REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2298 OF 2014

BANKING, INSURANCE & FINANCE UNION (KENYA)..... CLAIMANT

- VERSUS -

MAISHA BORA SACCO SOCIETY LTD..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant trade union filed the memorandum of claim on 19.12.2014 alleging unprocedural, unlawful, wrongful, unfair, and unjustified termination of employment on account of redundancy. The affected members of the claimant in issue were 63 but 6 were reinstated and the suit is about 57 employees. Mr. Isaiah Munoru appeared on behalf of the trade union.

The respondent's case is based on the amended memorandum of response filed on 11.05.2018 through Kimondo & Company Advocates.

An order for partial judgment, by consent of the parties, was entered on 21.06.2018 and the parties further agreed that the parties will make submissions on the following remaining issues for determination by the Court:

1. Whether or not the termination of employment of the grievants on account of redundancy was procedural.

2. If the answer to issue 1 above is in the affirmative, are the grievants entitled to compensation?

3. Whether the grievants are entitled to the following reliefs or claims:

    a) Housing allowance.

    b) Annual leave allowance.

    c) Service pay.

    d) One month's salary in lieu of notice.

    e) Interest on the above.

    f) Who bears the costs of the suit?

A further issue for determination subsequently agreed between parties was whether the claimant had locus to file the present suit on behalf of the grievants, the 57 members. The respondent's submission is that the claimant trade union lacks standing because there is no recognition agreement between the claimant and the respondent. There is no dispute that such recognition agreement did not exist at material time and there is no dispute that the 57 employees were employed by the respondent and they were members of the claimant trade union at all material times.

The respondent relies on **Employees of Voluntary and Charitable Organisations (KUEVACO) –Versus- Board of Governors & Maina Wanjigi Secondary School [2015]eKLR** where Mbaru J held that the evidence of lack of a recognition agreement and CBA meant that the claimant trade union in that case lacked standing before the Court. The respondent further cited **Communication Workers union –Versus- Safaricom Ltd [2014]eKLR** where Mbaru J held that without recognition by an employer a trade union even where registered as such becomes a by-stander waiting by the road side for instructions just like an advocate without a practising certificate.

In **Kenya Hotels and Allied Workers Union –Versus- Well-come Inn Hotels Ltd and Another [2015]eKLR** Onesmus Makau J respectively considered the foregoing holdings and held that a recognition agreement is a voluntary document which cannot be the only basis upon which a trade union can derive standing to represent its members.

The Court has carefully considered the issue and returns that once a union has recruited unionisable employees as its members, the trade union is thereby entitled to sue in furtherance of such employees' rights only that the same can only be urged on the basis of the individual contract of service and statutory or constitutional provisions. In making that finding the Court has considered the provisions of section 3 of the Employment and Labour Relations Court Act on just and expeditious determination of suits and considers that it is desirable that the trade union filed the suit rather than each grievant towards effective and efficient determination of the suit. A multiplicity of suits flowing from a single transaction occasioning the cause of action would not be encouraged and the trade union whose sector of recruitment is not in dispute is better placed to institute the suit as was done in the present case.

The Court will now proceed to determine the agreed issues for determination in line with the consent entered into by the parties.

The **1st issue** for determination is whether the termination of the grievants' employment by way of redundancy was procedural. The claimant's submission is that as at termination the grievants were its members and the respondent issued a notice of termination of employment on account of redundancy by the letter dated 28.11.2014 to the Minister of Labour. The letter listed 63 employees to be terminated from employment on account of redundancy. The respondent called a staff meeting on 29.11.2014 and issued the grievants with a one month notice of termination on account of redundancy. The respondent then extended the redundancy notice to 31.01.2015 as per the letter dated 29.12.2014 addressed to the Minister. The claimant was the grievants' trade union but it laments that it was not served the 30 day statutory notice under section 40 (1) (a) of the Employment Act, 2007. The notice having not been issued as prescribed, the claimant urges that the redundancy was illegal. The claimant relies on **Thomas De La Rue (K) Ltd –Versus-David Opondo Omutelema [2013]eKLR** where the Court of Appeal (Karanja, Kiage, & M'Inoti JJ.A) held thus, "**Where an employee is a member of a trade union, the law contemplates that the employer will deal with the employee through the trade union. That is why section 40(a) requires notification of the union in cases of redundancy of unionisable workers. Under section 56 of the Labour Relations Act, officials or authorised representatives of a trade union are entitled to reasonable access to the employer. It is only in cases where the employee is not a member of the union that the employer has to deal directly with the employee.**" Once again, this Court observes that the provision provides for a circumstance where the employee is a member of a trade union and there is no condition for the employer and the trade union to have been in a recognition agreement.

In the present case, the grievants were members of the claimant trade union and in line with the holding of the Court of Appeal and provisions of section 40(1) (a), the respondent ought to have complied and served the claimant the relevant notice of not less than a month prior to the date of termination on account of redundancy, on the extent of the intended redundancy. It was not said that the respondent was not aware that the grievants had joined the trade union and the respondent was bound to comply accordingly.

The respondent submitted that the respondent was not bound to notify the claimant for want of a recognition agreement but the Court returns that the holding by the Court of Appeal prevails and it is clear that section 40(1) (a) does not provide for existence of a recognition agreement between the employer and the union for the union to be served. The Court returns that under the section, where the employee is a member of a trade union, then the trade union must be served with the prescribed notice.

