



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.2620 OF 2016

JOSEPH MACHARIA WARUTERE

KENNETH KIARIE KIMOTHO

MARTIN NJOGU NYAGUTHI

JOSHUA MWANGI MAINA..... CLAIMANTS

VERSUS

SAAB KENYA LIMITEDRESPONDENT

JUDGEMENT

Issues in dispute

- (a) Unfair, unlawful and wrongful termination on account of redundancy of the claimants
- (b) Unfair and discriminative employment policy and practices of the respondent against the claimants
- (c) Non-payment of the claimants' terminal dues and benefits.

By consent between the parties herein, issue (a) was resolved. The only outstanding issues for determination herein remain (b) and (c).

Claim

1. The claimants being adult males were employed by the respondent company in various capacities and on different dates until 30th November, 2016 when they were terminated on account of redundancy.

The 1st claimant Joseph Macharia Warutere was employed on 1st October, 2010 as a Senior Driver.

The 2nd claimant Kenneth Kiarie Kimotho was employed on 1st October, 2010 as a Driver.

The 3rd claimant Martin Njogu Nyaguthi was employed on 1st October, 2010 as a Driver.

The 4th claimant Joshua Mwangi Maina was employed on 1st April, 2010 as a Contractor Integrated Logistics Support Assistant.

2. On 31st October, 2016 the respondent unilaterally and without any appraisal issued a letter which did not specify who was declared redundant. On 30th November, 2016 the respondent issued to the claimant's termination letters on the grounds of redundancy. The claimants were allowed to appeal within 7 days. Vide letter dated 15th December, 2016 the claimants' appeals were rejected by the respondent.

3. The termination of the claimant did not follow the law or the respondent philosophy of performance. The claimants were not appraised and the respondent's action terminating employment on account of redundancy was contrary to legitimate expectation and devoid of a criteria and principle of last in first out. The claimants work required them to work in a rotation and depending on the season and therefore termination on account of redundancy was not the first option. the unilateral selection of the claimants without a hearing was constructive dismissal within is an unfair labour practice.

4. The claimants were under the redundancy entitled to the following;

1st claimant

1. One month notice pay Kshs.72,410.00
2. Service pay Kshs.289,639.80
3. Compensation Kshs.868,920.00

2nd claimant

1. One month notice pay Kshs.72,410.00
2. Service pay Kshs.289,639.80
3. Compensation Kshs.868,920.00

3rd claimant

1. One month notice pay Kshs.72,410.00
2. Service pay Kshs.289,639.80
3. Compensation Kshs.868,920.00

4th claimant

1. One month notice pay Kshs.72,410.00
2. Service pay Kshs.289,639.80
3. Compensation Kshs.868,920.00

5. The claimants are seeking that the letter of 30th November, 2016 terminating their employment be declared unlawful, null and void. That the respondent should re-engage the claimants in work comparable to that which they held before termination of employment or into suitable employment on similar terms. The claimants also seek a reinstatement back into employment without loss of benefits.

6. In the alternative, the claimants are seeking for terminal dues with interests and costs of the suit and the issuance of Certificates of service.

7. The 2nd claimant testified for and on behalf of the claimants. He testified that upon the employment of the claimants by the respondent, each had a written contract of employment and had specified duties. Before the claimants were declared redundant, there was no notice or an informed process. 7. On 1st November, 2016 nine (9) employees were called to a meeting and issued with a notice of redundancy but it was not clear as to who was affected. There was no hearing of individual abilities. The letter of termination was issued on 30th November, 2016. The grounds were that the respondent was running down due to redundancy. The criteria used was not shared. There was no personal assessment r abilities audit. There was no report by the supervisor. The board had not stated any problem with the claimants' work. The board member Elizabeth who met with the claimants was not in direct contact with them. the witness had been in Namibia while Elizabeth was based in Nairobi.

8. The respondent had three teams and the witness was in the team supervised by Saaidi. Each team had its own location. The witness was assigned duties by Saidi and not Elizabeth.

Mr Kimotho also testified that he had been with the respondent for 6 years without any disciplinary record. The claimants seek reinstatement as the positions they held are still available.

9. On cross-examination, the witness testified that he was issued with letter dated 30th November, 2016 on the reason that the respondent had many drivers hence the redundancy. On 1st November, 2016 he was group at a group meeting and they were informed of the redundancy. The respondent had gone down and was considering a redundancy.

Defence

10. In response the respondent admit having employed the 1st claimant on 1st April, 2010 as a Senior Driver at a gross salary of kshs.56,329.00 per month; the 2nd claimant on 13th May, 2010 as a Senior Driver at a gross salary of Kshs.55,240.00 per month; the 3rd claimant on 1st April, 2010 as a Filed Team Supervisor at a gross salary of Kshs.74,539.00 per month and he stepped down to become a driver at a monthly salary of Kshs.; and the 4th claimant on 1st April, 2010 as a Driver at a gross salary of Kshs.50,152.00 per month.

