REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1302 OF 2012

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

VERSUS

CORN PRODUCTS KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. In the memorandum of claim filed in court on 1st August 2012, the issue in dispute herein is – unprocedural and unfair redundancy of 105 unionisable employees. On 9th July 2014, parties were heard before Rika, J. where the Claimant called Emmanuel Menya as their witness and on the basis that the dispute set out was with regard to the formula used to compute redundancy dues. The Respondent on this basis did not call any witness. Parties agreed to file written submissions.

2. On 25th January 2016, the court went through the record and gave directions with regard to the issue in dispute and noting proceeding before Rika, J. the only issue pending arbitration is that of the formula to be applied with regard to the redundancy dues to the Claimant members.

Claim

3. The claimant's case is that they are a registered trade union representing industrial interests of all employees engaged or employed in the Respondent Company. The parties have a Recognition agreement and have negotiated a Collective bargaining agreement (CBA). On 23rd July 2012 the Respondent wrote to the Claimant notifying the union the intention to declare 105 unionisable employees redundant. The reasons given were that due to the highly competitive environment and influx of cheap imports into Kenya, the Respondent was encountering increased disadvantage and were therefore considering disengaging from productions operations in Kenya and shutting down the plant in Eldoret. On 26th July 2012 the Claimant made effort to meet the Respondent but were denied access to the premises. The Claimant informed the labour Officer who on 27th July 2012 visited the Respondent premises but was denied access. The Claimant reported a dispute with the Minister.

4. The claim is that in the payment of redundancy dues the Respondent did not use standard formula in tabulating terminal dues.

The claim is for;

a) Severance pay

Basic salary x 24 days x 8 hours x number of years of service

182 hours

b) Leave probate

Basic salary x number of leave days x 8 hours

182 hours

c) Notice to be applied as per CBA

d) Costs.

5. In evidence, Emmanuel Menya Ochieno testified that he worked for the Respondent as a plant Boiler operator for 20 years. On 16the July 2012 something was posted on the notice board and every employee was told to carry his belonging as the Respondent was going to fumigate the plant. This was to be done by 20th July 2012. The Respondent was going to provide buses to ferry the employee's property. They got suspicious as fumigation had been done before without being sent away. As the shop steward he noted that the date to return to work was not indicated. The manager indicated it was a normal fumigation and issued notice on when to return but on 23rd July 2012 they found the gate locked. The managing director announced that the Respondent was restructuring and the employees were issued with termination letters.

6. The witness also testified that the parties had a CBA that allowed redundancy and termination subject to payment of notice, computation of dues and when the matter was reported to the minister and a conciliator appointed, there was no agreement on what was payable. The parties disagreed on the formula of the CBA at clauses 34(d0 and 31 (c). The employees worked for 42 hours per week and this was multiplied by 52 weeks in a year. This divide by 12 hours. The basic salary x 8 hours x 21 days x years served ÷ 182 hours.

7. The Respondent took a formula of basic x 21 days x years served ÷ 30 days.

8. The witness earned kshs.16, 900.00 and using the respondents' formula would lose kshs.80, 000.00 having served for 20 years. In 2005 there were redundancies and the formula used was as set out by the Claimant.

9. Upon cross-examination, the witness testified that on 23rd july2012 the Respondent held a meeting to update the Claimant about the financial position. On 16th July 2012 no one was fired and on 23rd July 2012 a notice to declare redundancy was issued. The witness got his notice of termination. There was a training on after work and such notices were copied to the labour office. That under the CBA for the years 2004 to 2006 at articles 31©, the severance pay would be 24 workings days per year; the CBA for 2006 to 2008 has 24 days similar provision under the 2008 to 2012 CBA with 24 working days for each year served as redundancy pay. That the law provides for 15 days' pay but the CBA negotiated provided for a better rate at 24 days.

Defence

10. In defence of the claim, the Respondent filed a Replying Memorandum on 9th August 2012 and a Supplementary reply on 15th October 2012. The defence is that the Respondent has engaged in production operations in Kenya for over 35 years where they employed the Claimant members. Due to a highly competitive environment and the influx of cheap imports into Kenya, the Respondent encountered continuous and increasing disadvantages over the years and due to resulting losses, business recovery became hard to achieve. On 23rd July 2012 the Respondent held a meeting with employees to review company performance but results were dismal. The Respondent took a decision to disengage in production operations and shut down the plant in Eldoret and the employees were informed.

