



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 758 OF 2014

BERNANRD MISAWO OBORA CLAIMANT

VERSUS

COCA COLA JUICES KENYA LIMITED RESPONDENT

JUDGEMENT

Appearance

Mr Chenge instructed by Chenge, Busiku & Co. Advocates for the Claimants

Mr Munyu instructed by Iseme, Kamau & Maema Advocates for the Respondents

1. The issue in dispute herein is the failure by the Respondent to adhere to the law while declaring redundancy.

2. The various employees who were affected by the redundancy filed different claims. These claims are consolidated herein. The consolidation was done in pursuance to the provisions of Rule 9 of the Industrial Court (Procedure) Rules for purposes of hearing and disposal of the matters.

3. The consolidated suits include;

Cause No. 754 of 2014 – Duncan Irungu Mange;

Cause No. 755 of 2014 – Julius Githinji Njoroge;

Cause No. 756 of 2014 – Earnest Muchiri Njooora;

Cause No. 757 of 2014 – Ayub Mwangi Wanjohi;

Cause No. 759 of 2014 – Morris Njiru Gikungi;

Cause No. 760 of 2014 – Michael Njoroge Murithi;

Cause No. 764 of 2014 – Francis Komu Waraga;

Cause No. 765 of 2014 – John Kieru Wanjiku;

Cause No. 1541 of 2014 – Ben Okeyo Aero;

Cause No. 1542 of 2014 – Zakayo Werangelo; and

Cause No. 1543 of 2014 – Kennedy Ndambuki Koti .

4. Both parties filed their witness statements for purposes of hearing and disposal of the matter. The Claimant filed the statement of Bernard Misawo Obora for the Claimants and the Respondent filed the statement of Christine Kagwiria the Human Resource Manager for the respondent. After the hearing, the parties filed their written submissions.

Claimant's case.

5. The claim is that the Claimants were employed by the Respondent on diverse dates and in various capacities;

Duncan Irungu Maingi was employed on 12th June 2006 as a Forklift Truck Driver earning Kshs.42, 532.00 per month;

Morris Njiru Gikungi was employed on 26th March 2012 as a Forklift Truck Operator earning Kshs.26, 450.00;

Bernard Misaro Obora was employed on 21st September 2011 as a machine Operator earning Kshs.42, 532.00 per month;

Ben Okeyo Aero was employed in 2010 as a Machine operator earning Kshs.46, 460.00 per month;

Zakayo Warangelo was employed on 26th April 2007 as a Forklift Driver earning Kshs.40, 470.80 per month;

Michael Njoroge Murithi was employed on 1st April 2012 as a process Technician earning Kshs.54, 510.00 per month;

Francis Komu Waraga was employed on 26th March 2012 as a Syrup and Water Treatment Technician earning Kshs.31, 481.00 per month;

Julius Githinji Njoroge was employed from 1st April 2011 as a Mechanical Technician earning Kshs.54, 510 per month;

Ernest Muchiri Njooora was employed from 1st April 2011 as a production Supervisor earning Kshs.54, 510 per month;

Ayub Mwangi Wanjohi was employed on 26th March 2012 as a Stores Clerk earning Kshs.31, 481.00 per month;

John Keiru Wanjiru was employed on 2nd April 2012 as a Machine Operator earning Kshs.40, 250.00 per month;

Kennedy Ndambuki Koti was employed on 1st April 2011 as A Process Technician earning Kshs.47, 400.00 per month;

6. They each performed their duties diligently and with dedication until termination on account of redundancy. That on 24th January all the employees of the Respondent were called who included the claimant, the managing Director Mr Daniel Nthurima announced that the company was undergoing a business transformation which would lead to a new model for the organisation. The Claimants and other staff were advised to proceed to their Heads of Department for further advice on the transformation process but the Claimants were shocked to be informed that their services would no longer be required and a letter dated 22nd January 2014 was issued indicating termination on account of business transformation where the Claimants were to collect their final dues upon clearance.

