



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 348 OF 2013

BETWEEN

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL
INSTITUTIONS, HOSPITALS AND ALLIED WORKERSCLAIMANT

VERSUS

ASSOCIATION FOR THE PHYSICALLY DISABLED OF KENYA..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Alex Thuita, Industrial Relations Officer, for the Claimant Union

Mr. John Makokha Advocate, instructed by the Federation of Kenya Employers

ISSUE IN DISPUTE: REDUNDANCY INVOLVING DISABLED EMPLOYEES

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant Union represents Unionisable Employees from a wide range of Institutions, among them the Respondent herein, a Non- Governmental Organization [NGO] involved in the rehabilitation and welfare of Persons with physical disabilities.
2. The Claim is brought on behalf of 24 Physically Disabled Persons, who lost their employment with the Respondent Organization with effect from 31st December 2012. The loss was attributed to a redundancy situation. The Respondent explained in its notices of redundancy issued to the Employees on 27th September 2012, that the Organization had incurred persistent losses in the last 4 years, and faced even higher deficits in 2012. All past revenue had been depleted, and the program was faced with possible closure.

3. The 24 Employees [hereinafter referred to as the Grievants] are named as **Ali Juma, Mwanaisha Molongo M. Ndegwa, Juliana Mukundi Andrea, Grace Mwelu Kitolo, Rachael Mwangome, Dennis Piru, Saidi Ali Kombo, Safari Mumba Kabani, Mwanasiti Hassan Chimwenje, Millicent Margaret Akoth, Grace Karungari, Kadzo Charo Mashanga, Rukia Saili, Lenox Kalume, Ruth Kagonya Onyango, Hellen Mwau Mweni, Shida Kenga, Margaret Kasanzo Ngute, Ruth Awinja, Baya Govu, Tabitha Maundu, Christine Nyanje, Mary Masakwe and Priscilla Kadzo.** They had worked for a number of years, and in various capacities such as Woodcarvers, Jewellery Workers, and Cleaners, at the time of termination.

4. The Claimant prays the Court to find the decision by the Respondent to terminate the Grievants' contracts offended Clause 22 [a] of the Parties' Collective Bargaining Agreement; Section 15[6] of the Persons with Disabilities Act 2003; and Article 54[a] of the Constitution of Kenya. The Court is asked to Order:-

- **The Respondent to withdraw all letters of termination for the 24 Disabled Employees**
- **The Employees to continue with their employment in order to assist themselves and their families.**

5. The Respondent filed its Statement of Response on 13th February 2014. Its position is that it has endured steady decline in business from the year 2007. There were massive losses. The Respondent's financial reserves went down from Kshs. 19.7 million in 2007 to Kshs. 10.4 million in 2011. The Respondent expected its reserves to climb down to Kshs. 3 million in 2012, at the time the termination decision was made. Several attempts by the Respondent to the National Government for funding were not successful. The Respondent was compelled to restructure, rendering the positions held by the 24 Disabled Employees redundant. The Respondent states it met all the procedural and substantive requirements in terminating the Grievants' contracts. The Claimant Union and the Labour Office were all notified. Individual Employees were consulted and notified. The CBA, the Persons with Disabilities Act and the Constitution were not flouted by the Respondent.

6. Four Grievants- Juliana Mukundi Andrea, Rachael Mwangome, Mwanasiti Hassan Chimwenje and Rukia Saili- testified on their own behalf and on behalf of their Co- Grievants. They testified, and closed the Claimant's case, on the 11th June 2014. The Respondent's Executive Officer Francis Joseph Kithuka Kivule testified for the Respondent on 2nd December 2014 bringing the hearing to a close. Parties confirmed the filing in Court of the Final Arguments on 6th February 2015, and the Decision of the Court reserved for 6th May 2015.

7. Juliana testified she was employed by the Respondent on 1st June 1990. She was a Jewellery Worker. She served for 22 years. She was issued the Redundancy Notice dated 27th September 2012, on 2nd October 2012. She was paid notice pay, but was unhappy with the termination decision. She wished the Court to consider her physical condition and reinstate her. She testified on cross-examination that the Respondent informed the Grievants of the impending redundancy by word of mouth. She received the Redundancy Notice. The Respondent did not have a problem paying the Grievants their monthly salaries. Her last pay was Kshs. 11,580. She was offered Kshs. 178,000 as severance package, which she refused to receive. She wishes to be reinstated.

