



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.2018 OF 2013**

**AND**

**CAUSE NO.2015 OF 2013**

**Consolidated with**

**CAUSE NO.2021 OF 2013**

**RAPEMO JULIUS OTIENO.....CLAIMANT**

**AND**

**RICHARD KISOI.....CLAIMANT**

**Consolidated with**

**ELVIS MBUGUA CHEGE.....CLAIMANT**

**VERSUS**

**VEGPRO KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

Issue in dispute – unlawful and unfair termination of employment and non-payment of terminal dues.

1. The claims herein for Rapemo Otieno, Richard Kisoï and Elvis Mbugua Chege were heard together. The main witnesses were Rapemo Otieno and Richard Kisoï.

2. The Claimants were employed by the respondent company on different dates.

Mr Otieno was employed in 1998 to 14<sup>th</sup> August, 2012 as a General Labourer earning a wage of Kshs.16,875.00 per month.

Mr Kisoï was employed in 1993 to 14<sup>th</sup> August, 2012 as a Field Assistant at a wage of Kshs.17,810.00 per month.

Mr Chege was employed in 1993 to 14<sup>th</sup> August, 2012 as a Filed Assistant at a wage of

Kshs.17,810.00 per month.

3. The claim is that on 9<sup>th</sup> July, 2012 the claimants were sent on compulsory leave and directed to resume duty on 14<sup>th</sup> August, 2012. Upon reporting back to work, the claimants were issued letters dated 1<sup>st</sup> July, 2012 by the human resource manager of the respondent and which declared their positions redundant. The terminal dues payable have not been paid despite a promise to pay.

4. The claim is also that the termination of employment on the grounds of a redundancy is unfair, unlawful and harsh considering the claimants had served the respondent for long periods of time. The termination of employment was also in breach of statutory provisions as the reasons given for a redundancy were baseless and the requisite procedures were not followed.

5. The claims are for;

*a) Notice pay*

*b) Salary arrears for August, 2012*

*c) Payment in lieu of untaken leave days*

*d) Leave travelling allowance*

*e) Service / gratuity when NSSF was not remitted [1998 to 2014]*

*f) Severance pay*

*g) Costs.*

6. The claimants' testimony is that upon employment by the respondent they worked diligently until they were sent on compulsory leave. The claimants were sent on leave on 9<sup>th</sup> July, 2012 and when they resumed duty on 14<sup>th</sup> August, 2012 they were issued with termination letters dated 1<sup>st</sup> July, 2012. This meant that termination had taken place even before the claimants were sent on leave. There was no notice, hearing or reasons given as to why the claimants were declared redundant.

7. In defence the respondent allege that the claimants were called to a meeting and directed to report to different farms but this was contested as not having been done in writing or verbally. As unionised employees, the claimants were not issued with notices from their union before the respondent terminated their employment. When the claimants reported their termination of employment to their union, efforts to resolve the matter was not addressed by the respondent. the matter was reported to the Labour Officer but the respondent refused to oblige.

Defence

8. In response the respondent admits the claimants were in their employment but not from 1998 for Mr Otieno or 1993 for Kiso and Chege and there is no proof of such allegations.

Otieno was employed on 17<sup>th</sup> June, 2004; Kiso was employed on 1<sup>st</sup> October, 1996; and Chege was employed on 22<sup>nd</sup> October, 1996.

9. At the time of termination the claimants were truck conductors with the main role of accompanying the drivers to fetch flowers and produce from various company farms. Each claim would start his journey in Nairobi and return back in the evenings. At the end of employed each claimant was earning a gross wage of Kshs.16, 875.00; 17,810.00 and Kshs.17, 810.00 respectively.

10. The claimants were members of Kenya Commercial Food and Allied Workers Union which has a

Recognition Agreement and a Collective Bargaining Agreement with the respondent. The claimants also were members of the Vegpro Group Staff Provident Fund, a retirement benefits scheme and the claimants were making a contribution of 5% to which the respondent was matching with a 5% contribution monthly. By joining the Provident Fund, Service Pay was not applicable to the claimants.

