of the respondent the union and the respondent met on 29.08.2016 to discuss the matter and which was outside the 30 days as agreed under clause 15 of the CBA. To that extent, the respondent breached the timelines. The Court finds that the respondent acted unlawfully when on 29.08.2016 it set out to end the claimant's employment immediately prior to the notified 31.08.2016. Taking those two considerations into account, the Court returns that the termination was without due process.

**Third**, the Court returns as follows on the remedies prayed for the parties:

a) The claimant is entitled to the declaration that the termination of the claimant by the respondent on grounds of redundancy was unfair on account of the belated discussion of the matter and the premature termination on 29.08.2016. The Court considers that the effect of the unfairness was not that the termination was null and void as prayed for the claimant but that the claimant would be justified to seek remedies as prescribed and available in law.

b) The claimant has prayed for reinstatement. The respondent has established that the claimant did not have the qualifications for physiotherapists under the prevailing regulations for professional delivery of the relevant service. It would also be burdensome or oppressive for the respondent to be required to retain the claimant in service in circumstances whereby the claimant is earning similar or more pay than qualified physiotherapists. The claimant admitted that he did not have the requisite formal qualifications for a physiotherapist. The respondent's further case is that the agreed retirement age is 57 years and the claimant is due to retire in November 2018 upon attaining that age. It was not shown how the retirement age of 60 years in the respondent's Employee

Handbook would apply to the claimant. In such circumstances, the Court returns that the remedy of reinstatement will not be desirable.

c) The claimant prays for 8 months' pay in lieu of notice Kshs.499, 696.00 (at Kshs.62, 462.00 current monthly pay in view of the interim orders). The respondent submits that the claimant was entitled to Kshs.411, 840.00 notice pay upon being declared at the prevailing monthly pay as at the time of the termination. On 31.08.2016 the Court ordered that the claimant was reinstated pending the hearing of the suit and the claimant has continued to earn pending determination of the suit but without working. The respondent's evidence was that there was no post to hold the claimant against as his post of physiotherapy attendant or assistant had been abolished and previously he had been a cleaner yet the respondent had since outsourced the cleaning services. The parties agreed on notice pay and redundancy was the condition precedent to such payment. The Court returns that it will not rewrite the parties' own agreement. The claimant is awarded the notice pay at **Kshs. 411, 840.00** as was initially prayed for and as per agreement on redundancy.

d) The claimant has prayed for damages or compensation under section 49 of the Employment Act for unfair termination (62, 462 x 12) Kshs.749, 544.00. The Court finds that the claim can only be based on salary as at the time of termination and not the present pay based on the prevailing interim orders. The Court has considered that the premature termination and the belated discussion of the matter as the procedural impropriety were effectively purged when the Court made the interim orders. The claimant has been paid pursuant to the interim orders throughout the period as ordered by the Court. The Court finds that the procedural failures have not been shown to have occasioned manifest injustice. The Court has also considered the payments made in view of the interim orders. Therefore, the Court returns that whereas the termination was unfair for the stated reasons, the claimant will nevertheless not be awarded compensation under section 49 of the Act.

e) The claimant has prayed for outstanding 60 leave days Kshs. 124, 924.00. As at termination it is not in dispute that the claimant had 40.5 outstanding leave days being Kshs.69, 498.00 as prayed for in the initial statement of claim. In the amended claim the claimant has added a claim of days allegedly accrued in view of the interim Court order. The Court finds that the claimant is entitled to the **Kshs. 69, 498.00** as at termination and as per section 40 of the Act and the agreement per CBA and which the Court will not re-enact or rewrite. As submitted for the respondent, for the period under the interim order the claimant earned but did not work and the Court finds that no leave was earned in terms of section 28 of the Act and as mitigation in favour of the respondent, the same will be declined.

f) The claimant has prayed for outstanding travel allowance for 2015, 2016, 2017 and 2018 at Kshs.22, 000.00. The Court finds that for the period after termination the claimant did not travel for annual leave and the prayer will fail. The Court finds that for the period prior to termination the claimant has been awarded pay in lieu of untaken leave per agreement and statutory provisions and the leave travel allowance as prayed has not been justified.

g) The claimant prays for severance pay at 19(20) days pay for each year worked for 33.5 years Kshs.1, 394, 984.70. In the initial claim the claimant had prayed for severance pay at 19 days for each of the 31 years served making Kshs. 1, 010, and 724.00. As submitted for both parties, redundancy pay at 15 days per completed year of service is available under section 40 (1) (g) of the Act. The claimant was entitled to severance pay under clause 15 (d) of the CBA providing for 19 days for each completed year of service. The claimant served for 31.5 years making 31 completed years. Under the heading the claimant is awarded **Kshs. 1, 010, 724.00**.

h) The claimant prayed for compensation under clause 18(c) of the collective bargaining agreement dated 23.04.2014 and 25.01.2017 Kshs.1, 046, 238.50. The clause provides thus, "**18. (c) When either party terminates the services for reasons other than gross misconduct or redundancy and where the employee has served the League for a period of five years and over such employee shall be paid compensation at the rate of 15 days pay for each completed year of service. This shall be in addition to his/her other entitlements (if any) provided for in this agreement."** The Court returns that the provision clearly excludes termination on account of redundancy like in the instant case and the prayer will therefore fail.