7. The claim is that this process of redundancy was arbitrary, hasty, unlawful and without justification. The process did not follow the law as upon the Claimants being informed of the redundancy on 24th January 2014, the same day they received their letters of termination dated 22nd January 2014. The law was not followed in that the Claimants had not been engaged in the process with a notification; there should have been a participatory rationalisation process; the notification of redundancy followed with termination on the same day was wrong; issuing the termination letter before redundancy notification on 22nd January 2014 and 24th January respectively; declaring redundancy without any justification; and breaching section 40 of the Employment Act. The Respondent thus failed to communicate when the rationalisation for redundancy arose and this amounted to the same being unprocedural hence invalid and amounted to unfair termination. The Claimants suffered unfair job loss, have had financial and mental anguish and hold the Respondent liable.

8. The Claimants are seeking for orders that their services were unfairly terminated by the respondent; their fundamental rights were violated; the Respondent breached fair labour practices and should compensate the claimants; the Claimants should be paid 12 months of compensation; payment of costs with interests; and any other order that the Court may direct.

9. In evidence, the Claimant called Bernard Misawo Obora who relied on his written statement dated 3rd December 2014. He stated that the Chief Executive officer of the Respondent called all employees on 24th January 2014 for a meeting at Town Hall and indicated that the Respondent was going to declare some employees redundant due to an organisational change. They all told to go to their Heads of Department where each was handed a sealed letter dated 22nd January 2014. The letter stated as to whether one was *impacted* or *non-impacted*. The claimant's letter was noted as *impacted* meaning they had been terminated. This was abrupt and they were all shocked with this development as there had been no prior discussions on the issue or a notice on the criteria that was to be used or a letter indicating why the Claimants had been selected for termination. This was unfair and the claims outlined should be paid.

10. In cross examination the Claimant confirmed that upon termination he cleared with his department head and was paid for one (1) month in lieu of notice; salary for time worked; severance pay for 30 days for each year worked; and the leave days due were paid for. However there was no reason as to why the Claimants were terminated.

Respondent's case

11. In defence the Respondent admitted having employed the Claimants and on 24th January 2014 a meeting was held where various presentations were made by management showing the poor performance of the business over the last few years and recommendations for restructuring and reorganisation were made. At the meeting, remedial measures proposed entailed an evaluation and restructuring of the entire human resource function that would lead to job losses. After the meeting, heads of departments conducted individualised consultations with all employees including those impacted by the restructuring and new operational model. The human resource policies and procedure manuals were followed especially clause 11.7.1 which provides for the factors to be considered while considering staff for redundancy. Factors considered included staff performance; skills capability; adaptability to current demands including ability to operate more than one machine among others. By a letter dated 22nd January 2014 the Claimants were informed that their positions had been eliminated/changed.

12. The Respondent also state that due to the seriousness of the job losses, they engaged Oasis Africa counsellors who provided the necessary counselling to the claimants. Following the termination of the claimants, their job positions were either merged or eliminated following the reorganisation. The Labour Officer was notified on 23rd January 2014 and the Claimants were paid according to the provisions of the Employment Act and Human Resource Policies and Procedure Manual by making payments of;

One month's salary in lieu of notice;

Outstanding leave days;

Overtime; and

One month gross pay for each completed year being severance pay.

13. Even though the Claimants were entitled to 15 days' pay for each year worked in law, the Respondent doubled the amount and paid 30 days for each year worked. All the Claimants were heard by their heads of department before termination and hence the Respondent has not violated any rights due to the Claimants under the Employment Act or under article 47 of the constitution and no compensation is due. All the necessary steps required in law were taken into account before termination. The suit should be dismissed with costs.

14. In evidence, the Respondent called Christine Kagwiria the Human Resource Officer of the respondent. She relied on her witness statement dated 26th January 2015. She admitted that all the Claimants were employees of the Respondent and on 24th January 2014 they were issued with termination letters dated 22nd January 2014. This followed a meeting with the Claimants held and addressed by the General Manager where presentations on the reorganisation process were made. The Respondent had faced financial challenges over the years and a decision was taken to lay off some employees in order to keep afloat.

15. The witness also testified that after the meeting, all the employees were required to meet their heads of department and each was issued with a letter stating whether they were impacted or not impacted by the reorganisation. The Respondent had also sourced Oasis Africa counsellor for any employee who needs counselling. In total, 18 employees were affected as their positions were made redundant. There was no notice issued. This was an omission. The redundancy considered ability, performance, skill and ability to operate multiple tasks and equipment. The affected employees were paid 30 days for each years worked, notice pay, overtime and leave days due. Other than omitting to issue notice, all other requirements in law were complied with. This was not a victimisation as the Respondent was fair and handled the process with respect.