8. Rachael was employed in the same position as Juliana, on 1st October 1989. She received the Redundancy Notice dated 27th September 2012, but was unable to read it because she is visually impaired. She did not agree with the Respondent's termination decision, nor the severance package offered to her. Casual Employees were employed after the Grievants left. The process was not fair. The Claimant Union was not consulted. Selection was not based on the principle of last-in, first out. She had worked for 23 years, and should have been among the last out, in accordance with the CBA. She wishes to be reinstated without loss of service, benefits and privileges. She agreed on cross-examination that she received the Redundancy Notice; and a copy was sent to her Trade Union. The CBA provided for redundancy. She was aware the Trade Union and the Respondent held consultative meetings. She refused the severance cheque which was offered to her. Casual Employees were employed after the Grievants left

employment. The Casual Employees earned higher wages than the Grievants were paid.

9. Mwanasiti and Rukia fully associated themselves with the Claimant's pleadings, and the evidence narrated by their Co-Grievants. Mr. Thuita for the Claimant informed the Court at the close of the Claimant's case, that, the Claimant wished to adopt the documents filed by the Claimant and the evidence of the four Grievants in full. Mr. Molenje then on record for the Respondent agreed there was no need to call the other Grievants. It was left for Kithuka Kivule to justify termination.

10. He testified that the Grievants are former Employees of the Respondent, working at the Respondent's Bombolulu Cultural and Workshop Centre. They made handicrafts. All, except Millicent Akoth, are Disabled Persons.

11. The Workshop operates as a business entity, selling its products locally and abroad. It is not funded locally. Salaries are paid from the business. In 2007 the business was affected by the electoral violence. Tourists could not visit the Respondent's premises and buy its products. From 2009, the business suffered the adverse effects of the international economic crisis. Most of the Respondent's overseas customers are drawn from the Fair Trade International Affirmative Group. 47 such customers closed down, leaving the Respondent with a paltry 10 customers from the overseas.

12. Kivule told the Court his Organization's financial status was as shown in the exhibited financial reports. It was the second time the Respondent was compelled to declare redundancies, having done so initially in the year 2011. The Respondent sought funds from the National Development Fund for Persons with Disabilities. The Government advised the Respondent it does not support payment of salaries. Then Minister for Gender and Social Services offered the Respondent no assistance at all.

13. The Respondent notified the Claimant Union about the redundancies. The Labour Office and Federation of Kenya Employers Mombasa were notified. The Grievants received individual notices. These issued on 27th September 2012. The CBA required the Respondent to issue the Grievants 3 months' notice. There were consultative meetings held between the Parties. There was no amicable settlement. The Respondent paid severance packages in accordance with the CBA, based on 18 days' salary for every completed year of service. 20 out of the 24 Grievants collected their settlement cheques.

14. It was not possible to declare positions held by Able-Bodied Persons redundant. Most affected handicrafts were generated by the Disabled. The Respondent runs Faida Income Generating Fund. It is a Fund which has assisted over 4,000 Disabled Persons run their own income generating projects. The Respondent prepares its Employees by training them to run their own businesses after employment. The Respondent's current financial position is worse than it was at the time redundancies were declared. It is impossible to reabsorb the Grievants. Reinstatement is not workable.

15. Upon cross-examination, Kivule testified Bombolulu Workshop is a business entity. It makes profits, but refers to the profits as surplus. Its website says it is non-profitable. The Organization aims at enablement, empowerment of the Disabled Persons. Only Millicent among the 24 Grievants is Able-Bodied. Redundancy has been forced by the reality on the ground. The Respondent engaged Casual Employees after the Grievants left. These Casual Employees were disabled, engaged whenever the Respondent had sufficient orders for its products. The Respondent compensated its Employee on piece rate basis. There are several businesses operating under the Respondent. The Respondent operates many service delivery and rehabilitation centres including Port Reitz Hospital and a furniture business at Likoni in Mombasa. All businesses are coordinated by the Respondent. The Respondent is a reasonable Employer and would be willing to pay the Grievants additional 1 month salary each, *ex gratia*, in full and final settlement.

16. From the Pleadings, Evidence and Submissions of the Parties on record, the issues in dispute may be reduced to the following:-

- **Was termination based on a genuine redundancy situation and therefore justifiable in substance?**

- **Was it carried out following the minimum standards of fairness under the Parties' CBA and under the Law?**
- **Are the Grievants entitled to the remedy of Reinstatement?**

The Court Finds and Awards:-

17. First, there was little or no challenge from the Claimant Union to the Respondent, on the presence of a genuine redundancy situation. The financial statements exhibited by the Respondent adequately capture the poor health of the Respondent finances, right from the year 2007. Electoral violence in the wake of the disputed presidential ballot in 2007, and the international economic crisis of 2009, demonstrably, weakened the Respondent's financial position. The Respondent's international customers dwindled, straining revenue streams. The Respondent could not sustain the Grievants in employment with these constraints. The existence of a genuine economic problem, requiring the Respondent to reorganize its business, cannot be gainsaid.

18. The situation was compounded by the lack of support for the Respondent from the Government. Honourable Moody Awori, the Respondent's Chairperson, and a respected former Vice- President in the Government of Kenya, wrote to Dr. Naomi Shaban, Minister of Gender, Children and Social Development on 22nd August 2011, calling for assistance. It is worth replicating this letter here, as it encapsulates the enormity of the problem the Parties herein were faced with, and is helpful in understanding the nature of the redundancy. Moody Awori writes:

‘‘ I refer to my letter dated 15th June 2011 appealing for an allocation of Kshs. 40 million through the Disability Development Fund towards funding of appliances and wheelchairs issued through our Branches. I am looking forward to your kind response.

There is another urgent matter which I would like to bring to your attention. APDK has been running the Bombolulu Handicraft Centre and Likoni Furniture Workshops in Mombasa, which were established in 1971, as sheltered workshops, employing 120 Persons with physical disabilities.

The Bombolulu Workshop has faced increasing losses since the post-election violence, which negatively affected sales to the tourist sector, and as a result of the global recession, exports have declined.

The cumulative losses of the last 3 years have reached Kshs. 15 million. The project was forced to declare 15 Workers [positions] redundant in April this year, which created negative publicity and the program is at the brink of collapse.

With increasing losses which amounted to Kshs. 3 million over the last 6 months, we might be forced to close down the project by the end of this year. The Bombolulu Workshop had collapsed in 1987 under the previous Management and APDK has put in considerable resources, but we can no longer sustain the program without external support.

Sheltered Workshops in developed Countries and in South Africa get substantial government support, to ensure their survival. We have also realized we can no longer sustain this program without support from our government, as international donors no longer support us.

With an annual government subsidy of Kshs. 5 million, we would be able to continue operating this landmark project and secure the jobs of 120 Employees- most of them being Persons with Disabilities.

I hereby extend an invitation to you and the Permanent Secretary Dr. Nyikal to visit Bombolulu Workshop so that you can acquaint yourself with the challenges we are facing.

We are looking forward to your favourable and urgent response and are prepared to meet with you or Dr. Nyikal to discuss this proposal further.’’

19. This communication succinctly reveals the persistent financial problems the Respondent has over the years, encountered in empowering the Disabled, and the attempts made at reversing the situation. It supports the evidence given by Kithuka Kivule, establishing the existence of a genuine redundancy situation. On the surface of it, and following a catena of judicial authorities cited by the Respondent in its submissions, the Respondent had a substantively valid ground in terminating the Grievants' contracts of employment.

20. Disabled Persons however, are not ordinary Employees, whose terms and conditions of employment are fully addressed through the provisions of the Employment Act 2007 alone; they are a special category of our Society. In determining the issues raised by this dispute, the Court has an obligation to consider other Legal Instruments that are meant to regulate the lives of Physically Challenged Persons. Justifiability of the Respondent's decision would have to be weighed against the demands of these Instruments.

21. The regular procedural requirements under Section 40 of the Employment Act 2007, and as adopted in the Parties' CBA, were honoured. The Grievants were issued notices of redundancy on 27th September 2012, to take effect at the end of that year. It was a clear 3 months, in accordance with the CBA. They received individual notices. Their Trade Union was similarly notified. Redundancy is a form of termination, and the general obligation of the Employer to issue termination notice, under Section 35 of the Employment Act, is not abrogated by the issuance of a notice of termination to the Trade Union issued under Section 40 on redundancy. Both notices recognize there are individual and collective rights owed to the Employees. CBAs concluded between a majority of Employers and Employees require notices are issued to both the Trade Union and the Individual Employee. The Grievants received their notices as did their Trade Union, in accordance with the CBA and the Employment Act 2007.

22. There were consultations between the Parties as required. The Respondent has in place a laudable program for training its departing Employees on running business, aimed at equipping them after they leave employment. Consultations took place with the aid of the Labour Office. It is not true that consultations are not a prerequisite of fair redundancy. Consultations must take place at every turn. An Employer such as the Respondent for instance, can not simply ask Disabled Persons to take their severance cheques and leave, without considering the social dimensions of the problem. Such consideration requires Parties engage in consultations. The Government is involved in consultations in its various subdivisions, as it is a key player in mitigating the social impacts of any redundancy- be it in the private or public sector.

23. The selection criteria and the principle of last in, first out were well explained by the Respondent in its evidence. Only a specific class of jobs- those dealing with the making of the handicrafts and undertaken by the Disabled Employees- were affected. There were no comparators in terms of longevity in the jobs up for restructuring. A whole class of Employees, doing similar jobs, was affected. The Court has also taken note that this was the second redundancy situation in as many years, and the fact that the Grievants, who overall, seem to have served for fairly long periods of time were not affected in the first redundancy exercise, would suggest to the Court they were preserved on the basis that they were perhaps first in.

24. There was no material showing the Grievants' positions were taken on the same terms, by other Persons, Able- Bodied or Physically Challenged. In terms of fairness, the Respondent seems to have acted in strict adherence to the CBA and the Law.

25. The Persons with Disabilities Act Cap 133 the Laws of Kenya, Section 11, requires the Government to take steps with a view to the full realization of the rights of Persons with Disabilities. Institutions such as the National Council for Persons with Disabilities, and the National Development Fund for Persons with Disabilities, are created under this Act in furtherance of the said objective.

26. Section 13 of the Act requires the Council to secure 5% of all positions in employment in the public and private sectors for Persons with Disabilities. Article 54 [2] of the Constitution of Kenya, while saying nothing of jobs in the private sector, requires that the State shall ensure the progressive implementation of the principle that at least 5% of the Members in elective and appointive Bodies are Persons with

Disabilities.

27. Section 32 creates the National Development Fund for Persons with Disabilities. Subsection 2 allows the Fund to contribute to the expenses of Organizations of or for, Persons with Disabilities. There is no provision under this law which prohibits the Fund from contributing to such expenses, in the payment of Disabled Persons' salaries.

28. Kenya signed the United Nations Convention on the Rights of Persons with Disabilities on 30th March 2007, and ratified the Convention on 19th May 2008. The Convention is part of the laws of Kenya, under Article 2 [6] of the Constitution.

29. The State Parties under the Convention recognize the right of Persons with Disabilities to work. State Parties have the obligation to safeguard and promote the realization of the right to work of Persons with Disabilities.

30. Article 27 demands that the State shall promote employment opportunities and career advancement for Persons with Disabilities in the labour market, as well as assist Persons with Disabilities in finding, obtaining, maintaining and returning to employment.

31. The Article, like Article 54 [2] of our Constitution, requires the State to employ Persons with Disabilities in the Public Sector. The State is to promote employment of Persons with Disabilities in the private sector through appropriate policies and measures, which may include affirmative action programs, incentives and other measures.

32. The State is required to achieve these objectives through legislation and other measures. The Convention is clear the State must promote job retention and return to work programs for Persons with Disabilities.

33. It was inappropriate for the Government not to respond to the letter of the former Vice- President, and not to render any financial assistance to the Respondent, in ensuring the positions held by the Grievants and other Persons with Disabilities working for the Respondent before the year 2012, did not fall redundant.

34. There is a Fund established under the law, to ensure Institutions such as the Respondent, continue rendering their invaluable service to the Society. The Fund is to be applied in advancing the rights of the Disabled Persons. What is the purpose of the Fund if not to assist in preservation of Disabled Persons' right to work? It is illogical for the Government to offer to reserve job openings for Disabled Persons, while doing nothing in practice, in preserving existing jobs.

35. The Court finds no fault with either the Claimant Union or the Respondent; the problem they grappled with, leading to the proceedings herein, was larger than their respective briefs. At the heart of the problem is the negligence by the Government, even when implored by a former Vice- President, to meet its legal and social responsibility to Persons with Disabilities. Sheltered Workshops enjoy Government support throughout the civilized world. The Bombolulu Workshop should enjoy the support of the Government, at National as well as County levels. The Respondent must be preserved, as must the right of the Grievants to work.

36. The Court is aware that the Government is not a party to the proceedings. The Court shall therefore *recommend the Government of Kenya releases to the Respondent a subsidy of Kshs.5 million annually, from the National Development Fund for Persons with Disabilities.* IT IS ORDERED:-

[a] The Respondent's decision terminating the Grievants' contracts was made within the law and the CBA concluded between the Parties, and was legally fair;

[b] The Grievants are however, a special class or Employees requiring the protection of the Court, and are therefore reinstated to their jobs, without loss of salaries, seniority, privileges and other benefits;

[c] Any terminal benefits which may have been received by the Grievants shall be offset from their salaries accrued from January 2013;

[d] The Grievants are directed to report to their former workstations at 8.00 a.m., on 1st of June 2015 for assignment of Duty;

[e] Parties to communicate this Decision to the Government of Kenya.

(f) No order on the costs.

Dated and delivered at Mombasa this 23rd day of March 2015

James Rika

Judge