



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 143 OF 2007

(Before Hon. Lady Justice Hellen S. Wasilwa on 22nd June 2016)

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS CLAIMANT

VERSUS

BRITISH AMERICAN TOBACCO

(KENYA) LIMITED RESPONDENT

JUDGMENT

1. The Claimants are former employees of the Respondent who were declared redundant in September 2006 and filed suit for wrongful termination through their Union the Claimant. On October 2008, the Hon, Justice Kosgei found in their favour finding that the redundancy was procedurally flawed and ruling as follows.
2. The Claimants were awarded: (page 40 of the Award)
 1. *That the Respondent immediately put into effect the processes of reinstatement of Grievants and each of them to their original job and position as at the date of their termination, without loss of their full salaries and all other benefits and allowances, privileges and continuity of service.*
 2. *In the event that a particular Grievant no longer wishes to work for the Respondent the Respondent do pay such employees the following terminal dues:*
 - a. *All outstanding wages, leave pay and allowances as provided for in the Collective Bargaining Agreement between the parties.*
 - b. *Pay in lieu of notice in accordance with the parties Collective Bargaining Agreement.*
 - c. *Severance pay in accordance with Clause 31 of the Collective Bargaining Agreement between the parties.*
 - d. *Twelve (12) months wages by way of compensation for unlawful loss of employment.*

3. *The foregoing payments be effected within 30 days from the date of this decision.*

3. The Respondent were aggrieved by the award, filed for stay of implementation of option 1 as the positions were no longer available and filed a Judicial Review Application seeking to quash the award.
4. However, on the 22nd of May 2012, the parties recorded a consent before Justice Warsame where they agreed that the Respondent herein would pay the Claimants' the undisputed sum as per the CBA and all Claimants accepted payment of the undisputed redundancy dues payable under option 2 of the Industrial Court Act.
5. Three of the Claimants, Justus Muthiani, Lawrence Muraya, and Joshua Nyang' accepted payment of 12 months wages as compensation for unlawful loss of employment and accordingly their claim against the Respondent was marked as settled.
6. The remaining Claimants, that is Benson Mwangi Macharia, Robert Machira, and Japheth Nyaga Mati accepted the undisputed Redundancy payments, less tax but declined to accept 12 months wages compensation offered and therefore the Judicial Review Application had to proceed to hearing.
7. On 26th June 2012 the Claimants through the firm of Lumumba, Mumma & Kaluma Advocates were paid the following Redundancy sums:

1. <i>Benson Mwangi Macharia</i>	<i>Kshs 1,753,640.23</i>
2. <i>Robert Machira</i>	<i>Kshs 3,224,589.60</i>
3. <i>Japheth Nyaga Mati</i>	<i>Kshs 2,540,670.81</i>

8. The Judicial Review Application was disallowed and the Respondent filed for maintenance of status quo pending the hearing and determination of the intended appeal. However, the remaining Grievants filed a replying affidavit on the 17th of June 2015 where they opted for payment of their dues under the second option of the original award.
9. The calculations for each side at this point are different hence the Court case now.

Claimants Submission

10. The Claimant submit that it is very clear that the Respondent was ordered and directed to reinstate the Grievants to their original jobs, positions as at the date of their termination [i.e. 1st October 2006] without loss of their full salaries and all other benefits and allowances, privileges and continuity of service.
11. However, they submit that the Respondent has refused and disobeyed the Court Order as he has never reinstated the Grievants and their subsequent applications for review were dismissed with costs by Justice Korir on 30th April 2015.
12. The Claimant insist that the Respondent comply with the Award at least in monetary terms i.e. pay them all their dues according to the award whose figures have already been tabulated and filed in Court on the 14th of July 2015.
13. The Claimant submits that the filed tabulation has taken into account the basic salary, house allowance, merit increment, annual increment, annual leave, leave entitlement and meal allowance from their date of termination i.e. 1st October 2006, the Collective Bargaining Agreement, (CBA) which they submit should all be commuted till 30th April 2015, when the Respondent's Notice of Motion was dismissed.
14. The Claimant submit that the Respondent must pay the Grievants all their salaries and other

financial benefits from October 2006, until 30th April 2015 so that they will be in a financial position as if they had been reinstated into their original positions less the amount paid to each Grievant via the firm of Lumumba Mumma & Kaluma Advocates. Further, the amounts owing have been calculated taking into consideration 12% interest from the award date being the normal interest rate applied by Court.

15. The Claimant submit that the Respondent's computation is erroneous for various reasons, first being that it disregards the Industrial Court Award/Order No 1, has brought in issues of redundancy which was declared a non-issue hence the order for reinstatement, is based on an erroneous twelve months compensation for unlawful loss of employment making it contrary to the award, has ignored the fact that the Court treated them as having their original employment from date of dismissal, while some of the sums reflected in the computation are sums originally calculated by the Ministry of Labour before the matter went to Court.

16. For the foregoing reasons the Claimant asks the Court to award as commuted.

The Respondent Submissions

17. The Respondent submit that the tabulation by the Claimant contains various enhancements not awarded by the Court such as:

- a. ***Interest rate of 12% where no interest was awarded by the Court, and further an award under the Trade Dispute Act the law applicable in this instance is silent on interest.***
- b. ***Anticipated pay including house allowances from the date of their redundancy until the date they would have retired under their contract which was contrary to the award, which was also not an entitlement in their fixed term contract.***
- c. ***Anticipated pay i.e. merit increments which would have purely been based on the assessment after work done.***

18. They submit that the Grievants calculations should be dismissed and their calculations adopted as the basis for the award.

19. The Respondent further submits that the Claimants were subject to the Collective Bargaining Agreement in force from 1st April 2005, to 31st March 2007 and was the agreement referred to by the Court in calculating the award, which was the basis on the payment of the undisputed redundancy payments.

20. In their submissions the Respondent rely on the case of **Otieno Nalwayo v Mumias Sugar Co. Ltd [2015]eKLR** where the Court stated in application to stay execution of a decree and setting aside of a warrant of execution on the ground that the decree holder had added interest to the award:

“I agree with the Applicant, that where the judgment is silent on interest a party cannot presume the same. The Court did not provide for interest in this case and none is payable.”

21. Moreover, they rely on the Trade Disputes Act where the award was made under Section 15(1) of the Act which reads as follows:

“15(1) in any case, where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the Court may order that employer to reinstate that employee in his former employment, and the Court may in addition to or instead of making an order for reinstatement award compensation to the employee”. Provided that such compensation shall not exceed:

i. ***In a case where reinstatement is ordered the actual pecuniary loss has suffered by the employee as the result of the wrongful dismissal;***

ii. ***In any other case, twelve months monetary wages.***

22. Further, the Respondents rely on the case of **Mary Mutanu Mwendwa vs. Ayuda Ninos De Africa – Kenya [2013]eKLR** where after Courts have recognized and dismissed an employee on a fixed term contract as one who is not entitled to anticipatory pay, in this case the Judge stated as follows:

“I do not see any policy or legislative reason why those on fixed term contracts should be treated any differently from those on definitive contracts with a retirement age being treated differently. It would not be fair to award those on fixed term contracts loss of earnings for balance of un-served contract and they deny those in definite or permanent contracts who are unfairly or wrongfully dismissed say with a balance of thirty years to retirement differently”.

23. The Respondents submit that the claim for balance of their contractual terms cannot be allowed and that this Court has no jurisdiction to award more than was awarded in October of 2008. Moreover, they rely on her Ladyships decision in **Charles Kobaya vs. Wakenya Pamoja Sacco Society Ltd [2014] eKLR** where it was stated:

“His demands to be paid for 5 years for which no services have been rendered is untenable”.

24. In conclusion the Respondents humbly ask the Honourable Court to adopt the Respondents interpretation of the award as amounts payable to the Grievants.

25. Having considered submissions of both parties, the issue this Court has to determine is how to compute the Grievants benefits in terms of Judge Kosgei’s Order of October 2008. The Claimants contend that they opted for option 1 above where the Court ordered they be reinstated.

26. The Respondents didn’t do so, so they contend that they should be paid all their outstanding wages, leave pay and allowances as provided in the Collective Bargaining Agreement, pay in lieu of notice, severance pay in line with Clause 31 of the Collective Bargaining Agreement and 12 months compensation for unlawful loss of employment. Other than this, the Claimants insist they be paid their salaries upto 2015 the time they would have retired.

27. The question then is whether the Claimants are entitled to anticipatory salary. In the case of **Kenya Airways Limited vs. Aviation and Allied Workers Union and 3 others, Nairobi Civil Appeal No. 40 of 2013** JA Maraga opined as follows:

“However, having found that redundancy was justified, I hold that the remedy of reinstatement with back wages was, in the circumstances, not efficacious and I accordingly set aside the learned Judge’s order of reinstatement in its entirety and substitute it with an award of damages equivalent to six months’ salary to each of the 447 retrenched workers”.

28. Under the repealed Trade Disputes Act Section 15:

“In any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the Court may order that the employer to reinstate that employee in his former employment and the Court may in addition to or instead of making an order for reinstatement, award compensation to the employee:

Provided that such compensation shall not exceed:

i. ***In case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as the result of the wrongful dismissal.***

ii. ***In any other case, twelve months monetary wages.***

-----“.

29. From the above provisions payment of anticipatory wages is not an option. Though the Claimants were not reinstated, the only remedies they are entitled to would be to award them actual pecuniary loss or 12 months wages. In this case then, the claim as submitted by Claimants for salaries since 2006 to April 2015 is not viable. I will award the Claimants as follows:

1. **Robert Machira**

Salary was 94,049/=

1. So pay in lieu of notice = 94,049/=
2. Clause 31 of Collective Bargaining Agreement for severance pay will be:
 - 1 month basic pay = 94,049/=
 - (4) days pay of basic pay including house allowance for each completed month of service which is like 48 days salary for each year worked = $150,478.4 \times 25.5 \text{ years} = 3,761,960/=$
3. 12 months salary = $94,049 \times 12 = 1,128,588/=$
4. Leave 7.4 days = 23,198.78/=

Total = 5,011,844.78/=

Less already paid = 3,224,089.60/=

Balance = 1,877,755.18/=

2. **Benson Macharia**

Salary was 97,392/=

1. So pay in lieu of notice = 97,392/=
2. Clause 31 of Collective Bargaining Agreement for severance pay will be:
 - 1 month basic pay = 97,392/=
 - (4) days pay of basic pay including house allowance for each completed month of service = 48 days salary for each year worked = $48 \times 3246.4 = 155,827.2 \times 11.6 \text{ years} = 1,807,595.52/=$
3. 12 months salary = $97,392 \times 12 = 1,168,704/=$
4. Leave due 15.9 days = 51,617.76

Total = 3,222,701.28/=

Less what was paid = 1,753,140.23/=

Balance = 1,469,561.05/=

3. **Japheth Nyaga Mati**

Salary was 73,521/=

1. So pay in lieu of notice = 73,521/=

2. Clause 31 of Collective Bargaining Agreement for severance pay will be:

- 1 month basic pay = 73,521/=
- (4) days pay of basic pay including house allowance for each completed month of service which is like 48 days salary for each year worked = $2450.7 \times 48 \times 24.10 \text{ years} = 2,834,969.76/=$

5. 12 months salary = $12 \times 73,521 = 882,252/=$

6. Leave due 8.4 days = 20,585.88/=

Total = 3,884,849.64/=

Less what was paid = 2,090,304.57/=

Balance = 1,794,546.13/=

30. Each Claimant is also entitled to costs. I also award interest on their amounts from the date of this judgment.

Read in open Court this 22nd day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Macharia for Claimants – Present

Kahora holding brief for Mr. Opiyo for Respondent