11. The Provident Funds were previously administered by Alexander Forbes Financial Service (EA) Limited but was changed to be under Kenindia Insurance Company Limited. The Claimants are also members of the NHIF and NSSF with the respondent making contributions therein while they were in employment.

12. The claimants took annual leave. The positions held by the claimants became redundant immediately the truck stem was farm based meaning the respondent trucks no longer started their trips from Nairobi but the farms took over this function. There was no longer the need for a conductor to accompany a truck.

13. The first meeting held with the claimants was in June, 2012 to let them know that there was a redundancy. The claimants were asked to take leave so that management could look for alternative vacancy for redeployment. Upon resuming duty, a meeting was held with the claimant and there was a communication that they should relocate to Naivasha and Nanyuki where the respondent has operations. This was to prevent job loss but the claimants insisted that they remain in Nairobi where they had been living with family and child going children.

14. There were 6 employees affected by the redundancy and the respondent was faced with the difficult task of finding new employment for them. It was not possible to have all the 6 in Nairobi. It was therefore made clear to the claimants that they would lose employment if they failed to take the offer of redeployment. This meeting with the claimants was held in the presence of the union.

15. Despite being given time to think over the offer for redeployment, the claimants declined to take it. A notice was issued and by error dated 1<sup>st</sup> July, 2012. This was later corrected by paying the claimants for 2 months in notice pay.

16. The union reported a dispute to the Minister. Final dues have been calculated and paid to the claimants and discharge vouchers duly signed. Due under the provident fund were also paid. The claims made are not justified and should be dismissed with costs.

17. In evidence, the respondent called John Mutanu as the witness. He testified that as the human resource manager for the respondent he worked with the claimants and has all the employment records. During the course of employment, the respondent made changes to the functions held by the claimants to reduce on costs. The farms they were getting produce from opted to undertake this function directly from the farms. There was no need for turn boys and role of the claimants.

18. The claimants were called and informed. They rejected the offer to move to the farms. They were all paid their terminal dues.

19. At the close of the hearing both parties filed written submissions.

20. It is the duty of the employer to keep work records. Under the Employment Act, 2007 and under the repealed Employment Act, Cap 226, the duty is vested upon the employer. Where the claimants were employed on divers dates before 2<sup>nd</sup> June, 2008 when the Employment Act, 2007 came into force, such employment was regulated under the repealed law, Employment Act, Cap 226. Such law allowed employment on casual basis and for unrestricted periods of time.

21. Therefore, based on the work records submitted by the respondent and confirming employment of permanent basis for the claimants commenced in 2004 for Mr Otieno and in 1996 for Kiso and Chege, this is acceptable under the applicable law. Such time in addressing any claims found justified will be applied in that regard.

22. An employer has the right to declare a redundancy where there is justification for the same. As this is an operational decision, it is regulated by law under section 40 of the Employment Act, 2007. The law requires that the employer should issue the general notice declaring the redundancy, and the individual notice to the affected employee(s). Where the employees are unionised and members, their union must be issued with such notices. There should also be notice to the Labour Officer.

23. Where parties have a Recognition Agreement and a Collective Bargaining Agreement, and redundancy provisions are addressed therein, it is trite, the agreements cannot go below the legal minimum standards. Such agreements can enhance the terms of the law but never below what is legally provided for. To do so would negate the basis of the law and be null and void to the extent of the inconsistency with the law.

24. The defence that the claimants were called to a meeting and advised of the redundancy in June, 2012 is not supported by any written notice to them, notice to their union or a notice to the labour officer. Such notice is mandatory under section 40(1) of the Employment Act, 2007. See in **Thomas De La Rue (K) Limited versus David Opondo Umutelema eKLR** held as follows;

*It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer...*

25. See also findings in **Dick Waswa versus Buffalo Bicycle Kenya Limited, Cause No.1028 of 2017**. The essence of such notice is to ensure that the established, business or employer has set in motion a procedure informing all stakeholder of the redundancy situation and the possibility of work loss, redeployment or reorganisations.

