REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 493 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

1. LUKE CHERUIYOT

2. CHRISTINE CHEBOROR

3. ANN J. KISANG

4. SOPHIA SEGHU

5. PAUL RANGUNDI

6. ROSE W. GATETE

7. TERESIA GITHIGA

8. JUDITH ANDIEMA

9. MARY M. NDEGWA

10. JACKSON S. KOIYET

11. GLADYS M. MUSYOKI

12. SAMUEL K. SABULEI

13. DAVID K. SXGILAI

14. APPOFIA N. MUTUNGI

15. MARION G. MARANGA

16. JAMES M. MACHARIA

17. KIBIWOTT KIPKEMOI

18. JEROTICH KIPROP

19. MATILDA R. MUTURI

20. SYLUS O. ONYANGO

21. MOSES K. MAIYO (DECEASED)

22. FRANCIS O. MOTONDI

23. JONES KASAYA

24. PAUL KIPLAGAT

25. PHILIP S. KIPTOO

26. BARNABA K. KOECH

27. CLEMENT MOMANYI

28. PAUL M. CHEGE

29. FRANCIS R. METTO

30. RICHARD MUCHOKI

31. CECILIA W. MAINA

32. BRYAN C. KIPKOECH

33. KIMUTAI S. CHERONO

34. JOYCE M. KIBATHI

35. KIPROTICH V. CHELIMO

36. CAPT. FRANKLIN NJERU

37. CHRISTOPHER M. SHANYUMA

38. REBECCA J. BIRGEN..... CLAIMANTS

-VERSUS-

NATIONAL OIL CORPORATION OF KENYA .....RESPONDENT

JUDGEMENT

1. The Claimant lodged suit vide a Plaint dated 17th September, 2001 filed on even date seeking damages for unlawful redundancy due to blatant disregard of the Employment Act Cap 226 Laws of Kenya (Now Repealed), the Trade Disputes Act, Cap 234, Laws of Kenya (Now Repealed), the Applicable Collective Bargaining Agreement dated 28th May, 1998, relevant circulars and Manuals and the Custom Practice within the line ministry and the Respondent's own internal Code of Regulations.

2. They aver that on 1.11.2000 and on 1.12.2000 the Respondent purported to terminate the Plaintiffs from the unionisable and management staff which act was wrongful for the reasons that:-

a. The exercise and the decision was made without the mandate and authority of the Board of the Defendant.

b. It failed to seek any authority from the Ministry of Energy, the head of the Civil Service or the Directorate of Personnel Management to do so.

c. It acted arbitrarily and in a capricious and partisan manner and followed no set criteria, guidance or scheme to make any decision declaring the Plaintiffs redundant.

d. Caused termination letters to be issued by a junior employee who had no authority to make such a decision.

e. Breached clause 26.10.O of the Collective Bargaining Agreement requiring the last employee in to be first one out.

f. Breached the Trade Disputes Act, the Employment Act by declaring the Plaintiffs redundant whereas no redundancy existed.

3. They aver that the unlawful and procedural termination of the Claimant's services caused them immense suffering which they continue to suffer and live with the damage visited upon them.

4. The Respondent in Response admit the employment relationship and state that the Plaintiffs 1-29 term of employment were governed by

the Collective Bargaining Agreement (CBA) between the Respondent and the Kenya Petroleum Workers Union dated 7th September, 2001, while Plaintiffs 30-38 terms of employment were governed by the Defendant's internal Code of Regulations and the Employment Act.

5. That the Respondent was entitled to dismiss the Plaintiffs on account of redundancy under the CBA, Trade Disputes Act and the Employment Act and upon payment to the Plaintiffs of all their dues which they allege they did.

6. That the decision to declare the Plaintiffs redundant was mandated and sanctioned by the Defendant's Board of Directors and it was thereafter issued by the Defendant's Human Resource Manager. Furthermore, that, the decision was made after consultations with the Ministry of Energy, The Head of Civil Service, The Directorate of Personnel Management and KPWU.