11. The Respondent issued notices to the Claimant and labour officer as required under section 40 of the Employment Act and clause 31 of the CBA. The employees were also informed. Each employee received and information pack with a notice of intention to terminate employment on account of redundancy; schedule of entitlements; list of questions and answers; and a note informing the employees of the dares they were to attend workshops to assist them in preparing for the job market. There was information that employment would terminate on 23rd August 2012. The Respondent offered to pay severance pay; pay in lieu of notice; leave accrued being payment due under the CBA. The Respondent was also going to pay for Long service pursuant to clause 33 of the CBA and gratuity payment due before an employee joined the retirement benefit scheme pursuant to clause 34 of the CBA.

12. The defence is also that the claim is not justified. What is due to the Claimant under severance pay is pursuant to the provisions of clause 31 of the CBA or where not agreeable to the claimant, this should be paid in accordance with section 40(1) (g) of the Employment Act.

Submissions

13. The Claimant submit that the Respondent declared redundancy and issued letters on 23rd July 2012. A dispute was reported to the Minister and a conciliator appointed. The formula for payment of severance pay was not agreed upon as the Claimant submissions were that previous practice by the Respondent was to pay severance and final dues to use hourly rates;

a) Basic salary x 8 hours per day x 24 days per year x number of years worked = 182 hours.

The 182 hours payable per months;

b) 52 weeks x 42 hours per week ÷ 12 months = 182 hours per week.

c) Formula applicable;

Basic salary x 8 hours per day x 24 days CBA x No. of years worked.

14. The Claimant also worked out the example of their witness Immanuel Menya Ochieno as follows; Kshs.16, 908.65 x 8 hours x 24 x 20 years ÷ 182

Severance pay = kshs.356, 752.95

Leave prorated = 16,908.65x8x8 ÷ 182 hours = 5,945

15. The Claimant therefore submit that the Respondent is using a formula less favourable to the Claimant by computing severance pay using a 1991 formula.

16. The Respondent submit that on 23rd July 2012 employees were issued with notices of intention to declare redundancy. Steps were taken to prepare them of the impending change and a separation package was prepared and issued. A specific notice was also issued to each employee indicating the date of termination and the dues payable. The Respondent also had to close the firm for clearing of its production machinery. All these procedures were undertaken with the knowledge of the union and the labour officer. The Claimant filed the dispute and a conciliator was appointed.

17. When parties met with the conciliator, the severance payable to employees was not agreed upon. The conciliator recommended that the formula applicable was the hourly rate but did not consider the CBA applicable at the time via-a-vies the other benefits and dues that had been paid to the employees under the same CBA. The conciliator's report had been agreed on a without prejudice basis but the Claimant has sought to introduce it as evidence and to support their case.

18. The Respondent also submit that section 40 of the Employment Act has set a formula for severance pay which is at 15 days for each full year worked. Under the CBA clause 31 on redundancy, parties agreed on 24 days for each completed year of service as the severance pay. The last redundancy prior to the one of 23rd July 2012 was in 2005 under a different CBA at which time there was no provision for a pension fund as set out under clause 34 of the subject CBA, which caused the shift to redundancy terms and payment of 24 days. It has never been based on hourly rates for computation. The application of agreed formula under the CBA or in law will not cause any disadvantage to the Claimant members as they have a Pension scheme.

Determination

19. From the proceedings, the evidence of Immanuel Menya Ochieno and noting at the close of the hearing, the only issue that remains for arbitration is that of the formula applicable in the computation of the severance pay. The introduction of new issues within submissions is not an acceptable procedure as exchange of pleadings had closed and hearing completed on the basis that the only issue in dispute was that of the formula to be applied in the computation of severance pay.

20. Parties are agreed on the fact that on 23rd July 2012 the Respondent declared a redundancy. The affected employees also received personal notice of termination. The Claimant and the labour office were aware and negotiations commenced on the basis of these facts. These are procedures and processes approved by this court in various cases and now reaffirmed by the Court of Appeal in the case of Kenya Airways Ltd versus Aviation 7 allied Workers Union Kenya & Others, Civil Appeal No.46 of 2013.

21. Where a redundancy has been declared, section 40 of the Employment Act is implicated. Section 40 sets the basic legal minimum standards applicable in a redundancy situation. There must exist a valid and fair reason based on a company operational requirements and the termination of services on account of redundancy so as to find justification. Though the validity and justification of the redundancy is not the issue herein, this is set out as once such a redundancy situation is declared, the affected employees are entitled to various terminal dues inclusive of severance pay. Such severance pay can be agreed upon in an agreement such as in the CBA or some employees set this out in the human resource manual or work place policy. In this case parties agree there is a CBA regulating the relationship and clause 31 contemplated a redundancy.

22. Where there is a dispute with regard to any matter between parties in an employment relationship, this court must give regard to the applicable law and any agreements between the parties. The law here is important as it gives the minimum standard. The agreement of the parties is equally important as with it the intention of the parties is set out. The court gives great weight to any agreement between the parties as with it are terms and conditions that parties mutually have set out terms and conditions to govern their relationship. Unless there is an inherent matter that creates an illegality, an agreement by the parties is subject for enforcement by this court.

23. By 23rd June 2012 parties herein had an ongoing CBA 2010 to 2012. The CBA set the terms and conditions to regulate the employment of the Claimant members with the Respondent as the employer.

24. The CBA is an agreement of the parties to it but it is not an ordinary 'agreement' as a commercial contract which parties can change at will. An agreement in labour relations is given legal force upon registration by this court as it is regulated in law under the Labour Relations Act. Such is the context within which the CBA subject herein running for the duration of 2010 to 2012 must be addressed. A CBA is defined under section 2 of the labour Relations Act as;

> "collective agreement" means a written agreement concerning any terms and conditions of employment made between a trade union and an employer, group of employers or organisation of employers;
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> 25. Pursuant to section 60 of the Labour Relations Court, a CBA must be registered with the Court upon assessment and confirmation that is not contrary to any law and has been agreed upon by the parties. More important is what is set out under section 59 of the Act thus;
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> 59. (1) A collective agreement binds for the period of the agreement -
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> (a) the parties to the agreement;

(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or

(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.

(2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employer association.
…

(5) A collective agreement becomes enforceable and shall be implemented upon registration by the National Labour Court and shall be effective from the date agreed upon by the parties.

26. Upon its registration with the court, a CBA becomes a binding agreement for its duration and based on its legal force, it is enforceable. Before parties to it can rely on any other document, the CBA becomes the primary document of reference.

27. In the CBA for the period 2010 to 2012, clause 31 on redundancy, at sub-clause 31(c) set out the following; An employee declared redundant shall be entirely to severance pay of 24 days for each completed year of service. This will be calculated on the employees' terminal basic pay.

28. My reading of clause 31 together with section 40 of the Employment Act on redundancy especially at sub-section 40(1) (g) states;

(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.

29. The common elements in both I find to that the payable severance pay is to be based upon days for each completed year of service. The only difference is the number of days. One has 24 days while the other has 15 days. I have had chance to read the termination clause of the CBA at clause 28, and notice clause at 30 and particularly clause 34 on retirement benefits, and I have not seen any computation of any dues based on number of working hours. All dues are compute don the basis of monthly wage as the common denominator. I therefore find no basis at all as to why the Claimant has relied in the claim and submission on an hourly rate as the basis for computation of the severance pay. Such is agreed upon in the CBA which is the binding agreement between the parties, and the law requires that if parties cannot agree on such an issue, the basic minimum standard to apply is 15 days' pay for each completed year.

30. In this case, to apply the legal minimum at 15 days would be an unfavourable rate for he Claimant members who enjoy a CBA with a higher rate at 24 days. Such should be the applicable rate as under clause 31 of the CBA on a formula of 24 days for each completed year of service. This will be calculated on the employees' terminal basic pay.

31. I make special reference to the report of the Minister and the Conciliator appointed. The basis of the recommendation that the applicable formula in computing severance pay is that of an hourly rate is on the grounds that the practice of the parties for many years was to use such hourly rates. The conciliator further makes an observation that to use one formula for many years and then use another formula on other employees that is less favourable is a discriminatory practice. That the fact of the employer using the formula for many years indicate that they accepted it to be the right agreed formula for computing terminal dues payable. However, contrary to these findings, where there is a labour dispute and a matter is referred to the Minister and a Conciliator is appointed, such a process does not in any manner render primary documents of reference inapplicable. Due regard must be given to the law and the CBA such as the one between the parties herein before reference is made to a practice that has applied for many years. A practice, or practices, however repeated and despite the long and many years of such application does not override a lawful document or a binding agreement such as the CBA. Where well persuaded, the moral value to the practice can apply but is not biding. The only biding and enforceable document was the CBA as at 23rd July 2012 pursuant to section 59(5) of the labour Relations Act;

A collective agreement becomes enforceable and shall be implemented upon registration by the National Labour Court [Employment and labour Relations Court] and shall be effective from the date agreed upon by the parties.

32. The conciliator further makes a finding that the Respondent in application of a different formula other than the first formula quoted by the union is discriminatory practice contrary to section 5(30 of the Employment Act. Such I find to be a serious finding but lacks justification and or basis. Such a finding has serious ramification on the Respondent as an employer, potential employer or as an entity operating business in this Republic or anywhere else. It should not be casually stated. It has to be made upon a firm and uncontroverted evidence that the Respondent was or intended to apply a discriminatory policy with regard to its employees. Had the conciliator addressed himself on the basic documents governing the relationship between the parties, had the chance to read the applicable law and matters at hand, it would have been easy to apply the CBA formula. This is clearly articulated at clause 31 and I find it to be more favourable to the Claimant members. I will not delve therein beyond these findings.

33. My reading of the case submitted by the Claimant in David Byagudi okoth & Another versus Corn Products Kenya Ltd, Cause No.254 of 2013 (Nakuru) is the court finding that;

… the payment is a function of the days in a year and not days in a year actually worked by the employee. The court

further holds that the pay of 24 days of thirty days in a month was more favourable severance pay than the statutory pay. The court finds that the computation based on 30 days was fair and the claimants' claim for a computation of 22 days will fail.

34. I find no departure in the cited case as herein. The court based its findings on the due severance pay on the agreed CBA formula at 24 days wage for the year and not on an hourly rate. This I find is correctly applied in this case, the CBA rate and formula is more favourable for the Claimant members unlike the lower rate set out in law at section 40(1) (g) of the Employment Act.

35. I therefore find the formula to apply in this case in the computation of severance pay is - 24 days for each completed year of service. This will be calculated on the employees' terminal basic pay.
The Claimant witness Immanuel Menya Ochieno gave his last salary as Kshs.16, 908.65. This is not indicated at to whether it was the basic or the gross wage. The Respondent too failed to set out what was basic pay and the gross pay. I will apply this same amount in setting the formula to apply.

36. Mr Ochieno had served for 20 years and on his last salary being kshs.16, 908.65, a daily rate in a 30 days month is therefore kshs.564.00. Such daily rate for 24 days amounts to kshs.13, 527.00 and for the 20 years served, this amounts to Kshs.270, 538.00.

16,908.65 ÷30 x 24 x 20 = 270,538.00.

37. In the notice issued to Immanuel menya Ochieno dated 23rd July 2012, the Respondent computation of severance pay is at No. 2 as follows;

2. Severance payment of 24 days base salary for each completed year of service and prorated for a partial year 274,576 Kshs. This includes any statutory severance mandated by law.

38. The severance pay for the employee at Kshs.274, 576.00 instead of Kshs.270, 538.00 is higher than the above computation. To claim more over and above what the Respondent has noted, I find does not have any justification. It is a favourable pay in severance. In a different case of Millicent Anyango Ayumba, she was employed from 10th April 1995 and terminated on 30th September 2012. She had served for 17 years. The last salary paid was kshs.32, 753.00 per month. For Millicent Anyango Ayumba, the due severance pay is 32,753 ÷ 30 x 24 x 17 = Kshs.445, 440.80. In the termination letter the severance pay is Kshs. 458,219.00 which is a higher rate than computed above. Such is favourable for the employee. Another employee whose computation of severance pay I can make reference to is Milton Sanya Wanyama who was employed on16th January 2006 and was terminated on 31st October 2012 after serving for 6 full years. The last salary paid was kshs.98, 693.00 per month. Severance pay due in his case is 98,693 ÷ 30 x 24 x 6 = 473,726.00. The severance due computed by the Respondent in the letter of termination is kshs.536, 457.00. Such I find to be a favourable severance pay.

39. As set out above, the Respondent has applied a favourable formula in computing severance pay. The disputed severance pay by the Claimant lack merit and I find no justification that severance pay should be paid based on an hourly rate computation. Such is not based on the applicable law or on the CBA between the parties.

In conclusion, the claim must fail. The claim is hereby dismissed. Each party shall bear their own costs.

Orders accordingly.

Delivered in open Court at Nairobi this 2nd day of March 2016.

M. Mbaru
JUDGE

In the presence of

Court Assistant: Lilian Njenga

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