



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KERICHO**

**CAUSE NO. 27 OF 2014**

*(Before D.K. N. Marete)*

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS AND HOSPITAL .....CLAIMANT

VERSUS

B.O.M CHILCHILA SECONDARY SCHOOL ..... RESPONDENT

**J U D G M E N T**

This matter came to court vide an application by way of Notice of Motion dated the 4th December, 2014 and filed on the same date under a certificate of urgency.

This application was also accompanied by a Memorandum of Claim of the same date. It sought the following orders of court,

- i. *The application be certified urgent and be heard ex-parte in the first instance.*
- ii. *The Honorable court be pleased to issue stay orders maintaining status quo and restraining the respondent from executing the intended termination of the employee until this matter is heard and determined.*
- iii. *The Honourable court be pleased to issues stay orders restraining the respondent from intimidating, harassing, declaring redundant or otherwise disadvantaging the claimant members in course of discharging their duties until this matter is heard and determined.*
- iv. *The Honourable court be pleased to issue stay orders restraining the respondent from conducting interview or employing new employees in the positions held by the members of the claimant until this matter is heard and determined.*
- v. *Any other relief the court may deem just and expedient.*
- vi. *The cost of this application to be paid by the respondents.*

and is supported on the following grounds;

1. *On or around 8<sup>th</sup> November, 2014 the Respondent served 11 of the claimant members working in the respondent employment with a letter dated 8<sup>th</sup> November, 2014 notifying their intention to declare them redundant and terminate their services by 7<sup>th</sup> December, 2014 to pave way for the employment of new employees.*
2. *The respondent purported that the decision to terminate the said employee on account of redundancy was a resolution by the board of management.*
3. *According to the letter dated 8<sup>th</sup> November, 2014 the respondent is giving reasons as to why the said employees' services have to be terminated being the equipment (sic) from the ministry of education.*
4. *The claimant is therefore left with no option but to turn to this Honourable court as a matter of urgency with prayers that the stay orders maintaining status quo be issued restraining the respondent from executing its intention of unlawful termination until this application is heard and determined.*
5. *As the respondent is by far and large not sincere on the reasons for the supposed intended termination on account of redundancy which is merely a plot to deny employees their constitutional right of being part of the claimant and further being represented in matters of employment.*
6. *The principal who dubs as the secretary to Board of Management and who has authored the redundancy notice is by high chance of probability a member of a teachers union, the question begs why would he want to be represented by workers union in negotiating terms with Teachers Service Commission while conspiring with other members of the board to deny non-teaching staff representation by their union.*
7. *It is therefore the contention of the claimant that these actions of the respondent is a serious contravention of Article 41 of the Constitution of Kenya, 2010, clause 7 and sections 5,40,43,45 and Section 46 of Employment Act 2007 and therefore unfair and a labour malpractice of the highest degree.*
8. *Supported by annexed affidavit of Ruth Ng'elechei, further ground to be adduced during hearing hereof.*

When the matter came to court on the said 4th December, 2014, the court ordered service of the application with a mention of the same *inter partes* on 8th December, 2014.

In the course of these proceedings, the parties entered into and filed a consent order on the following terms;

1. *That the application dated 4<sup>th</sup> December, 2014 be allowed.*
2. *That costs be in the cause.*
3. *That the memorandum of claim dated 4<sup>th</sup> December, 2014 be heard on the 5<sup>th</sup> March, 2015 subject to the court's convenience.*

and thus enabling a hearing of the main suit.

At the hearing, the parties presented their respective cases with the claimant seeking to rely on her pleadings as filed. She submitted that this was a dispute emanating out of unlawful redundancy of twelve (12) employees of the respondent. The illegality of the redundancy, he submitted was actuated by lack of reliance on Section 40, Employment Act, 2007 and clause 7 of the standing Collective Bargaining

Agreement *inter-partes*. The Collective Bargaining Agreement had come into force on 1st July, 1985 and was signed on 18th March, 1996. She further submitted that termination notices were made and issued on 8th November, 2014 and were effectively expiring on 7th December, 2014. These were in bad faith and flouted the law and Collective Bargaining Agreement as hereinabove expressed. The respondent had in the process of redundancy sought the advise of the Minister of Labour and was variously informed of the need to comply with the law but however ignored this counsel.