16. In cross examination, the witness confirmed that on 23rd January 2014, a letter on the redundancy was sent to the Labour Officer but there was no reply. The main consideration for the redundancy was the ability of each employee, skill and multitasking. Oasis Africa counselling was paid for offering the service of counselling to any employee who needed the same.

Submissions

17. In submissions the Claimant stated there is an admission by the Respondent that they failed to issue any notice with regard to the redundancy and that the Labour Officer was only notified on 23rd January 2014. The Claimants were also issued with termination letters dated 22nd January 2014 whereas they were told of the redundancy on 24th January 2014. In this case therefore, the redundancy was not justified. Even in a position where the employer has a right to declare a redundancy, the same has to be lawful and an employer must demonstrate the existence of both substantive reasons and compliance with lawful procedures. Where justification for a redundancy is lacking, the resulting termination is unfair as held in **Jane I Khalechi versus Oxford University Press E.A. Limited [2013] eKLR.**

18. The Claimants also submitted that no notice was issued before the termination as required under section 40 of the Employment Act. This failure to adhere to the law thus resulted in unfair process of termination. There were equally no consultation before the redundancy process and where such is lacking, the resultant action against the employee is invalid and has no effect in law as held in **Hezbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited [2013] eKLR** where Court held that the consultation process is not a one day process as it must be participatory, consultative and informative and the employer must undertake a process to rationalise the various positions before noting the affected positions.

19. The terminations of the Claimants were therefore unfair and they are entitled to the claims outlined.

20. The Respondent on their part submitted that that the termination of the Claimants on the grounds of redundancy was valid as there was evidence by the Respondent witness that since 2007 the Respondent was performing poorly and to sustain operations in 2014 restructuring was found to be necessary. A meeting with all staff was therefore held on 24th January 2014 where presentations were made and those affected issued with termination letters. There was therefore a valid reason as under section 43 of the Employment Act. The Claimants admitted to being at the meeting where the General Manager explained the situation and then directed the employees to have a meeting with the heads of departments where they were issued with letters. There was therefore a reason justifying the termination as held in Court of Appeal in **Kenya Airways Limited versus Aviation & Allied Workers Union & 3 Others**, and held that as long as an employer genuinely believed there was a redundancy situation, any termination was justified as it was not for the Court to substitute its business decision of what was reasonable.

21. The Respondent also submitted that they followed fair procedure in terminating the Claimants as under section 40 of the Employment Act. The only outstanding issue is the issuance of notices to the Claimants and to the Labour officer which the Respondent admitted were not done as required but the same was an inadvertent omission. Noting this and acting in good faith, the Respondent paid more in severance pay at 30 days for each year worked instead of 15 days. The terminal payments were done immediately without delay and where the Court finds that the failure to issue notice was prejudicial to the claimants, and then the principle applied in the case of **David Mutevu & 103 Others versus Africa Nazarene University [2014] eKLR** should be applied here. That the identification of those terminated was based on the Respondent policy looking at ability, skills and multitasking.

22. The Respondent also submitted that the claim for 12 months compensation is not due and they are only entitled to two months' pay each. There is no compensation due with regard to breach of article 47 of the constitution as this has no relationship with the case at hand. Constructional breaches and damages payable are not relevant in this case. There is equally no proof of violation of article 47 of the constitution and no damages are due.

Determination

Questions that arise are that;

Whether this is a case of unfair termination on the grounds fo redundancy and

Whether there are any remedies.

23. There are admitted facts in this case. Such facts guide the analysis of the issues identified herein. That the Claimants were called on 24th January 2014 and informed by the Managing Director of the Respondent that there was a restructuring that would impact on some positions. It is also an agreed fact that all the employees were advised to precede to their division heads and take a letter that indicated as to whether they were *impacted* or *not impacted*. That this meant that those *impacted* had lost their jobs and

that their terminal dues would be calculated as to end their employment with the respondent. It is also admitted that there was no notice of the meeting of 24th January 2014, its agenda, its intention or purpose. The respondent's witness Ms Christine Kagwiria stated that the non-issuance of the notice that is required was an omission. However, in paying terminal dues the Respondent put this into consideration and paid more than the legal minimum of 15 days and instead paid severance pay at 30 days for each year worked.

24. Section 40 of the Employment Act now regulates redundancies, the procedures to be applied and the criteria an employer is to apply. Employers are also encouraged to set in place work place policies that outline how the employer and employee relationship is to be governed such as a collective bargaining agreement where the employees are unionised or human resource policy or a redundancy policy that outline the procedures to apply in the eventuality that there is such need. In this case, the employees are not unionised but the Respondent as the employer has a Human Resource and Procedures Manuals and section 11.7.1 regulate a situation of redundancy.

25. Even in a case where an employer has a Human Resource and Procedures Manuals that regulate redundancy, such a policy must adhere to the provisions of the Employment Act, Article 41 of the Constitution and best practices. In a case of redundancy, the legal minimum standards are set out under section 40 of the Employment Act and beyond following such provisions; the same must meet the fair labour practice. In my reading of the Court of Appeal decision in **Kenya Airways Limited versus Aviation & allied Workers Union & 3 Others** is that before any employer commences a redundancy process, section 40 of the Employment Act makes provision for two very important notices required to be issued. One to notify the employees that there is a situation such as reorganisation, downsizing, cost cutting or as the case might be that requires an employer to reduce its human resource. Once such a notice is issued, the employer then sets in motion modalities of which positions will be affected and this is achieved by setting criteria that is to be applied as positions become redundant and not the employee. The employee has done nothing wrong and the employer has to address a business need or situation that does not just arise but has been assessed and analysed and a decision made that human resource must be reduced so as to achieve the business need or situation. Therefore where a redundancy is justified, there is no good reason as to why the employer cannot communicate this to its employees as required by the law. See the decision in **KUDHEIHA versus The Aga Khan university Hospital Nairobi, Cause No. 815 of 2015** where the Court noted that;

The notices envisaged under section 40 of the Employment Act are not mechanical or issued for the sake of going through a process. These processes affect employees and their jobs. Such notices should be carefully crafted prior to being issued. Such notices affect the employees behind the redundancy process.

26. The procedures applicable in a redundancy are therefore set out in law and are mandatory. The conditions precedent requires;

- a. A notice to the employees or to the union where there are unionised employees and the Labour Officer stating the reasons for, and the extent of, the intended redundancy;
- b. Non-union employees should receive a personal notice together with the Labour Officer;
- c. The selection criteria;
- d. Address the terms of the Collective Bargaining Agreement on redundancy on terminal dues without disadvantaging non-union employees and where there is no collective agreement, such terms as not to disadvantage any employees; and
- e. Issuance of a termination notice.

27. Such provisions being mandatory, an employer has to meet them and where not met, in their element, by an act of omission or commission, the resulting action that disadvantages the employees is inherently unprocedural and unfair. See **Banking Insurance and Finance Union (Kenya) versus Murata Sacco Society Limited, Cause No. 616 of 2010**.

28. In this case, the admission by the Respondent that the failure to issue the requisite notice to the employees was an error lacks good faith and cannot find basis as a substitute to the requirements set out

in law. The fact that the Respondent witness was aware as early as 2007 that the Respondent was undergoing through financial difficulties, yet the Respondent proceeded to hire the majority of the Claimants in 2011, 2010 and 2009 is in itself self-defeating of the effort to justify the redundancy. Where the Respondent became aware in 2007, 2010 and 2014 that they needed to reduce staff so as to meet their business need to reorganise and improve the business performance, then such knowledge was not an overnight occurrence. There had been consultations, analysis and a decision made and termination letters written on 22nd January 2014 way before the meeting of 24th January 2014 was called and the subsequent issuance of the termination letters after the fact. The requirement for the notification upon the Labour Officer was also not done as per the law. Upon realisation that the Respondent had not issued the required notices as under section 40 of the Employment Act, nothing prevented the Respondent from stopping the process and doing the right thing. To hire counselling services on the material day of termination meant that the Respondent was aware and had adequately prepared to proceed with the terminations without notice. Such an action however well-intended resulted in the negative. To fail to give notice and then call for counselling services in the vent this was needed is an unfair labour practice. No employee should be made to go through such a procedure.

