



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 1983 OF 2012
(as consolidated with Cause No. 1982 of 2012)

MUSTAFA JIVANJI MOHAMEDALI1ST CLAIMANT
PHEBE NYAMWEYA MONYENCHE 2ND CLAIMANT
VERSUS
HENKEL CHEMICALS (E.A.) RESPONDENT

JUDGMENT

1. Mustafa Jivanji Mohamedali and Phebe Nyamweya filed Cause No. 1982 of 2012 and Cause No. 1983 of 2012 respectively on 3rd October 2012. The two suits were consolidated and the Parties agreed to dispose of them by way of written submissions and respective statements of claim and annexures thereto.
2. Mustafa Jivanji Mohamedali and Phebe Nyamweya are hereinafter referred to as the 1st and 2nd Claimants respectively.
3. The 1st and 2nd Claimants were employed by the Respondent on diverse dates and their terms and conditions of employment were regulated by a Collective Bargaining Agreement (CBA) between the Respondent and the Kenya Chemical and Allied Workers' Union.
4. The 1st and 2nd Claimants were declared redundant by a letter dated 5th October 2011, in terms of **Section 40** of the Employment Act, 2007.
5. The reason given for the redundancy was economic crisis faced by the Respondent leading to a decision to downsize the company.

Claims

6. The 1st and 2nd Claims seek the following reliefs:
 - a. two (2) months' salary in lieu of notice in the sum of Kshs.460,000 and Kshs.102,858 respectively.
 - b. severance pay at the rate of forty (40) days for each completed year of service in the sum of Kshs.3,892,307 and 1,186,823 respectively;
 - c. the 1st Claimant has a further claim of unpaid severance pay in the sum of Kshs.1,459,615.40.
7. In addition the 1st and 2nd Claims seek general damages for unlawful termination of employment.

Defence

8. In the Memorandum of Defence dated 4th November 2013 and filed on 4th December 2013, the Respondent avers that the 1st Claimant was a senior member of the company and was part of the management and was therefore not unionsable. The terms and conditions in the Collective Bargaining Agreement were therefore not applicable to him.
9. The Respondent further states that the 1st Claimant was paid terminal benefits in accordance with **Section 40** of the Act.
10. In this respect, the Respondent produced a copy of the letter of appointment of the 1st Claimant in the position of Assistant Operations Manager.
11. Furthermore the Respondent furnished a notice to the District labour Officer dated 1st September 2011 in compliance with **Section 40** of the Act.
12. The Respondent also produced tabulation of the final sum paid to the 1st Claimant on 6th October 2011 indicating that the 1st Claimant earned a basic monthly salary of Kshs.230,000.00 and was paid Kshs.230,000 in lieu of notice; Kshs,61,923.08 for seven (7) days worked in October 2011; Kshs.265,384.62 in lieu of thirty (30) days leave and Kshs.48,653.85 in respect of 5.5. leave days for the previous year; leave travelling allowance in the sum of Kshs.3,150.00; Kshs.577.50 leave travelling allowance for the previous year and severance pay calculated at fifteen (15) days salary for eleven (11) completed years of service in the sum of kshs.1,459,615.38. Total amount paid was Kshs.2,069,304.42 less deductions.

The net pay was Kshs.1,454,581.00.

13. A discharge voucher dated 8th November 2011 signed by the 1st Claimant in acknowledgement of receipt of Kshs.1,454,581.00 was also produced by the Respondent.
14. With respect to the 2nd Claimant, the Respondent filed a memorandum of defence on 3rd December 2017 in which it denies the claim stating that the Claimant was paid all terminal benefits in terms of **Section 40** of the Act.
15. The Respondent also states that the 2nd Claimant was not a unionsable employee and was thus not covered by the CBA and in particular the terms and conditions set out in Clause 30 (1) were not applicable to her.
16. In this respect, the Respondent produced a letter of appointment of the 2nd Claimant in the position of company secretary which states *inter alia*, that the 2nd Claimant held a senior managerial position.
17. The 2nd Claimant was on 29th November 2011 internally redeployed to the Accounts Department, with effect from 1st December 2011 but was declared redundant on the same date.
18. The 2nd Claimant was paid in terms of a document produced by the Respondent dated 22nd December 2011 as follows;
 - i. gratuity for fifteen (15) years calculated at thirty (30) days salary for each completed year of service in the sum of Kshs.890,117.31;
 - ii. prorated leave of thirty (30) days plus nine (9) days from previous year in the sum of Kshs.77,143.50;
 - iii. leave travelling allowance in the sum of Kshs.3,150; and
 - iv. one (1) month's salary in lieu of notice Kshs.51,429.00.

Total paid less deductions was Kshs.685,970.00.

19. The amount was paid vide two cheques and payment voucher signed by the 2nd Claimant were produced.
20. The Respondent further relied on witness statements of Samson Wanyagu, the Human Resource Manager of the Respondent in which she stated that the 1st and 2nd Claimants were not unionsable members and the terms and conditions of termination contained in the CBA were not applicable to

them.

21. That the Respondent followed all the provisions under **Section 40** of the Employment Act, 2007 in retrenching the 1st and 2nd Claimants and all their terminal benefits were fully paid.

Determination

22. The Court has considered the pleadings by the 1st and 2nd Claimants, and those by the Respondent in opposition to the Claims. The Court has further considered the documentation produced by the parties and the written submissions in support of the respective cases and has come to the following conclusions of fact and law;

- i. That the Respondent issued the requisite notices to the 1st and 2nd Claimants and to the Labour Office and has complied with the provisions of **Section 40(1)** of the Employment Act, 2007 in respect of the notices required to commence and effect a redundancy.
- ii. The 1st and 2nd Claimants were in senior management positions in the employment of the Respondent and were not unionsable employees. Accordingly the Redundancy Clause in the Collective Bargaining Agreement (CBA) was not applicable to them.
- iii. The terminal benefits set out in the documentation before Court were properly computed and paid to the 1st and 2nd Claimants and in full compliance with the respective terms and conditions in the letters of appointment of the 1st and 2nd Claimants and under **Section 40(1)(e)(f)** and **(g)** of the Employment Act, 2007.

23. The 1st and 2nd Claimants have therefore failed to prove their respective Claims on a balance of probabilities as against the Respondent. The consolidated suit by the 1st and 2nd Claimants against the Respondent is dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 31st day of July, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE