



**REPUBLIC OF KENYA**

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

**CAUSE NO.159 OF 2017**

**Consolidated with**

**CAUSE NO.160 OF 2017**

**CAUSE NO.161 OF 2017**

**CAUSE NO.162 OF 2017**

[Formerly Cause No.58 of 2017, Cause No. 59 of 2017, & Cause No.160 of 2017 (Nakuru)]

**NATHAN KATHIARI KALOTHI**

**PATRICK NJUGUNA NDUNGU**

**CHRISTOPHER MAKHOHA LUMBASI**

**ISAAC AKUNAVA AKIMANYA.....CLAIMANTS**

**VERSUS**

**KIMILILI HAULIERS LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimants were employed by the respondent on various dates as Drivers; Nathan Kathiari Kalothi was employed in October, 2005. His last salary was Kshs.27, 000.00 per month. Patrick Njuguna Ndungu was employed in July, 2002. The last paid salary was kshs.22, 727.00 per month.

Christopher Lumbasi was employed in July, 2002. The last paid salary was Kshs.26, 000.00 per month.

Isaac Akunava was employed in 1985. The last paid salary was Kshs22, 727.00 per month.

2. On 10th December, 2016 the claimants together with other employees were called by the respondent to the office and informed that their employment with the respondent had been terminated. There was no notice or reasons given for the termination of employment. The claimants who were unionised did not have the benefit of their union being informed or the due process of the law being followed in effecting termination of employment.

3. The claim is that the respondent in terminating employment acted with malice and against the principles of natural justice. They failed to issue notice or give reasons for termination of employment; there was summary action without giving the claimant a fair chance to argue their case and not knowing the reasons as to why employment had abruptly terminated. Such was in violation of on-going contracts of employment and the applicable law.

4. The claimants are seeking for orders that the termination of employment be declared unfair and unprocedural; they be awarded as assessed by the Labour Officer vide letter dated 25th January, 2017, payment of general damages, payment of terminal dues and costs.

6. Nathan Kilothe testified in support of the claims made. Upon employment he served as a driver at various sites in Mombasa and then moved to Eldoret. On 10th December, 2016 while he was at work at 11m the respondent officer came to the work site at the quarry and told he claimants and other employees to stop work. The claimants went to the respondent's office to seek reasons as to this directive. The claimants were informed that their employment had terminated and would be paid their terminal dues.

7. Nathan Kilothe was paid Kshs.115, 057.00 on the basis that he had worked for the respondent for 13 years. This did not address the unpaid allowances over the years. The Certificate of Service had an error that the claimant had been employed from 2009 to 2016 instead of 2005. He thus lost several years of service pay.

Patrick Njuguna was paid Kshs.128, 828.00;

Christopher Lumbasi was paid Kshs.115, 000.00;

Isaac Akimanya was paid Kshs.167, 000.00.

8. The matter was reported to the union, the Kenya Union of Commercial Food & Allied Workers. The union reported to the labour officer and who assessed the claims and made an award which the respondent refused to oblige.

### **Defence**

9. In reply, the respondent's case is that Nathan Kilothe joined the respondent in the year 2009 to December, 2016 and not 2005 to 2016 as alleged and the claims made are without justification. Terminal dues were paid to him at kshs.115, 057.00 in full and final settlement. Terminal of employment was based on valid reasons and therefore lawful following a redundancy.

Patrick Njuguna was employed in 2009 and as alleged to December, 2016;

Christopher Lumbasi was employed in the year 2009 to December, 2016; and

Isaac Akimanya was employed in the year 2004 to December, 2016.

10. The claimants were all called by the respondent and informed of termination of employment due to reduced work in December, 2016. The intended redundancy resulted from lack of work at the respondent's establishment. The respondent had written to the Labour Officer that they would lay off 10 employees in a letter dated 8th December, 2016 and were advice to follow the provisions of section 40 of the Employment Act. On the due date, 10th December, 2016 the Labour Officer Mr Boaz Musandu came to witness payment of terminal dues to the claimants.