26. The defence also that the claimants were sent on leave in July, 2012 then issued with redundancy notices dated 1<sup>st</sup> July, 2012 but the same remedies with the offer to pay for two months, such does not remedy the legal minimum. An erroneous redundancy notice cannot be remedied in an overpayment. To do so is an outright act of unfair labour practice.

27. The essence of the notice dated 1<sup>st</sup> July, 2012 is not denied as having been issued. Such was issued while the claimants had not been issued with any notification of a redundancy so as to have their dues computed or the offer for a redeployment made. The offer for redeployment has not been attached. I therefore take it there was no such offer for the claimants to choose whether to take it or not.

The claimants were sent on compulsory leave on 9<sup>th</sup> July, 2012 and directed to return on 14<sup>th</sup> August, 2012. Where the notice dated 1<sup>st</sup> July, 2012 had been issued and two meetings held, there is no evidence of such knowledge or participation by the claimants, their union or information with the labour officer. Such is contrary to the mandatory terms and conditions of section 40 of the Employment Act, 2007 and a direct affront to the CBA between the respondent and the union.

29. Section 43(1) and (2) of the Employment Act, 2007 makes it mandatory for an employer to prove the reasons for the termination of employment and where the employer fails to do so the same is deemed unfair. In this case, where the respondent proceeded to declare the claimant's positions redundant without due process, the same became wrongful and thus unfair termination of employment.

29. Notice pay is due to the claimant for the summary action taken against them on 14<sup>th</sup> August, 2012. Each shall be paid for two (2) months' notice in terms of the Agreement between the respondent and the union at clause 17(c). The claimant had worked for period of over 5 years and thus benefit from the two months' notice pay herein.

30. On the claim for August, 2012 salary, from the work records attached by the respondent, I find each

claimant was paid full pay for the August, 2012. To claim such would be a double payment. Where termination took effect on 14<sup>th</sup> and there was pay for the full month, such is adequate compensation.

31. Untaken leave is claimed. To this effect the respondent has attached leave schedules of leave days taken by each claimant. In the last pay slip, what remained due and untaken is quantified and received by the claimants. The claim is not justified.

32. Leave travel allowance is agreed upon in the collective agreement. Such leave allowance was payable with taking of leave. Where the claimant did not take leave, there was therefore no travel to justify the claim.

33. Service gratuity was agreed by the parties in the CBA under clause 23 thus;

*Where no pension scheme is in force, an employee whose services are terminated, or is retired after five (5) years shall be entitled to 21 days' pay for every completed year of service.*

34. In this case, it is not challenged by the claimants that they were part of a Provident Fund scheme to address what was contemplated under clause 23 of the CBA. With the Provident Fund available to the claimant and with their contributions to it and now having had access to the same, service pay or gratuity is not available. Such is also dealt under section 35 of the Employment Act, 2007.

35. Severance pay I find is an amount computed for time served by each claimant and duly acknowledged. To seek the same herein and on the finding as above on the law applicable in terms of the period before the claimants were formally engaged by the respondent would be contrary to fair labour relations.

36. On the finding that the procedures laying off the claimants from their employment with the respondent were wrongful and amounted to unfair termination of employment, section 45 of the Employment Act, 2007 apply and compensation is due in terms of section 49 of the Act. Each claimant is herein awarded 3 months gross wage.

**Accordingly, judgement is hereby entered for the claimant for notice pay of two months and compensation for three months gross pay;**

**Rapemo Julius Otieno**

**(a) Notice pay Kshs.33,750.00**

**(b) Compensation Kshs.50,625.00.**

**Richard Kiso**

**(a) Notice pay Kshs.35,620.00**

**(b) Compensation Kshs.53,430.00.**

**Elvis Mbugua Chege**

**(a) Notice pay Kshs.35,620.00**

**(b) Compensation Kshs.53,430.00.**

**The claimants are awarded 50% of their costs.**

Delivered in open court at Nairobi this 31<sup>st</sup> day of October, 2017.

**M. MBARU JUDGE**

In the presence of:

Court Assistants: David Muturi & Nancy Bor

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