The **2nd issue** for determination is whether the grievants are entitled to compensation in view of the procedural unfairness. Section 49 (1) of the Employment Act, 2007 would be satisfied because the procedural unfairness amounted to unfair termination as envisaged in section 45 (2) (c) of the Act – the employment was terminated in accordance with unfair procedure. The Court has considered that though the trade union was not notified, there is no dispute that the affected individual grievants were notified. The Court has also considered that as submitted for the respondent the reason for the redundancy was genuine as envisaged in section 43 of the Act. The considerations amount to mitigating factors under section 49 of the Act. While the grievants did not contribute to the termination and desired to continue in employment and taking into account the mitigating factors, each grievant is awarded 3 months' gross salaries (less tax) as at termination, for the unfair termination.

The **3rd issue** for determination is whether the grievants are entitled to the other claims. The Court makes findings as follows:

a) The claimant prays for house allowance. It is submitted that under section 31 of the Act the employer must provide reasonable housing accommodation or pay reasonable house allowance. The respondent did not pay house allowance or provide housing and therefore it is submitted that the claimants be paid house allowance per section 63(2) of the Labour Institutions Act, 2007 which sets housing allowance at a minimum of 15% of the employee's basic pay. The Court has considered the provisions of the section and it does not provide as submitted for the claimant but it refers to regulations on minimum wages. In this case, the claimant has submitted that regulation 4 of the Regulation of Wages (General) Order requires an employer to provide the employee with free housing accommodation or in default pay the employee housing allowance equal to 15% of the basic pay. The claimant also relied on **Joshua Lihanda –Versus- Outdoor Occassions Limited [2014]eKLR** where Rika J held, "**25. The respondent had the obligation to provide the claimant a written contract of service under section 9 of the Employment Act. There was no written contract, which read with section 31(2) of the Act, would include the provision which consolidates the claimant's basic wage or salary with the rent. It cannot be for the claimant to demonstrate that what was paid to him was not consolidated wage or salary; the law places the obligation of proof of the consolidation provision on the employer.**" It was submitted that the grievants were grossly underpaid in terms of basic salary. In such circumstance it cannot be said that the wage was consolidated with reasonable provision for rent. Thus the claimant submits the 15% of basic pay in house allowance should be ordered by the Court. The respondent submits that the grievants must have waived the claim for house allowance because over the years of service the issue appears not to have come up. The Court has considered the submissions. First it is clear that under section 90 of the Act, the claim for house allowance was in the nature of a continuing injury, the injury ceased upon the date of termination, and the suit was filed within 12 months of such cessation as per section 90 of the Employment Act, 2007. The Court returns that there is no evidence of alleged waiver and the claimants have properly put their claim. Second the claimants have established that they were not paid a consolidated salary with the element of a provision of rent for a reasonable housing accommodation and the respondent has failed to discharge the burden of proof in that regard as per the holding by Rika J in **Joshua Lihanda –Versus- Outdoor Occassions Limited [2014]eKLR** . Thirdly, the claimant has established that under the minimum statutory provisions, the grievants are entitled to the house allowance as prayed for at 15%

of the basic pay throughout the service. The Court awards accordingly.

b) The claimants have prayed for annual leave travelling allowance. The claimant has not cited the specific provision in the Regulation of Wages and Conditions of Employment (General) Order prescribing for the annual leave travelling allowance as claimed and the Court returns that the prayer will fail.

c) The claimants pray for service pay. It is submitted that the claimants are entitled to 15 days service pay for each year served as at 02.06.2008 prior to coming into force of section 35 of the Employment Act, 2007. For the employees employed after 02.06.2008, it is submitted that the claim does not apply in view of section 35 of the Act which provides that where there is alternative pension arrangement such as NSSF, then service pay will not be available. The Court has considered the submission and returns that as submitted for the respondent, the claim was time barred under section 90 of the Act, the cause of action having accrued on 02.06.2008 and for such continuing action, the 12 months of limitation of action having lapsed on or about 02.06.2009.

d) The claimant prays for payment of one month's salary in lieu of notice as computed in the submissions. It is submitted for the respondent that the claimants were given a one month notice and therefore the one month pay in lieu of notice is not available. The Court finds that the notice under section 40(1) (a) which the respondent refers to is the preparatory notice to enable the employee to be aware of the looming redundancy. Section 40 (1) (f) then provides that the employer pays the employee declared redundant not less than one month's notice or one month's wage in lieu of notice. It has not been established that consequential to the redundancy decision such payment was made in favour of the grievants and the Court returns that the prayer will succeed.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) The declaration that the termination of the employment of the grievants by the respondent by way of redundancy was procedurally unfair.

b) The respondent to pay each of the 57 grievants 3 months' salaries for unfair termination and the computed total be included in the decree and at the rate of monthly salaries stated in the schedule marked 1 on the submissions.

c) The grievants be paid one month salary or wages in lieu of notice making a sum of **Kshs.1, 151, 840.00**.

d) The grievants be paid underpayments for housing allowance at 15% of the basic salary amounting to **Kshs. 14, 434, 946.00**.

e) The payments as ordered in this judgment be paid by 31.12.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

f) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 26th October, 2018.

BYRAM ONGAYA

JUDGE