



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1590 OF 2013

DIDACUS ODHIAMBO AHAGO.....CLAIMANT

VERSUS

MIDROC WATER DRILLING LIMITED.....RESPONDENT

JUDGMENT

1. On 18th November, 2014 I directed that this suit be heard together with cause number 1593 of 2013 since the issues involved and the respondents are common in both causes.
2. On 19th November 2014 when the present cause came for hearing, after listening to opening remarks by counsel for the parties, I came to realize that the only issue in both causes was the declaration of redundancy of the Claimants and redundancy being a matter of law, it was not necessary to receive oral evidence in addition to the factual documentation of events as presented by the parties in their pleadings before the Court.
3. I consequently directed that the parties file written submissions with regard to their respective positions on the issue of redundancy and leave it to the Court to determine the issue.
4. Mr. Namada for the Claimants on his part submitted that the case before the Court was a clear case on whether the respondent followed laid down procedure in declaring the claimant's redundant or not that is to say whether the legal requirements as to the declaration of redundancy as stipulated under section 40(1) (b) of the Employment Act were met in declaring the Claimant's redundant.
5. According to Counsel, section 40 (1) (b) require that an employer must notify the employees to be affected personally in writing of the impending redundancy and reasons thereof.
6. Second, the employee must notify the Labour Office of the intended decision and upon the implementation of the process, it must take cognizance of the experience and the service durations of the affected employees. Finally, the employer must immediately pay all the terminal benefits.
7. According to counsel, these requirements of the law were not abided by at all by the respondent. That is to say the respondent never gave the claimants any prior written notice on redundancy. Counsel submitted that this notice must be in writing and that the law requires that a declaration of redundancy be clearly documented and overseen by the Labour Office to protect employees rights.
8. Counsel submitted that a claim by the respondent that it had a dispute with one of their clients which

degenerated into a Court dispute was no justification for declaration of redundancy and neither did the dispute prevent the respondent from abiding by the provisions of the law. Counsel further submitted that the respondent despite complaining of financial woes had never declared any insolvency to enjoy the protection under section 40(2) as read with section 66 of the Employment Act.

9. Mr. Namada therefore finally submitted that having failed to abide by the law, the Court should find as in other cases before it that such termination which flouts the law amounts to an unlawful and unfair termination of employment. In this regard counsel referred the Court to the cases of **Kenya Union of Journalists v. Nation Media Group (2013) eKLR**, **Paul Ngeno v. Pyrethrum Board of Kenya (2013) eKLR** and **Banking and Finance Union v. CFC Stanbic Bank (2014) eKLR**.

10. Mr. Wangila for the respondent on the other hand submitted that the respondent advised the claimant that their employment was coming to an end due to termination of construction contract the respondent entered into which formed the basis of their employment.

11. According to Counsel when the construction contract was terminated by the National Water and Pipeline Corporation, the respondent commenced a civil suit number HCCC No. 45 of 2013 which was still pending in Court. Counsel submitted that the claimants were advised that work had stalled and which was why they were idle but still being paid their monthly salaries.

12. According to Counsel, the respondent through its agents held a number of site meetings where the employees including the claimants were informed that work had stalled and was coming to an end due to the contractual differences between the respondent and National Water Conservation and Pipeline Corporation (NWCPC). When the contract was eventually terminated, the respondent was forced to release its employees including the claimants immediately since the respondent had run out of funds to keep paying them.

13. According to counsel, the claimants and their co-workers were released using a letter dated 13th February, 2013 which read as follows: _

RE REDUNDANCY

You are hereby informed that your services with Midroc Water Drilling Company Limited have been terminated with effect from 13/02/2013; this is as a result of reduction in the company's operations.

You will be officially informed for reinstatement when the company shall start recording high production units yield and operations. We wish you all the best in your future endeavours.

14. The letter, Counsel submitted, connoted a desperate situation which the respondent found itself in and had to release its 300 employees including the claimants. Accordingly, the requirements of section 40(1) (b) which requires an employer to notify an employee or his union did not apply in the case of the claimants since they were not members of a union and further that these provisions can only apply in a normal work environment where an employer decides to terminate an employee and declare some redundant.

15. Counsel posed the question on what happens if the very reason for an employment contract to come to an end is the abrupt cancellation of the main contract on which the employment depended? Would an employer be required to keep the employees for a further month of the notice period even if it has no money to pay the employees?