29. I therefore find the process undertaken by the Respondent before the termination of the Claimants was procedurally unfair. Termination took place on 22nd January 2014 but the notice of redundancy was only communicated to the employees on 24th January 2014. The Labour Officer was not involved in the process and the letter sent to the office on 23rd January 2014 is not what is envisaged by the law under section 40 of the Act. To the contrary, the Notice to such office is meant to have the office advice the employer on the modalities to be followed, the requirements of the law and how to set the criteria in ensuring that the employees are treated fairly. Nothing stopped the Respondent as the employer from following the requirements of the law and hence the resulting termination became procedurally flawed.

Remedies

30. The Claimants are seeking compensation for the breach of their rights to fair labour practices and unfair termination. Upon the finding that the Claimants were unprocedurally terminated, compensation is due under section 49 of the Employment Act. The unfair labour practice that the Respondent committed is in the same vain leading to the unfair termination and cannot be separated as being different for an award of damages. the failure to issue the required notices to the Claimants in itself was a practice that was unfair hence the finding that procedures set out under section 40 of the Employment Act that are mandatory were not followed. The Court will therefore award compensation.

31. In assessing the compensation payable to the claimants, I note the bulk of the terminal benefits due were immediately paid by the respondent. There are no complaints in this regard. The effort to pay above the legal minimum is commendable but this cannot justify the omissions made as failure to issue notice is a serious omission of a legal requirement. The Respondent has the advantage of having a Human Resource Officer who should have had the benefit of reading the relevant law. The Claimants have served for different periods and cannot all receive a similar rate of 12 months' pay in compensation. Each employee will be awarded one month's pay for each year served as follows;

- a. **Duncan Irungu Maingi served from 2006 and is awarded 8 months compensation all at kshs. 340,254.00;**
- b. **Morris Njiru Gikungi served from 2012 and is awarded 2 months compensation all at Kshs. 52,900.00;**
- c. **Bernard Misaro Obora served from 2011 and is awarded 3 months compensation all at Kshs. 127,596.00;**
- d. **Ben Okeyo Aero served from 2010 and is awarded 4 months compensation at Kshs.185,840.00;**
- e. **Zakaro Warangelo served from 2007 and is awarded 7 months compensation at Kshs.283,295.60;**
- f. **Michael Njoroge Murithi served from 2012 and is awarded 2 months compensation at kshs.109,020.00;**
- g. **Francis Komu Waraga served from 2012 and is awarded 2 months compensation at Kshs.62,**

- 962.00;**
- h. Julius Githinji Njoroge served from 2011 and is awarded 3 months compensation at Kshs.163, 530.00;**
 - i. Ernest Muchiri Njooora served from 2011 and is awarded 3 months compensation at Kshs.163, 530.00;**
 - j. Ayub Mwangi Wanjohi served from 2012 and is awarded 2 months compensation at Kshs. 62,962.00;**
 - k. John Keiru Wanjiru served from 2012 and is awarded 2 months compensation at Kshs.40, 500.00; and**
 - l. Kennedy Ndambuki Koti served from 2011 and is awarded 3 months compensation at Kshs.142, 200.00.**

32. The compensation awarded above is based on the gross monthly pay that each Claimant last received as at 24th January 2014. The payments due shall be subject to the provisions of section 49(2) of the Employment Act.

33. Noting the matter raised in the claim and the finding that there was procedural unfairness, the Claimants are awarded 50% of their costs.

34. Before conclusion, I would like to thank both counsels for the parties, Mr Chenge for the Claimants and Mr Munyu for the respondent. You were meticulous in your pleadings, examination of the witnesses and in submissions. I appreciate the materials submitted for the Court assessment and the efforts put in your work. It made the assessment of the issues at hand instrumental. I hope this is a trend that can be replicated as a best practice.

Judgement is entered for the Claimants as outlined above under paragraphs 31 (a) to (l) and 32 above; such compensation is subject to the provisions of section 49(2) of the Employment Act and costs awarded at 50%.

Delivered in open Court dated and signed in Nairobi on this 25th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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