7. They contend that the staff were sensitised on the redundancy exercise prior to identification and notification of those affected. That a selection criteria was fully disclosed to all the members of staff and it was based on age, performance, discipline, medical, length of service, last in first out, qualifications and suitability and Clause 24.10 of the CBA for the unionisable staff.

8. It is also the Defendant's position that they could not have breached clause 26.10 of the CBA dated 28.5.1998 on the issue of last in first out as the said agreement had already been spent by effluxion of time. That the non-unionsable employees were terminated lawfully and their dues properly calculate.

9. They contend that the termination was unavoidable due to the downturn in the economy and resultant financial hardship faced by the Defendant making the Defendant unable to sustain the employment of the Plaintiffs. That the Plaintiffs voluntarily accepted, signed and agreed to the termination of their services and the dues presented to each one of them and all are estopped from claiming otherwise.

10. That the Defendant had requested for a tax exemption for the Plaintiffs which is still being handled by the Directorate of Personnel which was to thereafter facilitate payment to the Plaintiffs.

Evidence

11. Luke Cheruiyot, the 1st Plaintiff, testified on behalf of Plaintiff's No. 2, 3, 4, 6, 7, 9, 10, 14, 15, 16, 18, 23, 28, 30, 31 and 36. The rest were yet to give their authority as at the time of the trial.

12. He stated that he was employed by the Respondent on 14.9.1984 in the administrative department as a messenger. Thereafter he became a Clerk. That there was a CBA dated 28.5.1998 guiding their respective employment.

13. Mr. Cheruiyot stated that they were terminated on 1.11.2000 by being declared redundant but the Defendant did not pay them their allowances. He alleged that the criteria used to terminate them was not clear to them. The procedure to be followed in terminating them was contained in a circular dated 20.7.2001 which procedure was apparently not followed and as such the Court should declare the redundancy unlawful.

14. In cross-examination he admitted collecting a cheque of Kshs. 250,000/= two weeks after being terminated. That the payments made to him and his co-claimants was salary alone and did not include allowances. He stated that he did not know how the retrenchment came about as there were no meetings held. That his termination was wrong as the procedure was not followed.

15. The Respondent put up one witness one Susan Karemi who joined the Respondent in 2012 as a Human Resource Officer. She stated that the impugned retrenchment was done as part of civil service reform programme. That a sensitisation manual was sent to all civil servants and it gave guidelines on how the redundancies would be done. They were to adhere to the Labour Laws, Public Service Commission Act, Human Rewouce Manual and CBAs which were followed. Payments were also done.

16. She stated that meetings were held between the Respondent and the Union and deliberations on redundancy were done. They also involved the Ministry of Energy and informed them of the redundancy. That the notice of redundancy was placed on the notice board and thus the Plaintiffs were aware of the redundancy. That the termination was not unfair as the same was done in accordance with the law.

Submissions

17. The Claimants submit that the redundancy was unlawful as the procedure set out in Section 16 of the Employment Act Cap 226 was not followed. No notice of intended redundancy was issued to the Claimants' union. They submit that the form of notice is not contained in the law but cited case of **Elizabeth Tumaini Adhola v Management Board of St. Mary's School [2015] eKLR** where the Court adopted the ratio in its earlier decision of **Loise Obengo Vs Nyanza Reproductive Health Society (2013)eKLR** which held that:-

> **"In the written notice the following information should be disclosed:**
>
> **i. The reasons for retrenchment**
>
> **ii. The alternatives considered by the employer to avoid retrenchment and the reasons given for rejecting them**
>
> **iii. The number of employees identified to be affected and their job categories**
>
> **iv. The selection criteria applied**

v. The date of termination of services

vi. The proposed severance pay

vii. The assistance offered to employees likely to be affected by the retrenchment an

viii. The possibility of the future re-deployment of the retrenchees."

18. They submit that no notice envisaged under the law was issued to the union or to the labour officer.

19. It is submitted that the Respondent applied both LIFO and FIFO formula in effecting the termination, which was contrary to what was provided in the CBA. That is an integral part of procedural fairness in redundancies and as such the Defendant actions were unlawful. They cite the case of **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014)eKLR** to lay emphasis on the aspect of a proper and clear selection criteria.

20. As to the remedies sought, it is submitted that the Claimants paragraph 8 of the Defence is an implied admission on the part of the Respondent that the Claimants were its employees and that the Respondent terminated their respective services with itself.

21. It is also submitted that the act of accepting what was legally due to them cannot and should not be construed as an estoppel from issuing claims against the Respondent nor to challenge the lawfulness of the redundancy process conducted by the Respondent.

22. In the case of **Jane Njeri Wanyoike & 23 Others v Pan Africa Insurance Company Limited & 2 others [2017] eKLR** the Court had occasion to deal with a similar issue and held that:-

> **"The terminal dues owing to the Claimants shall be computed based on the applicable CBA… Even where an employee has accepted terminal dues and acknowledged the same as a final and full settlement, such does not negate the payment of any lawful and justified payment that ought to go with such employment. As a right in employment all owing dues in fact and in law cannot be compromised by an employee signing off a payment less what is an entitlement. The rationale is that such dues owing to an employee as of right should be paid as a matter of course when due and owing. To accept less what is due does not affect a claim for the whole… In the claimants' acceptance of terminal dues offered upon their termination of employment by the respondent, such was an acceptance of what was owed to them in redundancy. Such did not stop the claimants from filing suit before the court seeking what is legally due to them."**

23. That the Respondent cannot allege that the CBA had elapsed as it applied the formula contained therein in calculation of what was due to the Claimants.

Respondent's submissions

24. It is submitted that 25 employees are the only ones to have their claims considered before this court. It is further submitted that of the 25 who gave authority, only the 6 Claimants with Witness Statements on record should have their claims against the Respondent considered.

25. That PW1 on cross-examination stated that he had not met some of the Claimants albeit having authority to give evidence on their behalf. Despite having authority, most of the Plaintiffs were not in Court and have never taken interest in the suit. Counsel for the Respondent informed court of this fact and went ahead to call out those who were present in court as only about six (6) of them have been showing up in Court.

26. PW1 was also unable to show all copies of either appointment letters of letters declaring the Plaintiffs redundant. They submitted that in the absence of any supporting documents, it is submitted that claims by the Plaintiffs without any supporting documents be dismissed, as it is trite law that he who alleges must proof.

27. It is submitted that the law was adhered to and the right procedure was followed and therefore the termination was lawful and therefore damages do not lie and in any event terminal dues were settled.

28. As to claim of general damages, it is submitted that they are not payable for under this head, damages are not usually payable in an employment contract as per the principles of case law assessed. They cite the case of **Peter Baiye Gichohi & Another-vs- Attorney General [2012] eKLR** to buttress the position.

29. They pray for the claim to be dismissed with costs.

30. I have examined evidence and submissions of all the parties. As stated by CW1, he had authority to prosecute this claim on behalf of Claimants Nos. 1, 2, 4, 6, 7, 9, 10, 14, 15, 16, 18, 23, 28, 30, 31, and 36.

31. I therefore start from the premise that the claim against the 5, 8, 11, 12, 13, 17, 19, 20, 21, 22, 24, 25, 26, 27, 29, 32, 33, 34, 35 and 37 has not been prosecuted and I there strike it out.

32. As to the rest of the Claimants who have prosecuted their claim by giving written authority to 1st Claimant to prosecute this claim, the fact that some of them were not physically present in Court during the hearing does not negate the fact that they gave consent and authority

to 1st Claimant to prosecute the case on their behalf.

33. From the evidence, statements and pleadings of the claimants, the claimants received letters terminating their services without any notice.

34. On 25/10/2000, the Respondents Managing Director had written a memo to all staff notifying them of steps the Corporation was taking to have a leaner corporation so as to succeed in the existing competitive marketing environment. The effect was to effect some redundancies. The staff to be affected by the redundancies were not mentioned.