Nathan Kathari Kilothe was paid for;

a) 21 leave days Kshs.18,900.00;

b) Service of 112 days Kshs.100,800.00;

c) 30 days' notice Kshs.27,000.00;

d) Days worked Kshs.9,000.00 Total Kshs.155, 700.00

Less statutory deductions Kshs.40, 643.00 Total dues Kshs.115, 057.00

Patrick Njuguna Ndungu was paid;

a) 42 leave days Kshs.37,800.00;

b) Service for 112 days Kshs.100,800.00;

c) 30 dyes notice Kshs.27,000.00;

d) Days worked Kshs.9,000.00 Total Kshs.174, 600.00

Less statutory deductions Kshs.46, 313.00 Total dues Kshs.128, 287.00

Christopher Makokha Lumbasi was paid;

a) 21 leave days Kshs.18,900.00;

b) 112 service days Kshs.100,800.00;

c) 30 days' notice Kshs.27,000.00;

d) Days worked Kshs.9, 000.00. Total dues kshs.155, 700.00

Less statutory deduction Kshs.40, 641.00 Total dues kshs.115, 059.00

Isaac Akunava Akimanya was paid;

a) 21 leave days Kshs.18,900.00;

b) Severance pay of 195 days Kshs.175,100.00;

c) 30 days' notice Kshs.27,000.00

d) Days worked Kshs.9,000.00 Total Khs.230, 000.00; Less PAYE Kshs.62, 655.00 Total dues Kshs.167, 345.00

11. The defence is also that the respondent signed an agreement with Kenya Transport Workers Union and was not aware that the claimants had joined Kenya Union of Commercial Food and Allied Workers. There was due compliance with section 40 of the Employment Act and the claims made are not justified. The applicable union, the Kenya Transport Workers Union was fully informed of the redundancy. The union has not made a claim.

12. The defence is also that Isaac Akimanya is back at work with the respondent upon resumption of work he was given first consideration. The practice of the respondent is to recall its previous employees when there is work.

13. In evidence, the respondent called Francis Osoro Odera, the Human Resource officer and who testified that the respondent followed the due process of the law in terminating the employment of the claimant, the Labour Officer was informed and attended when the claimants were being paid their terminal dues and the applicable union the Kenya Transport Workers Union was informed and there has been no challenge to the lawfulness of the termination of the claimants. The respondent has since recalled Mr Isaac Akimanya back to work when work became available.

14. At the close of the hearing, both parties filed written submissions. These submissions, the pleadings and the evidence of the parties shall be put into account in assessing the claims made.

## **Determination**

The questions which arise for determination is whether termination of employment was lawful and or unfair; and

Whether the claims made are justified and with merit for the court to award.

15. Before addressing the above issues as highlighted, a matter arose which the parties have not addressed in their submissions. The question of unionisation of the claimants.

16. The claimants asserted that they belonged to the Kenya Union of Commercial Food & Allied Workers (KUCFAW). The claimants have attached receipts dated 26th January, 2017. Such receipts are to *M/S Wanjiku Karuga & Co. Advocate*. Such fee is noted as *consultancy fees*.

17. The respondent's case is that they had an agreement with Kenya Transport Workers Union for and on behalf of the claimants. The respondent's thus sent notice of redundancy to such union and not to KUCFAW as they were not aware of such union as representing the claimants.

18. The claimants admit they were drivers with the respondent. They undertook their duties driving various motor vehicles in a quarry and other transport duties. That the respondent is a construction company and the claimants were allocated duties of delivery of work and construction materials from various sites.

19. The court reading of section 14(1) (d) (i) of the Labour Relations Act, 2007 is that a trade union in representing employees in a given sector should that that union which addresses itself to a substantial proportion of the interests in respect of which the employees work under, the trade of engagement, the sector relevant and or closely related to.

20. The essence of such representation in a sector substantially covered by the employees is to ensure that the trade union is addressing the terms and conditions of employment for the benefit of their members and employees of a given employer, sector, field, trade or field are able to engage and get recognition and negotiate a collective agreement from a point of knowledge in such sector. 21. Therefore under section 45 of the Labour Relations Act, 2007 the employer is required to recognise a trade union for the purpose of engaging in collective agreement negotiations based on the appreciation that such a trade union represents the substantial interests of its members in the employment of the employer.

