



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 301 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

MERCYLINE MAKUNGU 1ST CLAIMANT

ROSEMARY CHEROP 2ND CLAIMANT

VIOLET YANDUNYI EVAYO 3RD CLAIMANT

JACKSON AKAVEGA 4TH CLAIMANT

PHOEBE JELAGAT MARU 5TH CLAIMANT

-Versus-

BINSCAPE LIMITED RESPONDENT

JUDGMENT

Issue in Dispute

Unlawful termination of employment of claimants

Facts of the case

The Claimants were all employed by the Respondent, a cleaning company, and deployed at Nakumatt Holdings Ltd, Eldo Centre, Eldoret. According to the Claimants, they were employed on different dates as follows:

MERCYLINE MAKUNGU - 24th January 2012

ROSEMARY CHEROP - 24th January 2012

VIOLET YANDUNYI EVAYO - 1st April 2010

JACKSON AKAVEGA - 1st October 2011

PHOEBE JELAGAT MARU - 1st April 2010

The Respondent however pleads that all the Claimants were employed on one year fixed term contracts on 1st October 2011 but were retained in employment without signing fresh contracts after expiry of the said contracts.

The Respondent terminated the cleaning contract with Nakumatt Holdings Ltd. Eldoret Branch by notice dated 2nd May 2013. On the same date the Respondent issued notices of termination of employment to the Claimants. The Claimants reported to the Kenya Union of Commercial, Food and Allied Workers, Eldoret Branch which wrote several letters seeking a meeting with the Respondent to discuss the terminations but the Respondent did not respond. The Claimants thereafter filed this suit.

The Claimants aver that the termination of their employment was unfair for failure to pay their terminal dues and pray for payment of annual leave, service benefits, underpayments and compensation. The Respondent on the other hand avers that the termination was in compliance with the law and pray that the Claim be dismissed with costs. The Respondent further avers that all the Claimants were absorbed by another employer who took over the cleaning contract at Nakumatt Holdings Eldoret Branch in the same capacity and that in fact they did not lose employment.

With regard to the letters from the Kenya Union of Commercial, Food and Allied Workers, Eldoret Branch, the Respondent avers that it has a recognition agreement with Kenya National Union of Service Employees signed in April 2013.

The case came up for hearing on 7th December 2016 when the court directed that parties proceed by way of written submissions as the facts of the case are not contested. The parties thereafter filed and exchanged written submissions and also filed supplementary submissions.

Claimants' submissions

In the submissions filed on behalf of the Claimants it is submitted that the termination of the Claimants did not comply with the law. The Claimants rely on the case of **Walter Ogal Anuro v Teachers Service Commission** in which the court stated "*...termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee*".

It was further submitted for the Claimants that there was no valid reason for termination of employment of the claimants. It was submitted that section 40 of the Employment Act was not complied with by the Respondent. The Claimants relied on the case of **Julie Tupiran Njeru v Kenya Tourist Board (Cause 886 of 2010)** in which the court cited the case of **Kabengi Mugo v Syngenta East Africa Limited Cause No, 1476 of 2011** where it was held that:

"The Kenyan employment law no longer accepts the "at will doctrine" whereby an employer can fire employees at will, for any reason or no reason."

The Claimants further relied on the case of **Donald Odeke v Fidelity Security Limited** in which the court held:

"It does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair."

It is submitted that the Claimants were neither subjected to any disciplinary procedure nor the provisions of section 40 of the Act, that no notice was issued to the Labour Officer or the Claimant's union, and the termination was therefore unfair.

In the supplementary submissions, it is submitted that there was no compliance with section 40 of the Act as there was no notification of redundancy as required under section 40(1)(a) and (b) and further that the Claimants were not paid severance pay as provided under section 40(1)(g) as well as payment for leave due under section 40(1)(e).

Respondent's Submissions

For the Respondent it is submitted that the Claimants' contracts were based on the substratum of the

contract with Nakumatt Holdings Ltd which was terminated because it was expensive and uneconomical to the Respondent. The Respondent referred the court to the case of **Lucas O Ondoya & 43 Others v Rift Valley Railways Kenya Ltd** in which Rawal J, as she was, stated:

"...the employer under the Employment Act No. 11 of 2007 has the right to terminate the services of an employee by declaring him redundant ... the right is not subject to any negotiations..."

It was submitted that the Respondent complied and served notices upon the Claimants a month before the redundancy was effected. The Respondent referred the court to the case of Kenya Hotel and Allied Workers Union v Travellers (TIWI) Beach Hotel in which the court held that:

"... jurisdiction of the court to pass orders in relation to industrial matters is not so much from considerations as to the existence of contractual rights and obligations, as on considerations of equity, security of all employees."

It was submitted that the Respondent made plans in good faith and ensured the employees were absorbed by another employer, yet this was not the duty of the Respondent. It is prayed that the Respondent should not be punished for going an extra mile to ensure continuity of the Claimants' employment and for keeping industrial peace.

Determination

As stated above, the main facts of this case are not in dispute. The Claimants were all employed by the Respondent as cleaners and their employment was terminated when the Respondent terminated the cleaning contract with Nakumatt Holdings Limited, Eldoret Branch where all the Claimants were deployed. The issues for determination are therefore whether the termination was fair and if the Claimants are entitled to the remedies sought.

Fair termination

Section 45(2) of the Employment Act provides that termination of employment shall be unfair if the employer fails to prove-

- (a) that the reason for the termination is valid;*
- (b) that the reason for the termination is a fair reason—*
 - (i) related to the employee's conduct, capacity or compatibility; or*
 - (ii) based on the operational requirements of the employer; and*
- (c) that the employment was terminated in accordance with fair procedure.*

In the present case it can be understood that the termination was "*based on the operational requirements of the employer*" following the termination of the contract in which the cleaning services of the Claimants was anchored. There was thus valid reason for the termination of the contracts. It is further understood that the Claimants were absorbed by the person who took over the contract after the Respondent got out of the same. This however is immaterial as it does not absolve the Respondent from its obligations under its contract with the Claimants. Based on the facts, the termination of the Claimants' contracts fell under the definition of redundancy as defined under section 2 of the Act and the Respondent was bound to comply with the procedure for redundancy as set out under section 40 of the Act as follows-

40. Termination on account of redundancy

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—*
- (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*
 - (c) the employer has, in the selection of employees to be declared redundant had 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;*
 - (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*
 - (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*
 - (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*
 - (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

The Respondent only complied with section 40(1)(f). It did not comply with any other requirements under the section. No notification was issued to the Claimants, their trade union or the Labour officer as provided in section 40(1)(a) and (b). The Respondent did not comply with section 40(1)(e) and (g) as they were not paid leave earned and severance pay.

For termination to be fair BOTH valid reason and fair procedure must be proved by the employer. Having

not complied with the procedure as set out in section 40 of the Act, the termination was procedurally unfair and I find accordingly.

Remedies

I will now consider the remedies sought by the Claimants.

1. Leave

The Respondent confirmed that the Claimants were not paid in lieu of earned leave. According to the contracts signed by the Claimants they were each entitled to 24 working days per year. The Respondent having admitted that no payment was made in lieu of earned leave, the Claimants are each entitled to their respective earned leave. The Respondent's argument that the Claimants did not apply for leave is irrelevant in view of the express provisions of section 40 that-

"An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions.-"

The Claimants are therefore entitled to leave earned as at the time of termination of employment.

2. Service Benefits

Having been members of the NSSF as confirmed by the payslips, the Claimants are not entitled to service pay under section 35(6) of the Act.

3. Underpayments

The Claimants were all cleaners. At the time of termination each of them was earning Kshs.7030 (basic salary) and kshs.1054 (house allowance). They were declared redundant at the end of May 2013. Their statutory minimum basic salary was therefore Kshs.9024.15. However the underpayments having been for months prior to May 2013 should have been based on statutory minimum wages for 2012 which was Kshs. 7915.90 with 15% house allowance of Kshs.1187.40. The correct consolidated wage up to April 2013 was therefore 9103.30. Having been paid Kshs.8040 they were each underpaid by Kshs.1063.30 per month.

4. Compensation

Having found that the termination of employment of the Claimants was procedurally wrong, they are entitled to compensation. I have considered that what each of them lost was the notification of the redundancy under section 40(1)(a) and (b). I have further considered that they had worked for fairly short periods and according to the Respondent (but not confirmed or denied by the Claimants), they all got employment with the company who took over the cleaning services after the Respondent terminated the same. It is therefore my opinion that 3 months' salary as compensation is reasonable in the circumstances and I award each of the Claimants the sum of Kshs.27309.90.

Date of Employment

Before I conclude, I have to determine the date of employment of each Claimant as the parties were not in consonance on the same. In the Memorandum of Claim, it is alleged that the Claimants were employed on the following dates:

Mercyline Makungu - 24th January 2012

Rosemary Cherop - 24th January 2012

Violet Yandunyi Evayo - 1st April 2010

Jackson Akavega - 1st October 2011

Phoebe Jelagat Maru 1st April 2010

The Respondent did not address this issue but submitted copies of fixed term contracts of the Claimants dated 1st October 2011. I will therefore take it that Mercyline Makungu, Rosemary Cherop and Jackson Akavega were employed on 1st October 2011 as indicated in their contracts produced by the Respondent. For Violet Yandunyi Evayo and Phoebe Jelagat Maru I will take the date of employment to be 1st April 2010. This is based on the fact that the Respondent did in the letters dated 1st October 2011 (Respondents Appendix B) allude to previous employment of the Claimants at paragraph 2 thereof.

Conclusion

In conclusion, I find and declare the termination of the Claimants' employment by the Respondent procedurally unfair and award each of the Claimants the following-

Mercyline Makungu

Leave from 1st October 2011 to 30th May 2013(20 months) (40 Days) Ksh.12,138

Underpayments for 12 months Kshs.12759.60

Compensation Kshs. 27309.90

Total **Kshs.52,208/=**

Rosemary Cherop

Leave from 1st October 2011 to 30th May 2013(20 months) (40 Days) Ksh.12,138

Underpayments for 12 months Kshs.12759.60

Compensation Kshs.27309.90

Total **Kshs.52,208/=**

Violet Yandunyi Evayo - 1st April 2010

Leave from 1st April 2010 to 30th May 2013 (38 months)(76 days) Kshs.23062

Underpayments for 12 months Kshs.12759.60

Compensation Kshs.27309.90

Total **Kshs.63,132/=**

Jackson Akavega - 1st October 2011

Leave from 1st October 2011 to 30th May 2013(20 months) (40 Days) Ksh.12,138

Underpayments for 12 months Kshs.12759.60

Compensation kshs.27309.90

Total **Kshs.52,208/=**

Phoebe Jelagat Maru 1st April 2010

Leave from 1st April 2010 to 30th may 2013 (38 months)(76 days)Kshs.23062

Underpayments for 12 months Kshs.12759.60

Compensation Kshs.27309.90

Total **Kshs.63,132/=**

The Respondent shall pay Claimant's costs limited to instructions fees and 2 attendances only as there was no hearing, the parties having proceeded by way of written submissions.

Dated, Signed and Delivered this 22nd day of September, 2017

MAUREEN ONYANGO

JUDGE