11. The defence is also that the respondent is engaged in the business of security and defence and provides security products and solutions to various bodies, manufacture specialised advanced technical systems and weaponry.

12. In October, 2016 the respondent embarked on a reorganisation for its Deployable Tactical Engagement Simulation (DTES) operation in Nanyuki. This team supports British Army Training Unit Kenya (BATUK) exercises with specialised training and simulation analysis. The reorganisation was necessitated by the reasons of large vehicles fleet reduction by 2 vehicles from 9 to 7 in September, 2014; small fleet reduction by 2 vehicles from 13 to 11 in June, 2016 and therefore reducing the associated maintenance and management overhead; and in 2017 the client BATUK informed the respondent that the number of exercises programmed for the year had been reduced by 2 from 6 exercise and thus only 4.

13. The result of the reorganisation was that the number of contracted integrated logistics support senior driers was reduced by 2 from 3 to 1 since one senior driver under supervision of the support manager as able to supervise the whole vehicle fleet. The number of CILS HGV drivers was reduced by 2 from 5 to 3 since there was no justification for employment for 5 drivers.

14. Following the reorganisation, the respondent was compelled to embark on a redundancy exercise since it had excess drivers in its workforce. On 24th October, 2016 the respondent held a meeting with the County Labour Officer on the matter and received advice on the applicable law. On 31st October, 2016 the respondent capability manager Mr Todd held a meeting with al 9 drivers in the DTES operation and informed them of the reorganisation and intention to reduce the number of ndrivers through redundancy. On 31st October, 2016 all the 9 drivers including the claimants were given letters informing them of the

reorganisation.

15. The respondent then constituted a redundancy selection panel to consider the ability, skill, reliability of each of the 9 driver so as to determine who would be declared redundant. The panel comprised senior officers of the respondent. there was a point based score, a review process and scoring. Each of the 9 drivers was reviewed and a score given. considering was given to individual work performance, additional skills, age, tribe and personal circumstances of each driver was put into account. The claimants got the lowest scores in the assessment.

16. On 30th November, 2016 the claimants were issued with letters terminating their employment and advised to appeal. There were no satisfactory grounds for appeal and thus were rejected.

17. Final dues were paid to the claimant and final computation was sent to the County Labour Officer for their collection. Such dues included;

a) *Severance pay at 20 days' pay for each year worked;*

b) *Salary for November, 2016;*

c) *Leave days not taken;*

d) *Three (3) months' salary in lieu of notice;*

e) *Certificate of service;*

f) *Letter for pension access from Britam*

18. The claim thus made for notice pay, service pay, compensation are not due on the grounds that the claimant have received their final dues. The claim for re-engagement is not possible as the respondent had reorganised operations for a reduced workforce and thus not able to re-engage the claimants. The redundancy was necessary to avoid the respondent incurring further costs which were not sustainable. The claims thus should be dismissed with costs.

19. In evidence the respondent witnesses were Richard Todd and Russell Isaac Thuma the capability manager and human resource managers of the respondent business.

20. Mr Todd testified that the reorganisation of the respondent business was necessary and justified noting reduced business and funds from clients and for sustainability, it was necessary to declare various positions redundant. The matters were thought through by management, a meeting called to inform all employees and the 9 drivers likely to be affected and when a capability assessment was undertaken, the claimants using objective criteria were identified as the ones to receive termination letters.

21. Mr Todd also testified that before the respondent could undertake the organisation they held a meeting with the County Labour Office for advice on the applicable law and how to undertake the procedures of laying off employee within the law. All procedures were undertaken with the approval of the labour office and final dues paid through the same office.

22. Mr Thuma also testified on his human resource function with the respondent and the procedures undertaken in arriving at the termination of the claimants on account of redundancy.

23. At the close of the hearing, both parties filed written submissions.

24. As noted above on 3rd May, 2017 the parties entered a consent with the settlement on one issue in dispute being (a) *the Unfair, unlawful and wrongful termination on account of redundancy of the claimants.*

25. Upon this settlement, what remained was the issue of unfair and discriminative employment policy and practices of the respondents against the claimants and the non-payment of terminal dues. In the pleadings these two (2) remaining issues in dispute are not articulated. Save for remedies sought with regard to notice pay, service and compensation, there is no remedy sought with regard to the alleged discriminatory employment policy against the claimants. No evidence was led in this regard. The material only arise within the written submissions.

26. A redundancy is defined by the Employment Act, 2007 as arising out of a business need, reorganisation or the services of an employee have become superfluous and thus an office is abolished. There is therefore the aspect of involuntary loss of employment. This does not relate to the any act of misconduct of the individual employee affected by the redundancy, rather, the business has to reorganise to remain in business.

27. Section 40 of the Employment Act, 2007 gives the procedures the employer has to follow in the eventuality of a redundancy. The claimants have not challenged the existence of such a situation save that in arriving at their termination of employment, there principle of last in fast out was not put into account and thus the respondent acted in a discriminatory manner.

28. Once the claimants settled on the issue of their being a redundancy situation within the respondent, the motions of section 40 of the Employment Act, 2007 come into force. The criteria set out under section 40(1)(a) to (g) should be put in context and not addressed in a single format. To do so would defeat the very purpose of accepting that indeed their existed a business need to reorganise and thus lay off some employees.

29. The criteria to be applied must be based on the business need. This is not the subject of the employee to determine. As much as the law requires that account must be given to the principle of last in fast out, such can only apply where there are similar situated employees or in a case where all employees hold a similar position on similar terms. In arriving at this finding I am well guided by the Court of Appeal where Murgor JA in **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** held that;

In Thomas De La Rue (K) Ltd versus David Opondo Omutelema [2013] eKLR this Court stated:-

“Where an employee is a member of a trade union, the law contemplates that the employer will deal with the employee through the union. That is why section 40 (a) requires notification of the union in cases of redundancy of unionisable workers. Under section 56 of the Labour relations Act, officials or authorized representatives of a trade union are entitled to reasonable access to the employer’s premises to; amongst other things represent its members in dealing with the employer. It is only in cases where the employee is not a member of the union that the employer has to deal directly with the employee.”

*A contrary view was expressed by the Industrial Court when it concluded that, the selection criteria should be discussed with the employee **and** the trade union, where the employees are advised on how the criteria would be applied. I do not agree. This interpretation is not was intended by the ILO Convention. The Convention expressly provides that the trade union representatives, **on behalf of the employees**, would engage and hold consultations with the employer.*

In the High Court case of Kenya Union of Commercial Food and Allied Workers vs British American Tobacco Cause No. 143 2008 the learned judge outlined the manner in which redundancy consultations should be conducted when he stated,

“The legal obligation on the parties to consult on the matter is designed to enable the parties to explore ways and means of minimizing the social and economic impact of the loss of jobs. The obligation is primarily imposed on the employer. The union’s duty is to make reasonable counter proposals to the employer’s proposals with a view to giving the affected employees a “soft

landing ground". In our view such consultations must be meaningful and held within the true spirit of collective bargaining. The employer ought to give the union an opportunity to influence its decision. There must be a genuine attempt to resolve the matter through objective consideration of the proposals generated by the parties to mitigate the harsh impact of redundancy.

30. Thus to allege there was a discriminatory practice for the reason that there was a particular selection criteria applied by the respondent is not appropriate. Allegations of discrimination at work are a serious matter and should be back by concrete evidence and where there is proof, a serious sanction must follow.

31. Mr Kimotho for the claimants testified that in October, 2016 the respondent officer called all drivers and informed them that there would be a reorganisation of the business which would result in the loss of employment for some of the drivers. No driver was identified for termination at this point. There was an assessment of each driver but the claimants were not called to defend themselves. The next thing the claimants received was the letter notifying them of termination of employment.

32. The claimants are not unionised. They confirm receipt of the general notice and the individual notice. Section 40(1)(c) allow the *employer* after the issuance of the general notice of redundancy to assess its workforce in terms of skill, abilities, capabilities and determine on this basis which employee is to receive the next notice. The same must be objective and where questioned, the employer be able to show that indeed there was a criterion in place.

33. Mr Todd testified that the respondent management sat to review the entire 9 driver based on criteria that was objective and looked at various aspects of each employee. The team making this assessment arrived at individual scores and the claimants ranked lowest.

34. On the premise of section 40(1)(c) and based on the evidence before the court, I find no justifiable cause to negate the criteria applied, the outcome result arriving at identifying the claimants as the ones to be lose employments on a process of redundancy that is not challenged. Such is not discriminatory, there was no policy to specifically set out and place the claimants' at a disadvantage to warrant a claim for discrimination against them. such a claim lack merits.

35. Terminal dues in a redundancy are clearly set out in law. Section 40 (1) (e) to (g) contemplate a payment of;

a) Leave days due in cash;

b) Notice pay and

c) Severance pay.

36. In defence and evidence of Mr Todd, the respondent has since paid the claimants 3 months' notice; confirmed that the claimants were members of a social security fund; and that the leave days due where applicable were put into account.

37. In this case, I find no justification for the award of the remedies sought. Having settled by consent that there was a redundancy, re-engagement of the claimants goes with it. Each claim has been issued with a Certificate of Service. due notice has been served upon the County Labour officer. The respondent went over and above the legal minimum in the payment of the terminal dues. With such a payment which I find generous, the claims made lack merit.

Accordingly, the claim is hereby dismissed in its entirety. Each party to bear own costs.

Delivered in open court at Nairobi this 31st day of October, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants: David Muturi & Nancy Bor

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