22. In this case, where the respondent had an agreement with Kenya Transport Workers Union, such agreement is not produced as required under section 10(7) of the Employment Act, 2007 when these proceedings commenced. The alleged redundancy notices required under section 40 of the Employment Act, 2007 are only sent to the Labour Officer and the one to the alleged trade union, Kenya Transport Workers Union is not attached.

23. The above put into account, the claimants have equally not demonstrated that they were members of KUCFAW. The referral of the matter to KUCFAW by their advocates is not for membership as demonstrated by the fee note attached to the claims. Such only related to a consultancy arrangement to make an assessment of the terminal dues owing to the claimant. Such union, KUCFAW covers a sector different and fundamentally different from the nature of work the claimants were engaged, transport.

24. The referral of the matter to KUCFAW has no legal basis.

25. In addressing the issues set out for determination, section 40 of the Employment Act, 2007 sets a template under which an employer seeking to terminate employment on the basis of a redundancy must address. Such provisions of section 40 of the Employment Act, 2007 are mandatory.

26/ In addressing the provisions of section 40 of the Act, the Court of Appeal in **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR** held that; **Section 40 (1) of the Employment Act prohibits, in mandatory tone, the termination of a contract of service on account of**

redundancy unless the employer complies with the following seven conditions, namely:

- a. if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;*
- b. if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;*
- c. in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;*
- d. where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;*
- e. the employer must pay the employee any leave due in cash;*
- f. the employer must pay the employee at least one month's notice or one month's wages in lieu of notice; and*
- g. the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.*

27. The purpose and period of the notice was construed in the case of **Thomas De La Rue (K) Ltd versus David Opondo Omutelea a [2013] eKLR** to be the same as provided for in section 40 (1) (a), that is, *'the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect'*. It is mandatory to serve the same notice on the Labour Officer.

28. In this case, where the respondent had agreement with a trade union, section 40(1) (a) of the Act has not been complied with. There is no notice demonstrated as having issued to any trade union. Equally, the notice to the Labour Officer is issued two (2) days prior to the intended termination of employment.

29. Even where the requisite notices contemplated under section 40(1) (a) had issued, which is not the case here, the claimants had effectively no knowledge of the intended redundancy and termination of employment until the due date which eventually led to summary termination of employment on 10th December, 2016.

30. The Court of Appeal in further assessing the provisions of section 40 of the Employment Act, 2007 in the above cited case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR** and held that;

*There is a heavy burden of proof placed upon the employer to justify any termination of employment. As stated earlier, the appellants here ought to have given the "the reasons and the extent of the redundancy" but there is no evidence on record sufficient to discharge that burden. It was further contended by the respondents that the Labour Officer was not served with any letter or reasons as required under **section 40** but the appellants merely made a bare assertion that service was made and reasons given for redundancy. In the absence of proof, we must find that there was no service and therefore the notice was invalid.*

31. The mandatory nature of the law is that the procedures of section 40 should not be mechanical but rather intended to ensure that following a finding by the employer that there are operational reasons leading to reduction of staff and such having arisen out of factors that requires such action be taken, then the due notices to employees ought to issue.

32. In the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3**

**Others [2014] eKLR** the Court emphasised that the purpose of issuing notices to the employees, to the trade union and to the labour officer is to allow for consultations with the purpose that;

*... is to give the parties an opportunity to consider “measures to be taken to avert or to minimise 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 1<sup>st</sup> respondent that consultation is an imperative requirement under our law.*

34. As noted above, without proof that the claimant got the requisite notices, without notice to any trade union, Kenya Transport Workers Union or KUCFAW, I take it no notice issued to the claimant prior to the termination of Employment on 10th December, 2016. The notice to the Labour Officer though issued does not meet the requisite legal threshold as well. The notice should issue setting out **the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect.** The notice by the respondent is two days prior to termination of employment. In any event the fundamental notice ought to have issued to the claimant being the primary rights holders as they were about to lose employment through no fault of their own.