16. Counsel further submitted that the requirements of section 40(1) (c) on the first in last out process could not be observed because the entire operation was forced to come to an end. That is to say where there is total stoppage of operations section 40 (1) (c) could not hold substance. Counsel therefore submitted that his client cannot therefore be held liable for not adhering to the requirements of section 40 of the Employment Act.

17. Concerning payment of terminal benefits of the employees declared redundant, as required by section 40(1) (e), (f) and (g), counsel submitted that the claimants and his colleagues could not get their terminal dues although the respondent was willing to pay them and that is the reason why the respondent proceeded to compute the same and hoped to pay immediately it got money.

18. Concerning notice of redundancy, Counsel relied on the case of ***Banking Insurance and Finance Union vs. Kirinyaga District Co-operative Union and Another (2014) eKLR*** where the Court held that the Act does not provide for the form and manner in which such notification should be made. According to Counsel therefore, all the employees of the respondent including the claimants were aware of the going ons at the respondent since they had been idle though continued to draw salaries from the respondent resources.

19. From the submissions by the respondent it would seem that it does not deny that it declared the claimants redundant. What seems to emerge from submission by counsel is that redundancy became inevitable after the respondent's contract with NWCPC got terminated by the latter. Counsel therefore submit that the provisions of section 40 of the Employment Act ought to be qualified in situations when an employer is compelled by circumstances beyond it to terminate services of employees.

20. Section 40 of the Employment Act provides as follows:-

40 (1) An employer shall not terminated 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 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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that part shall be applicable.

21. Section 66 (1) of the Employment Act which deals with insolvency provides as follows:-

66 (1) Where on an application made to him in writing by an employee or his representative the Minister is satisfied that –

(a) the employer of an employee has become insolvent,

(b) the employment of the employee has been terminated, and

(c) On the appropriate date the employee was entitled to be paid the whole or part of any debt to which this part applies;

The Minister shall, subject to section 69, pay the employee out of the National Social Security Fund, the amount to which, in the opinion of the Minister, the employees are entitled in respect of the debt.

22. Section 67 of the same Part also provides as follows:-

67. An employer is insolvent for the purposes of this Part -

(a) if the employer is a person who

(i) has been adjudged bankrupt or has made composition or arrangement with his creditors or

(ii) he died and his estate is to be administered in accordance with the Law of Succession Act;

(b) if the employer is a company

(i) a winding up order or an administration order has been made, or a resolution for voluntary winding up has been passed, with respect to the company; or

(ii) a receiver or a manager of the company's undertaking has been duly appointed, or possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge.

23. The letter dated 13th February, 2013 referred to earlier in the judgment was headed redundancy hence in the mind of the respondent it intended to declare the claimants and his colleagues redundant on account of reduction in the company's operations.

24. Further counsel for the respondent in his submissions before the Court conceded that there was intention by the respondent to declare its employees redundant due to the reduction of work occasioned the termination of the contract between the respondent and National Water Conservation and Pipeline Corporation.

25. Section 40 of the Employment Act does not provide for qualification or waiver of procedure and conditions for declaration of redundancy except in situations of insolvency dealt with under section 66 of the Act.

26. The respondent has neither been declared insolvent within the meaning of section 67 of the Act nor averred that it is in the process of being so declared. The declaration of redundancy against the claimants therefore amounts to wrongful and unfair termination of services within section 45 of the Employment Act and the Court so finds.

27. The Court therefore awards a follows:-

A. DIDACUS ODHIAMBO AHAGO

(i) one months salary in lieu of notice.....	25,000
(ii) service pay for 3 years.....	37,500
(iii) leave balance for 2012.....	9,996
(iv) 13 days worked in February.....	10,829
(v) 5 month's salary for unfair termination of Employment.....	<u>125,000</u>
	<u>208,325</u>

B. JOSEPH KIPKIRUI LANGAT

(i) one months salary in lieu of notice.....	25,000
(ii) salary arrears for January, 2013.....	1,000
(iii) 1 days worked in February, 2013.....	10,829
(iv) 5 months salary for unfair termination of employment.....	<u>125,000</u>
	<u>161,829</u>

This award shall be subject to taxes and statutory deductions.

28. The respondent shall further issue the claimants with certificate of service.

29. It is so ordered.

Dated at Nairobi this 6th day of February 2015

Abuodha J. N.

Judge

Delivered this 6th day of February 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge