



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO.110 OF 2014

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKCLAIMANT

VERSUS

PWANI UNIVERSITY1ST RESPONDENT

STANDARD TECHNICAL SERVICES

AND GENERAL SUPPLIES2ND RESPONDENTS

J U D G M E N T

Introduction

1 The claimant brings this suit on behalf of 23 members (grievants) who were all employed by the 1st respondent up to 30.11.2012 when their services were terminated. The reason cited for the termination is that their services were no longer required at the university college with effect from 1.11.2012. The termination notice was communicated by letter dated 15.11.2012 which also directed the grievants to hand over any property of the university which was in their possession before their departure on 1.12.2012. The 1st respondent undertook to pay their last dues.

2 The grievants were not pleased with the termination and reported the matter to the claimant. The latter reported a trade dispute to the minister on 21.6.2013 and a conciliator was appointed on 28.8.2013 but dispute was never resolved prompting the claimant to bring this suit on 26.3.2014 and amended it on 14.7.2014. The suit accuses the 1st respondent of unfair termination of the grievants employment through un-procedural redundancy and seeks for reinstatement of all the grievants to their employment with the 1st respondent and in the alternative, payment of terminal dues plus compensation. The claimant has also enjoined the 2nd respondent and accused her together with the 1st respondent of unfair labour practice and urges the court to nullify the labour outsourcing contract between the two respondents.

3 The first respondent has objected to the suit on ground that the claimant has no authority to represent the grievants who are not covered by recognition agreement between the claimant and themselves That the claimant is only recognized to represent the interest of workers who are in the employment of the 1st respondent in grades (1) to (iv). That the grievants were just casual employees who did not require notice before termination and are not entitled to any terminal dues. She denies that the grievants were declared redundant and avers that their positions of casual staff was only transferred to the 2nd respondent for out sourcing and the grievants were free to apply. She further denied the

accusation of unfair labour practice and urged for the striking out of the 2nd respondent from the suit for being wrongfully enjoined.

3 The 2nd respondent has denied any involvement in the termination of the grievants employment with the 1st respondent. She has also denied any unfair labour practice attributed to her by the claimant and averred that she has only employed the willing casual staff and she is paying them the wages prescribed by the law. That there exists no dispute between the claimant and herself that is capable of being adjudicated upon by this court as there is no employment relationship between the grievants and herself.

4 The suit was heard on 14.5.2015 and 21.7.2015 when the claimant called Mr Humphrey Mwatsuma Shoka (fourth grievant) as Cw1 while the 1st respondent called Ms Betty Saleri as Rw1 but the 2nd respondent called no witness. Thereafter all the parties filed written submissions.

Analysis and Determination

5 There is no dispute that the grievants were all employed by the 1st respondent for periods ranging between 3 and years as casual employees without any written contracts. There is also not dispute that the grievants were being paid their salary on monthly basis and were contributing to the social security. There is further no dispute that the grievants were members of the claimant, who had a Recognition Agreement and a Collective Bargaining Agreement (CBA) with the 1st respondent. There is also no dispute that the grievants employment were terminated by the 1st respondent through a letter dated 15.11.2012. The issues for determination are:

a) whether the suit is incompetent for claimant's want of authority to sue on behalf of the grievants.

b) whether the 2nd respondent is wrongly enjoined to the suit.

c) whether the termination of the grievants employment was unfair.

d) whether the claimant is entitled to the reliefs sought on behalf of the grievants.

In competent Suit

6 Rw1 told the court that the grievants herein were ungraded casual staff who were not covered by the Recognition Agreement and the (CBA) between the 1st respondent and the claimant. That according to the university staff grading, Grade (i) to (iv) are people with at least D+ in KCSE while all the greivants had not attained such academic qualification. Rw1 however admitted on cross examination that the staff grading she was referring to was published in the second education of 1st respondents employment guidelines which came into force in November 2012 while the CBA in issue took effect in January 2012. She also admitted that in January 2012 all the grievants were employees of the 1st respondent. She admitted that clause 2 of the CBA provided that after signing of the CBA, the existing employees of the 1st respondent were not to be given less favourable terms of employment than the ones stipulated under the CBA.

7 Cw1 contended that the grievant were covered by the CBA which came into force eon 1.1.2012 and was to remain in force until another one was signed. He further contended that they were no longer casual employees because they had served for a long period.