i) The claimant prayed for a declaration that the retirement notice dated 21.11.2017 requiring him to retire on 20.07.2018 is null and void. The Court finds that the interim order having reinstated the claimant pending the hearing, the reinstatement would not go beyond the agreed normal retirement age. The normal retirement age was 57 years under the CBA. The Court returns that the contractual retirement age was fast approaching and the suit had not been determined so that the respondent was entitled to mitigate its situation by invoking the agreed retirement procedure. Thus, the Court returns that the retirement notice was not illegal or did not violate the interim order. The prayer will therefore fail.

j) The claimant prayed for a declaration that right retirement age for the claimant is 60 years as provided for in the respondent's employee handbook. The Court has already found that the agreed retirement age in the CBA was 57 years of age and the claimant has not showed how the provisions of the handbook would become applicable to his retirement age. Further, the Court finds that the dispute was primarily about the redundancy and the issue of the normal or contractual retirement age appears to have been an afterthought and an unfair effort by the claimant to stretch the application of the interim orders beyond the orders' legitimate scope. The prayer will therefore fail.

The respondent prayed that the claimant's suit be dismissed with costs and the Kshs. 1, 029, 600.00 already paid to the claimant as at the date of the amended defence and counterclaim and any further amounts paid to the claimant in form of salaries up to the determination of the suit. As to dismissal of the claimant's suit, the Court has already made some affirmative findings in favour of the claimant. As for the counterclaim of Kshs. 1, 029, 600.00 already paid to the claimant as at the date of the amended defence and counterclaim and any further amounts paid to the claimant in form of salaries up to the determination of the suit, it is submitted for the respondent that the interim orders were given on 31.08.2016 to reinstate the claimant despite the provisions of section 12(3) (viii) of the employment and Labour Relations Act, Rule 17(10) of the Employment and Labour Relations Court ( Procedure) Rules, 2016. The interim orders were as follows:

1. That this application be and is hereby certified urgent.

2. That in the interim and pending service upon the respondent for hearing, the parties shall maintain the status quo and the respondent, its members, employees and/or agents be and is hereby restrained from effecting the decision to terminate the claimant on grounds of redundancy.

3. That in the interim and pending the service upon the respondent for hearing, the parties shall maintain status quo and the respondent, its members, employees and/or agents be and is hereby ordered to reinstate the applicant/claimant to his position as a Physiotherapy Assistant with full payment and without loss of benefits.

4. That the notice dated 26th July 2016 be and is hereby lifted.

5. That the respondent to be served who shall reply for hearing on 8th September, 2016.

The respondent's submission is that it applied to set aside the orders it has submited were adverse and as per the application dated 24.10.2016, but, the Court declined the application and directed the respondent to file submissions with respect to the claimant's application dated 31.08.2016. The Court then directed the hearing of the main suit. The respondent submitted that the Court should find that the redundancy was fair and in accordance with the law. The respondent prayed for judgment in favour of the respondent for salaries paid pending the hearing and determination of the suit standing at **Kshs. 1, 238, 950.00**. It was further submitted that as at time of termination the redundancy package payable was Kshs. 1, 395, 171.17 and the respondent was willing to set off the retirement package against the salaries paid under the interim orders and to make good any outstanding amounts.

There were no submissions made for the claimant with respect to the counterclaim.

The money as counterclaimed was paid in line with the interim court order on record. The Court declined to set aside the interim orders as per the ruling delivered on 08.12.2016. The Court considers that the refusal to set aside the interim orders could only be challenged in an appropriate appeal or application for review and which are obviously not the subject of this judgment. The judgment has earlier considered the mitigation the paid salaries have had on the possible awards to the claimant as prayed for. The Court returns that such consideration is sufficient justice in the case. In so far as the interim orders were in place, the Court considers that nothing seriously prevented the respondent from assigning the claimant such appropriate work pending the lapsing of the interim orders and thereby to further mitigate its losses. To that extent the respondent failed to mitigate its losses and in view of the pending interim orders.

The Court has carefully revisited the record. The claimant does not deny to have earned in line with the interim orders and without working for the respondent. The Court has not seen the defence or response to the counterclaim. The claimant has made no submissions to oppose the counterclaim. Towards balancing justice, the Court sees no bar to granting the award and set off as prayed for as is hereby granted. The claimant has been awarded by the judgment **Kshs 1, 492,062.00** less the set off as prayed of **Kshs. 1, 238, 950.00** making a balance of **Kshs. 253, 112.00** payable to the claimant by the respondent.

In consideration of parties' margins of success, each party shall bear own costs of the suit including the counterclaim.

In conclusion, judgment is hereby entered for the claimant against the respondent with orders as follows:

1. The declaration that the termination of the claimant's contract of employment by the respondent on grounds of redundancy was unfair on account of the belated discussion of the matter and the premature termination on 29.08.2016.

2. The respondent to pay the claimant **Kshs. 253, 112.00** by 01.09.2018 failing interest to be payable thereon from the date of the suit till full payment.

3. As the certificate of service is a right per section 51 of the Act the same be delivered by the respondent to the claimant forthwith and not later than 01.08.2018.

4. Each party to bear own costs of the suit including the counterclaim.

**Signed, dated and delivered in court at Nairobi this Friday 6th July, 2018.**

**BYRAM ONGAYA**

**JUDGE**