



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 105 OF 2016

PATRICK NJUGUNA KAMAU1ST CLAIMANT
DIANA WAMBUI.....2ND CLAIMANT
TERESIA WANJIRA MUNGAI.....3RD CLAIMANT
HANNAH WAMBUI NDUNGU.....4TH CLAIMANT
NANCY WANJIKU IRUNGU.....5TH CLAIMANT
CHARITY NYAMBURA MBATHIA.....6TH CLAIMANT
JECINTA WARIGIA KARIUKI.....7TH CLAIMANT
REGINAH NJOKI MBURU.....8TH CLAIMANT
ELIZABETH WANJIRU NJAU.....9TH CLAIMANT
MARY WANJIRA.....10TH CLAIMANT
ELIZABETH WACU NJUGUNA.....11TH CLAIMANT
VICTOR MUTHEMBWA KIEMA.....12TH CLAIMANT
ALICE MARY WANJIKU MWANGI.....13TH CLAIMANT
MUTETI KITONDE.....14TH CLAIMANT
JOYCE WANJIKU NDUNGU.....15TH CLAIMANT
LILIAN WANJIKU NDUNGU.....16TH CLAIMANT
SUSAN NJERI GICARU.....17TH CLAIMANT
DAMARIS WANJIKU NDUNGU.....18TH CLAIMANT
SUSAN WAMBUI.....19TH CLAIMANT

MARY WAITHERA NG'ANG'A.....20TH CLAIMANT

MARTHA WANJIRU NGUGI.....21ST CLAIMANT

BEATRICE WANJIKU NJOGU.....22ND CLAIMANT

DAVID MUTO MUYANGA.....23RD CLAIMANT

RODESTER KAVATA NZOMO.....24TH CLAIMANT

VERONICA MUGURE.....25TH CLAIMANT

JOSEPHINE GATHONI MUSYOKA.....26TH CLAIMANT

PAMELA AUMA OKWARA.....27TH CLAIMANT

VERSUS

WILHAM (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 14th July, 2017)

JUDGMENT

The claimants filed the memorandum of claim on 20.05.2015 through Ishmael & Company Advocates. The claimants prayed for judgment against the respondent for:

- a) A declaration that the respondent's action to summarily dismiss the claimants from employment was illegal, unlawful, unfair and inhumane.
- b) A declaration that the respondent's action of ipso facto declaration of redundancy was illegal, unlawful, unfair and inhumane.
- c) An order for the respondent to pay the claimants' terminal dues and compensatory damages as pleaded in paragraph 7 herein totalling to Kshs.3, 476,093.00.
- d) An order for the respondent to pay the claimants' costs of the suit plus interest thereon.

The response to the claim was filed on 26.08.2016 through Wachira Wanjiru & Company Advocates. The respondent's case was that the suit was an afterthought and it be dismissed with costs. The amended memorandum of claim was filed on 29.07.2016.

The claimants state that they were verbally terminated from employment on 23.07.2013 on account of redundancy. It is their case that the alleged redundancy was not genuine because the respondent continued in business and even employed fresh staff. The court has considered the claims and prayers for the continuing injuries namely unpaid leave; untaken or unpaid holidays; and untaken and unpaid annual leaves. The court returns that the claims were time barred under section 90 of the Employment Act, 2007 as they ought to have been claimed in a suit filed within the prescribed 12 months' limitation period. The 12 months lapsed on or about 24.07.2017 and the suit was filed belatedly on 26.08.2016. Thus the court returns that those claims and related prayers will fail as they were time barred.

The court has considered the prayers for gratuity and finds that it was not in dispute that the claimants were members of the NSSF so that in absence of a specific agreement in that regard, they were not entitled to gratuity as per section 35(6) of the Employment Act, 2007. The claims and the prayers in that

regard will therefore fail.