The claimant further submits that the action of the respondent violates Article 41 of the Constitution of Kenya, 2010 and also Section 40, 43, 45 and 46 of the Employment Act, 2007 which call for non discrimination and justification on such eventualities. He prayed that the redundancy be declared unlawful and reinstatement issued besides compensation by twelve (12) months salary. He also prayed for compensation for under payment as per the Director of Personnel Management circular for year 2012 which became effective on 1st July, 2012. He in the penultimate reiterated for prayers as per the memorandum of claim.

The respondent chose to rely on her response to memorandum of claim dated 17th December, 2014 and the annexed documents. She also called DW1 Everlyn Koech who testified that she is the Principal and Secretary, Board of Management of the respondent. She testified that she is fully aware of the dispute and knew the claimant. She further testified that redundancy was occasioned by the need to restructure her workforce and there were thirteen (13) instead of nine (9) workers. There were three (3) excess workers to wit, one (1) secretary and two (2) account clerks. The matter had been discussed between the Board of Management and the workers and agreed on. She prayed that this court allows the restructuring progress so as to facilitate compliance by the respondent with the guidelines of the Ministry of Education regarding pupils/workers ratio. On cross-examination, she testified that she now has thirteen (13) workers, two watchmen and a gate man and three (3) account clerks. She further testified that these workers had been employed without regard to qualifications and this redundancy was intended to facilitate restructuring and alignment of workers to qualification. They had been invited to re-apply for their positions.

The issues for determination therefore are;

1. *Was the redundancy of the twelve (12) employees of the respondent lawful?*
2. *Was the termination of the employment of the respondent's employees wrongful, unfair and unlawful?*
3. *Who bears the costs of this cause?*

Redundancy is the province of Section 40, Employment Act, 2007. This is as follows;

*Section 40(1) An employer shall not terminate 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 on the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the 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 IX in which case that Part shall be applicable.*

*(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.*

The 1st issue for determination delves onto the legality of the redundancy of the 12(twelve) employees of the respondent. The claimant submits a case of unlawful redundancy where the respondent went out of her way to disregard Section 40 Employment Act, 2007 as above set out. The respondent spells out a case of lawful redundancy that was occasioned by the need to restructure employment needs with the staff. She cited a case of guidelines by the Ministry of Education that requires that the ratio of student/workers be thirty three (33) to one(1) thus allowing and necessitating only nine (9) out of the thirteen (13) employees of the respondent. The respondents justification fails purposely on one ground; lack of compliance with the procedure and law on redundancy as expressed under Section 40 above. There is no regard or application of Section 40 (a) (b) and (d) and generally the entirety of the provisions of the law on termination on account of redundancy as provided. I therefore find that the redundancy undertaken by the respondent vide her letter of 8th November, 2014 was unlawful for want of form and process.

The 2nd issue for determination is whether the termination of the employment of the respondent's employees was wrongful, unlawful and unfair. This court has established a case of illegitimate redundancy for reasons aforesaid. The respondent further does not adduce concrete reasons for termination of employment. The ground of restructuring to meet equitable ratios has not been adequately demonstrated in evidence. The reasons for termination as per section 43 of the Employment Act would therefore not hold sway. There is no indication that these were communicated to the employees prior to the termination and or redundancy. Again, the respondent also fails to demonstrate the application of the tenets of unfair termination as expressed under Section 45 of Employment Act, 2007. Like submitted by the claimants, this redundancy could be actuated by bad faith or at the best be not well thought out.

The respondents case becomes a cropper foremost due to lack of compliance with the law at Section 40, Employment Act. Employers should be warned that no amount of zeal and desire to realize internal designs of the establishment shall be sustainable if these are sought and or realized outside the realms of the law. We are all subjected to the law – good intentions notwithstanding. I therefore find a case of wrongful, unfair and unlawful termination in the circumstances.

The last issue for determination is who meets the costs of this cause. This shall follow the event and I in the end allow the claim and order as follows;

- (i) That the redundancy of the twelve (12) employees of the respondent be and is hereby declared unlawful.
- (ii) That the respondent be and is hereby ordered to reinstate the grievants without loss of benefits,

promotion or other emoluments.

(iii) That the respondent be and is hereby ordered to meet and pay the grievants salaries and allowances during the pendency of the unlawful redundancy.

(iv) That the costs of this cause shall be borne by the respondent.

**Delivered, dated and signed this 19<sup>th</sup> day of March 2015.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Hezron Onwong'a for the union

2. Mr. Mburu instructed by Rodi, Orege & Company Advocates for the respondent