



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 607 OF 2015

KAVUTHA NGONZI & 11 OTHERS.....CLAIMANT

VERSUS

KAPRIC APPARELS (EPZ) LTD.....RESPONDENT

J U D G M E N T

Introduction

1. The Claimants were employed by the respondent from diverse dates starting 1.9.2001. They were employed on the basis of fixed term contracts which were reviewed consecutively the last one starting January 2015. On 3.7.2015 they were all terminated on account of redundancy by letter dated 2.7.2015. They have now brought this Suit alleging that their employment was unfairly terminated without following section 40 of the Employment Act and the Collective Bargaining Agreement (CBA) negotiated by their Union. They therefore Claim an aggregate sum of Kshs. 3,355,361 made up of severance pay, gratuity pay, salary for the un-expired contract term and compensation for unfair termination of their contracts.

2. The respondent has admitted that all the claimants were her former employees and that she terminated their services on account of redundancy. She has however denied that the termination was unfair and averred that she fully complied with section 40 of the Act and the CBA before declaring their positions redundant. She further averred that she paid to the claimants all their rightful dues as provided in Section 40 of the Act and Clause 27 of the CBA. She therefore denies the reliefs sought by the claimants and prays for their suit to be dismissed with costs.

3. On 13.7.2016, the parties agreed to dispense with the hearing and opted to dispose of the suit by adopting their pleadings, witness statements and documentary evidence filed and by filing written submissions.

Analysis and Determination

4. There is no dispute that the parties herein related as employer - employees until 3.7.2015 when claimants were terminated on account of redundancy. There is also no dispute that each claimant was paid and acknowledged as full and final dues the following:-

a) One or two months' salary in lieu of notice depending on years of service.

- b) Salary for day and overtime worked in July 2015.**
- c) Accrued leave days.**
- d) Severance pay at the rate of 17 days' pay for each completed year of service.**
- e) May and June increment arrears.**

5. The issues for determination herein are:-

- a) Whether the redundancy was a valid and fair reason for terminating the claimant's service.**
- b) Whether procedure followed was fair.**
- c) Whether the claimants are entitled to the reliefs sought or any part thereof.**

Redundancy as the reason for termination

6. There is no dispute that the respondent's business is fully dependent on orders from abroad. There is also no dispute that her major client or buying agent, Shah Safaris gave notice, dated 2.5.2015, to the respondent that she was reducing her order from 763583 pieces to 411523 pieces. There is further no dispute that such reduction in the order reduced the amount of Labour required to make the 411523 pieces ordered. The reduced order also meant that the revenue to the respondent was reduced and therefore it was not economical to continue employing all her staff.

7. In view of the foregoing observations it was proper for the respondent to use her managerial prerogative to lay off some of her workforce. Such prerogative is permitted under section 45(2)(b) of the employment Act which provides that, the reason for terminating the services of an employee is fair if it relates to the operational requirements of the employer. In this case the employer did not need to retain labour which had become superfluous after her major client reduced the amount of business she was doing with the respondent. Consequently, in view of the letter dated 2.5.2015 from the respondent's major customer reducing the business to be transacted with her, I find and hold that redundancy in this case was a valid and fair reason for terminating the claimant's employment contracts.

Procedure Followed

8. The claimants have contended that the respondent never complied with section 40 and the CBA before terminating their appointments on redundancy. It is their case that they were denied prior notice and the redundancy was done without hearing them. The respondent has produced letters dated 26.5.2015 to the claimant's union, and the county labor office notifying them of the intended redundancy in her workforce. She has also produced other correspondence with the union and minutes of meeting held between the union official and the respondent to dismiss the redundancy.

9. After careful consideration of the evidence on record, I am satisfied that the procedure followed before laying off the claimants was fair and in compliance with section 40 of the Act and clause 27 of the CBA. First the respondent served notice of more than 30 days to the claimants' union and the county labour office. Second the respondent that the union officials and agreed on the more selecting the employees to be laid off including but not limited to productivity, absenteeism, low performance, sickness. Third, the respondent also held meeting with the claimants and other workers and notified them of the shortage of work as confirmed by the third claimant in her witness statement. Finally, the claimants were paid their dues including salary in lieu of notice, unpaid salary and overtime, accrued leave, severance pay and arrears of wage increment.

10. In my view there is nothing which was not done right in the termination of the claimants under section 40 of the Act and clause 27 of the CBA. Under section 40 (1) (a) of the Act the claimant were not entitled to any direct notice so long as their union was served with the notice. Consequently, I hold that

the procedure followed in laying of the claimants on 3.7.2015 was fair.

RELIEFS

Compensation and salary for un-expired term.

11. In view of the finding that the redundancy of the claimants was fair, I dismiss the claim for compensation for unfair termination and salary for the un-expired contract term.

Gratuity Pay

12. The claim for gratuity is dismissed because as correctly submitted by the defence, clause 31 of CBA provides for payment of gratuity after serving for 3 years if the employment is terminated by death or retirement on medical ground or normal retirement on attaining age of 60 years. In this case the termination was through redundancy whose remedy is payment of severance pay under section 40 of the Act and clause 27 of the CBA. The claimants cannot therefore get both gratuity pay and severance pay unless it was expressly agreed in the contract of employment which is not possible.

13. The reason for the foregoing opinion is that the circumstances for redundancy cannot converge with the circumstances for termination through death or retirement. The two forms of termination will always happen differently under different circumstances and that is why each form of termination enjoys a unique form of remedy. Consequently, the claimants having been paid severance pay for the years served, they are not entitled to claim gratuity pay for the same years served.

Unpaid severance pay

14. The claim for arrears of severance pay is also dismissed for lack of particulars and evidence.

Disposition

15. For the reasons that the redundancy was fairly done and that the claimants were paid all their rightful dues under the CBA and Section 40 of the Act, I dismiss the Suit with no order as to costs.

Dated, Signed and delivered at Mombasa this 3rd February 2017.

O. N. Makau

Judge