35. The net effect of the findings above is the provisions of section 43 and 45 of the Employment Act, 2007. an employer may terminate the employment of an employee upon giving him notice for valid and fair reasons which the employer genuinely believes to exist and related to employees conduct, capacity or compatibility or based on operational requirements of an employer and upon according the employee fair procedure before termination as required under sections 43(2) and 45(2) of the Act. Also see findings of the Court of Appeal in **Nation Media**

#### **Group Limited versus Onesmus Kilonzo [2017] eKLR.**

36. Section 43(2) provides:

***“43. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”***

37. Section 45(1) of EA prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

***“(2) A termination of employment by an employer is unfair if the employer fails to prove—***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason—***

***(i) related to the employee’s conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure.***

38. The failure by the respondent to adhere to the provisions of section 40 of the Employment Act, 2007 in issuing the requisite notices to the claimant offended the mandatory provisions of section 43 and 45 of the Employment Act, 2007. Such resulted in unfair termination of employment. Compensation is due to

the claimant upon such a finding.

39. In assessing the compensation due, I take note of the provisions under section 45(5) of the Employment Act, 2007 that the respondent paid terminal dues immediately upon termination of employment. Such good practice should be taken into account in assessing the compensation due to the claimants. In this regard, a payment of one (1) month gross salary to each claimant is found appropriate.

40. In addressing the other claims, I note the terminal dues paid to the claimants included;

Notice pay of one month;

Leave days due;

Service pay; and

Days worked in December, 2016.

41. The main contest herein is the number of years worked and the computations of service pay.

42. The claimants' evidence was that they were employed in different years and dates and issued with contracts of employment. No claimant submitted such contracts save for the NSSF records noting the name of the employer.

43. The respondent has not submitted the work records save for the Certificate of Service. such records are crucial and important in assisting the court in the assessment of terminal dues. In addressing the gaps herein, without the claimants submitting their work contracts as alleged, the only records on their work years is the Certificates of Service. Such Certificates though contested remains the only legal records.

44. The returns filed with regard to the NSSF records are not proof of employment.

45. The court finds, the dates of employment are;

Nathan Kathiari Kalothi July, 2009 to December, 2016; Patrick Njuguna Ndungu July, 2009 to December, 2016;

Christopher Lumbasi, 2009 to December, 2016; and

Isaac Akunava Akimonya, 2004 to December, 2016.

46. The claims made by the claimants are in the nature that the court should make orders that;

*b) an award as per the assessment of the Labour Officer dated 25<sup>th</sup> January, 2017*

*c) the general damages suffered as a result of the respondent action.*

*d) an order that the claimant was underpaid by the respondent and therefore be paid lawfully all outstanding appropriate dues.*

47. In analysing the entire record, there is no assessment herein done by the Labour Officer on 25th January, 2017. what is on record is a letter by the claimants' advocates making demands on the alleged terminal dues owing.

48. Save for Isaac Akunava Akimanya who claimed severance pay, the other claimants were paid for service. there is no claim(s) made by the other claimants in this regard. I take this is not by error but deliberate as both parties enjoyed legal representation.

49. Based on the provisions of section 40 of the Employment Act, 2007 in assessing the dues payable to the claimants, the respondent paid the requisite terminal dues for notice, due leave days, and number of days worked. The monies paid for service though not claimed and noting all statutory dues to NSSF had been paid in terms of section 35 of the Employment Act, 2007 and there being no claim with regard to severance pay due under section 40 of the Act, the payment now made as *service pay* is found to be generous settlement.

50. Save for the award of compensation for one (1) month gross salary for the unfair termination of employment, all other claims must fail. Costs are due noting the unfair labour practice noted above with regard to failure by the respondent to follow the due process of the law.

**Accordingly, judgement is entered for the claimants against the respondent with an award of one (1) months gross salary for each claimant for unfair termination of employment together with costs.**

**Delivered in open court at Eldoret this 26th day of September, 2018.**

**M. MBARU**

**JUDGE**

In the presence of:

.....

.....