



**REPUBLIC OF KENYA**

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

**CAUSE NO.32 OF 2017**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS..... CLAIMANT**

**VERSUS**

**OLIVADO (EPZ) LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 12<sup>th</sup> May, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 07.02.2017 alleging the unlawful and unprocedural redundancy affecting its members and being employees of the respondent namely, David Makau; Mary Nyambura Njenga; and Mary Mwangi (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grievants respectively). The claimant prayed for judgment against the respondent for orders:

- a) That the respondent's action is unfair and unprocedural.
- b) That the notices dated 19.01.2017 and issued to employees be and are hereby withdrawn.
- c) That the costs of the claim be provided for in favour of the claimant.
- d) In alternative and if the court finds that the redundancy should take place, then the court awards benefits being one month salary, salary for January 2017, salary for February 2017, and 12 months compensation making Kshs. 741, 462.00 for 1<sup>st</sup> grievant, Kshs. 325, 385.00 for 2<sup>nd</sup> grievant, and Kshs. 911, 539.00 for 3<sup>rd</sup> grievant.

The memorandum of response was filed on 08.03.2017 through Anne Babu & Company Advocates. The respondent prayed that the suit be dismissed with costs.

There is no dispute that the grievants were employed by the respondent. The 1<sup>st</sup> grievant was employed on 01.11.2011 as a stock coordinator and on 20.01.2011 was working as a Liaison Officer or Manager; the 2<sup>nd</sup> grievant was employed on 01.04.2011 and as at 20.01.2017 worked as Personal Assistant to the Management Board; and the 3<sup>rd</sup> grievant was employed on 01.09.2014 and as at 20.01.2017 worked as Fruit Handling Assistant.

It is not in dispute that the parties have concluded a recognition agreement and are in the process of negotiating a collective agreement.

The 1<sup>st</sup> issue for determination is whether the respondent undertook a lawful redundancy with respect to

the grievant's service. The respondent served the claimant a notice of intended termination of employment of the claimants on account of redundancy. The notice was dated 19.01.2017 and stated the reason for redundancy as restructuring the organisation to implement an IT system for farmer data processing so as to better serve the respondent's 1500 farmers. The notice stated that in view of the IT system, manual data processing would not be required. It was stated that the grievants would be paid one month salary in lieu of notice; 15 days' pay for each completed year of service; payment in respect of leave days accrued as at the date of termination; and a certificate of service.

The claimant disputed the redundancy and parties disagreed at the meeting of 31.01.2017 as the claimant's position was that the termination of employment was due to the grievants' involvement in union activities and not the reasons as advanced for the respondent.

The grievants were scheduled to leave employment on 20.02.2017. However, prior to that date, the respondent issued the internal memorandum of 20.01.2017 addressed to its security office instructing that the grievants should not be allowed into the respondent's premises without prior consent by the office. The grievants' case was that they were locked out from employment effective that date.

The respondent has relied on organograms and job analysis and evaluation with respect to offices held by the grievants to show that indeed there was restructuring following introduction of an IT system. The analysis includes time sheets showing that the roles played by the grievants had indeed diminished. The grievants disputed the analysis in the time sheets. There is evidence that the grievants as well as the claimant's officials met the respondent's managers and discussed the intended redundancy.

The court has considered the evidence and finds that there is no reason to doubt that the respondent introduced an IT system to manage its data. The claimant's position is that the grievants were terminated on account of their union activities but the court returns that the formal reason for the termination is clearly restructuring on account of the new IT system and in any event there was no evidence to establish the alleged union involvement to have been the reason for the termination.

The **2<sup>nd</sup> issue** for determination is whether the respondent followed the procedure as stipulated in section 40 of the Employment Act, 2007. First, the section required the respondent to serve the union and the area labour officer a months' notice of the reasons for, and, the extent of the intended redundancy. The court finds that the notice was served upon the claimant union but the grievants were locked out of employment prior to lapsing of the notice. The court returns that the lock out thereby impaired the lawfulness of the notice. Second, the section required the respondent to select the employees to be declared redundant with due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by redundancy. The respondent has not showed that it complied with that provision and the evidence was that the duties by the grievants would be taken up by other staff. The analysis in identifying the grievants in terms of the statutory criteria has not been established. In particular, it was not showed how the grievants were, in preference, identified for redundancy, as against other staff such as those who were to take over the grievants' duties. Accordingly the court returns that the statutory selection criterion was not complied with. The **2<sup>nd</sup> issue** for determination the court returns that the respondent did not follow the procedure a

To answer stipulated in section 40 of the Employment Act, 2007.

The **3<sup>rd</sup> issue** for determination is whether the claimants are entitled to the remedies as prayed for. The respondent has established that it was indeed restructuring on account of a new IT system. The court considers that reinstatement would be inconsistent with that respondent's restructuring objective and the prayer for reinstatement will be declined. The redundancy was unfair in so far as the respondent failed to comply with the cited provisions of section 40 of the Employment Act, 2007. The court has considered that the grievants desired to continue in employment and they did not contribute to the ensuing unfair termination of their respective employment. The court has considered the period of time each employee had served and further considered the consent orders of 21.03.2017 that the respondent pays the grievants full pay for the entire period the grievants have not worked but interim orders were in place being salary for January 2017 to the date of the judgment; and the grievants not to report at work pending the

judgment. In view of the factors considered by the court, each grievant is awarded two months' salaries for unfair termination under section 49 (1) (c) of the Act and one month pay in lieu of a valid termination notice. Accordingly, the 1<sup>st</sup> grievant is awarded Kshs.126, 000.00 plus severance pay as prayed for of Kshs. 121, 154.00 making **Kshs.247, 154.00**; the 2<sup>nd</sup> grievant Kshs.60, 000.00 plus severance pay Kshs. 23, 077.00 plus 9 days' leave pay Kshs. 6, 923.00 making **Kshs.90, 000.00**; and the 3<sup>rd</sup> grievant Kshs.150, 000.00 plus severance pay Kshs.144, 231.00 plus accrued leave pay Kshs. 28, 846.00 making **Kshs.323, 077.00**.

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

- a) The declaration that the termination of the grievants' employment by the respondent on account of redundancy was unfair as it was unprocedural.
- b) The respondent to pay the 1<sup>st</sup> grievant **Kshs.247, 154.00**, the 2<sup>nd</sup> grievant **Kshs.90, 000.00**, and the 3<sup>rd</sup> grievant **Kshs.323, 077.00** by 01.07.2017 failing interest at court rates to be payable from the date of this judgment till full payment.
- c) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 12<sup>th</sup> May, 2017**.

**BYRAM ONGAYA**

**JUDGE**