Next is whether the claimants' termination from employment was unfair. The reason for termination as advanced for the respondent is that the claimants were at all material times on strike. On 25.07.2013 the respondent entered into a return to work agreement stipulating that the employees were to return to work on 27.07.2013 at 7.00am without fail. If they failed to do so, the agreement provided that the employees would be subjected to a disciplinary action. The court finds that there is no reason to doubt the respondent's account. However, there is no evidence on record that in view of the absence from duty due to the alleged strike, the respondent initiated a disciplinary process by way of a notice and a hearing for each of the employees as provided in section 41 of the Employment Act, 2007. The evidence by the claimants is generally that they were locked out sometimes in July 2013. The court finds that the claimants contributed to their termination. The termination was unfair for want of due process of a notice and hearing. Even for the 27th claimant, the court returns that there is no evidence that she was accorded due process. To balance justice and taking into account the tenure of service of the claimants prior to the termination, their desire to continue in employment and their established contribution to the termination, the court awards each of them six months' gross pay for the unfair termination under section 49(1)(c) of the Employment Act, 2007. As they were not given a termination notice, each is awarded one month pay in lieu of the termination notice.

While making the findings the court has considered the suspect binding effect of the return to work agreement as it was not established that the claimants were members of the union as was alleged and the parties to the suit did not mention existence of a recognition or collective agreement at all material times. Further the court has considered the inapplicability of the ultimatum principle in our labour relations system and as upheld in **Kenya Plantation Agricultural Workers Union –Versus- Carzan Flowers [2013]eKLR** and as articulated in the judgment of this court in **Kenya Plantation & Agricultural Workers' Union –Versus- Roseto Flowers, Industrial Cause No. 44 of 2013** thus, **"First, it is the view of the court that a punishment including the dismissal on account of an employee's involvement in a strike that does not comply with provisions of the Labour Relations Act, 2007 can only be imposed by the employer through a fair process that affords the employee an opportunity to know the allegations levelled and a chance for the hearing. The Labour Relations Act, 2007 does not prescribe the procedure for the disciplinary action and the court holds that such procedure is provided for in the principles of due process of justice set out in the Constitution such as Articles 47 and 50(1), the provisions of the Employment Act, 2007 and the lawful provisions of the agreement between the parties.**

Secondly, the court finds that under section 80 of the Act, the primary punishment to be imposed by the employer is to deny payment to the concerned employee for the period of the strike because the section declares, such an employee "...is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike...". While making this holding, the court further holds that the imposition of that primary punishment can only take place after the employee has been accorded due process to establish that the employee was indeed involved in the strike that did not comply with the statutory provisions. The primary punishment cannot be imposed sweepingly like by invoking the ultimatum principle which is devoid of the statutory and constitutional fair process as already elaborated and as innocent employees could easily be unfairly punished.

For avoidance of doubt, the drastic punishment of dismissal may be imposed in appropriate cases under due process but the view of the court is that the primary punishment is preferable so as to foster collective bargaining recognising that employees usually do not go on lawful or unprotected strikes with the evil design to injure the employer and end the relationship; it is bargaining chip invoked as a last option to strike amicable balance - the storm before the tranquillity. The purpose of the strike is seldom to trigger a separation and termination or dismissal should, in the opinion of the court, be invoked in extremely rare and obviously justified cases.

Thirdly, the court finds that under section 80 of the Act, the employee does not surrender the right and freedom not to participate, so to say, to refuse to participate, in a strike that does not comply

with the statutory provisions. This principle against expulsion, disability or disadvantage for refusal to take part in a strike because it contravenes the statutory provisions imports individual responsibility of the employee in a strike situation and the collateral obligation upon the employer is to deal with staff individually in strike cases. That effect of the section effectively makes the ultimatum principle unavailable in our strike legislative framework.

Fourthly, the jurisdiction to determine the legality of a strike is vested in this court as per provisions of section 80 of the Act.”

In conclusion, judgment is hereby entered for the claimants against the respondent for:

- a) The declaration that the termination of the claimants’ employment by the respondent was unfair.
- b) The respondent to pay each claimant 6 months’ gross salary for unfair termination and one month’s pay in lieu of termination notice as prayed for; and to pay by 01.09.2017 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- c) The respondent to pay claimants’ costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 14th July, 2017.

BYRAM ONGAYA

JUDGE