35. Appendix 2 of the Claimant's documents is the notice on Voluntary Redundancy Programme which sets out the redundancy package but which I find did not concern the claimants herein as their redundancy was not voluntary.

36. The redundancy proceeded which each of the Claimants receiving their redundancy letters dated 1.1.2000 and 24.11.2000 (see Appendix 11 and 15, 21, 22 and 24 as sample redundancy letter). The letter No. 11 is dated 24.11.2000 and was issuing a notice of redundancy with effect from 30th November 2000.

37. The letter No. 15 was dated 1.11.2000and was issuing a notice of termination effective the same date 1.11.2000. It is therefore clear that the redundancy was done without due notice as envisaged.

38. Appendix 17 is a letter from the Office of the President signed by R.E Ndubai for attention of Corporations on redundancy and it indicated as follows:-

> **"….. I wish to draw your attention to OP circular Ref. No. OP.13/19A of 7th November 1995 on Reform Programme in the Public Service, a copy of which I have enclosed herewith for ease of reference. It is not clear how you undertook the exercise without complying with the requirements of the Circular.**
>
> **Would you therefore urgently submit a comprehensive brief to this office on the matter including the extent to which you complied with the requirements of the circular referred to".**

39. It is therefore apparent that even in government circles, it was obvious that the redundancy was not carried out properly as the law was not followed.

40. Section 16A(1) of Repealed Employment Act Cap 226 states as follows:-

> ***16A*** **(1) …"A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:-**
>
> > **a. the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;**
> >
> > **b. the employer shall have 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;**
> >
> > **c. no employee shall be placed at a disadvantage for being or not being a member of the trade union;**
> >
> > **d. any leave due to any employee who is declared redundant shall be paid off in cash;**
> >
> > **e. an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;**
> >
> > **f. an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay".**

41. From the correspondence given to the Claimants, the above provisions of the law were flouted.

42. Infact CW1 informed the Court that he was one of the oldest employees of the Respondent in terms of time of employment as his employment No. is 0027 yet he was among those retrenched. The Respondents therefore failed to adhere to even to the law which provides that consideration should be given to employees who came in 1st to exist last.

43. In the circumstances of this case, it is my finding that the redundancy was done in an unfair manner.

44. In terms of remedies, I therefore find for the Claimants herein and award them compensation for the unfair redundancy at 12 months' salary for each year worked.

45. The figures translate as follows:-

> **1st Claimant - Luke Cheruiyot = 12 x 26,878 = 322,536 /=**

2nd Claimant - Christine Cheboror = 12 x 15,598 = 187,176/=

3rd Claimant - Ann J. Kisang = 12 x 19,178 = 230,136/=

4th Claimant - Sophia Seghu =12 x 19,838 = 238,056/=

6th Claimant - Rose W. Gatete = 12 x 30,158 = 361,896/=

7th Claimant - Teresia Githiga = 12 x 19,178 = 230,136/=

9th Claimant - Mary M. Ndegwa = 12 x 29,558 = 354,696/=

10th Claimant - Jackson S. Koiyet = 12 x 22,318 = 267,816/=

14th Claimant - Samuel K. Sabulei = 12 x 21,138 = 253,656/=

15th Claimant - David K. Sigilai = 12 x 19,384.25 = 232,611/=

16th Claimant Appofia N. Mutungi = 12 x 22,178 = 226,136

18th Claimant - James M. Macharia = 12 x 21,138 = 253,656/=

23rd Claimant - Matilda R. Muturi = 12 x 29,258 = 351,096/=

28th Claimant - Jones Kasaya = 12 x 29,558 = 354,696/=

30th Claimant - Philip S. Kiptoo = 12 x 16,423 = 197,076/=

31st Claimant - Kiprotich V. Chelimo = 12 x 34,573 = 414,876/=

36th Claimant – Paul Chege = 12 x 20878 = 250,536/=

The Respondent will in addition pay to the Claimants costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Tororey for Claimants – Present

Saende with Wanda for Respondent – Present