8 This court is satisfied from the material before it that, the grievants being unionmisible employees were covered by the Recognition Agreement and the CBA signed between the 1st respondent and the claimant on 24.5.2010 and 20.3.2012 respectively. Section 59 (1) (a) and (b) of the Labour Relations Act (LRA), provides that:

“59 (1) a collective agreement binds for the period of the agreement.

a. ***The parties to the agreement.***

b. ***All unionisable employees employer by the employer, group of employers or members of the employers’ organization party to the agreement”.***

9 The provision above is very clear that a CBA cannot leave out any unionisable employee working for an employer who is a party to the CBA. Consequently the court finds and holds that all the grievants herein were covered by Recognition Agreement and the CBA signed by the 1st respondent in March 2010 and March 2012 respectively because they were unionisable employees in the service of the 1st respondent then. The said CBA remained in force as at the time when the grievants were dismissed from work. Section 59 (3) of LRA provides in mandatory terms that:

“(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.”

Subsection (2) then provides that:

“ A collective agreement shall continue to be binding on an employer or employee who were parties to the agreement at the time of its commencement”.

Misjoinder of 2nd Respondent

10 The main dispute before the court is the termination of the grievants employment by the 1st respondent. It is that issue which had been taken for conciliation before the labour office. The 2nd respondent was not a party in the conciliation proceedings. So why has she been enjoined herein? The court is satisfied that the dispute herein is only between the 1st respondent and the grievants who were related as employer and employees. Relief being sought, namely reinstatement and/or damages are only directed at the 1st respondent. It is trite law that joinder of a party is only necessary when it is for effective adjudication and determination of the dispute before the court. It is also rite that joinder of a defendant is necessary only if there is a relief sought against him or if a decree ensuing from the proceedings before the court may not be executed without enjoining the defendant. The foregoing is not the case herein. The 2nd respondent has never employed the grievants and she is not privy to the Recognition agreement and the CBA between the 1st respondent and the claimant. Consequently the 2nd respondent is struck out of this suit but with no order as to costs.

Unfair Termination

11 Cw1 testified that he worked for the 1st respondent from 2007 and was a member of the claimant union just like the other grievants. That on 5.11.2012, Cw1, and the other greivants were called to a meeting with the management where professor Rajab told them that they were going to be handed over to the 2nd respondent as their new employer who had been contracted to outsource labour for the 1st respondent. He then gave the grievants forms from the 2nd respondent to sign for 3 months contract and for a daily wage of Ksh 200. That some employees signed the new contracts and continued with their work. However the greivants refused to sign and they were served with letter dated 13.11.2012 notifying them that their services were no longer required with effect from 1.11.2012. Cw1 contends that he was declared redundant with the other grievants after they refused to sign contracts with the 2nd respondent. He maintained that they were terminated on redundancy because the 1st respondent said that she was reorganizing its operations and did not require their services any more from 1.11.2012. That the redundancy was done without prior notice.

12 Rw1 contended that the termination of the grievants services was fair because the vice chancellor met the grievants and explained to them that henceforth they were going to be engaged through the 2nd

respondent as an outsourced labour under the same terms they were enjoying with the 1st respondent. That should any vacancy arise in the university the vice chancellor promised the grievants that they would be considered for employment. She however contended that the grievants were not entitled to any notice before termination. She admitted that the section 40 of the EA was not complied with in terminating the grievants' services because they were not covered by the CBA. She contended that the grievants were vetted and found to be unqualified for direct employment by the 1st respondent. She however did not produce any evidence of such vetting. She further admitted that the grievants were capable of doing the job at the university but clarified that the ideal behind the termination was to lower the cost of managing labour.

13 After considering the pleadings, evidence and the submissions by the parties, the court finds on a balance of probability that the grievants employment was terminated unfairly and wrongfully through an unlawful redundancy. They were not to blame for the termination of their employment. It was an initiative of the 1st respondent in what he described in the termination letter as "reorganization of its operations". Section 2 of the EA defines redundancy as;

"...the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

14 Redundancy also refers lay off or retrenchment which means termination of employment by the employer in order to cut back on costs or institutional reorganization. Redundancy applies where there is less work, changes in conditions of service that transforms and elevates the nature of the job from the old one and finally where labour is contracted from outside the establishment. All these are strategies applied by both private and public entities to remain relevant or competitive. It may also be caused by a change in the legal regime or economic reasons. In the present case the 1st respondent was reorganizing her operations, and as candidly put by the Rw1, "to lower costs of managing labour". Consequently the respondent terminated the grievants services through redundancy but without following the procedure provided under section 40 of the EA read with clause 10 of the CBA covering the parties herein.

15 The 1st respondent was supposed to secure the claimant and labour officer with at least one month before the termination. There after a fair selection of the staff to be laid off was to be done. Lastly the affected staff were to be paid salary in lieu of notice, all accrued benefits plus severance pay. That procedure was not followed and the termination of the grievants employment was rendered unfair.

16 The explanation given by the defence for flouting the statutory procedure is that the grievants were casual employees and notice was not required before terminating their services. That is a laughable misconception of the law. The grievants had worked for many years and were receiving monthly salary in arrears. For that reason, they had assumed the protection of the law from arbitrary dismissal by the employer. Under section 35 of the EA, they could not be terminated without a prior notice in writing of 28 days. In addition, under section 37 of the EA their terms and condition of series had become the same as those of the other regular employees who were not casual employees. They had also been protected by the CBA signed by the university and the claimant, that took effect on 1.1.2012.

Reliefs

17 In view of the findings above, the court declares that the termination of the grievants' employment by the 1st respondent was unfair. The court will however not order reinstatement because it will not be practicable to have the grievants go back to their former employment in view of the fact that university operations have changed after the reorganization exercise. The court will therefore award damages under section 49 (1) of the EA. The claimant has filed a schedule of the items she wishes the court to consider. The schedule is annexed to the amended claim which show that the grievants were either in Grade I or II in the CBA. Under the CBA the basic salary for grade I and II was Ksh 7,418 and 8,608 per month respectively. The house allowance for the two grade was Ksh 5,784 and 6,329 per month respectively.

The gross pay for grade I and II was therefore ksh 13,202 and ksh 14,935 respectively.

18 The court awards them pay in lieu of notice of between one and three months depending on the length of service as per clause 8 of the CBA.

The court also awards each grievant pay for 45 leave days as pleaded by respondent in her amended defence and as provided for, under clause 12.1 (b) of the CBA. The court will further award each grievant salary arrears in respect of the salary under payment from 1.1.2012 when the salary in the CBA became effective to 30.11.2012 when they were discharged. The arrears is the difference between the actual salary paid to each grievant and the salary prescribed by the CBA. Lastly they court awarded each grievant six month gross salary as compensation for unfair termination of their employment. This award will be based on the salary prescribed by the CBA. In view of this last award, the claim for:

Severance pay is disallowed.

20 The following is the summary of the award for each grievant

Samuel Kalama Gona: Farm work Grade I employed in 2010:2 years

Notice	13,202
Underpayment	68,662
Leave	11,127

Compensation 79,212

172,203

Kenga Katana: Dairy attendant Grade I employed in 2007:5 years

Notice	13,202
Underpayment	68,662
Leave	11,127

Compensation 79,212

198,607

Uchi Chisenga: Gardener Grade I (2010): 2 years

Notice	13,202
Leave	11,127
Underpayment	68,662

Compensation 79,212

172,203

Johnson M Naunga: painter Grade II (2008) :4 years

Notice	29,870
Leave	12909
Underpayment	24365
Compensation	89610
	<u>156,598</u>

Reuson C Naunga: Mason/Welder Grade II (2007): 5 years

Notice	44,805
Leave	12909
Underpayment	24365
Compensation	89610
	<u>171,689</u>

Mwagambo K Mwagambo: Artisan grade II (2008): 4 years

Notice	29,870
Leave	12909
Underpayment	81785
Compensation	89610
	<u>214,174</u>

Mwanasita Althmani: Hotel Attendant Grade I(2009):3 years

Notice	26,404
Leave	11,127
Underpayment	68,662
Compensation	79,212
	<u>185,405</u>

Mwangambo M Barahawa :Gardener GradeI(2009) :3 years

Notice	26,404
Leave	11,127
Underpayment	68,662

Compensation	79,212
	<u>185,405</u>

Peris D Kitsao:Farm worker Grade I (2009) :3 years

Notice	26,404
Leave	11,127
Underpayment	68,662
Compensation	79,212
	<u>185,405</u>

Jackson C Balozi:Painter Grade II (2008):4 years

Notice	29,870
Leave	12,909
Underpayment	68,662
Compensation	79,212
	<u>190,653</u>

Chelestine K Kazungu:Room Steward Grade I(2007): 5 years

Notice	39,606
Leave	11,127
Underpayment	68,662
Compensation	79,212
	<u>198,607</u>

Albert M Kanyoe:Maintenance Grade II(2007): 5 years

Notice	44,805
Leave	12,909
Underpayment	24,365
Compensation	89,610
	<u>171,689</u>

Sahim S Chumbe: Dairy Attendant Grade I(2009): 3 years

Notice	26,404
Leave	11,127
Underpayment	62,722
Compensation	79212

179,465

Shadrack B Thoya:Gardener Grade I(2008): 4 years

Notice	26,404
Leave	11,127
Underpayment	68,662
Compensation	79,212

185,405

Agnes Jamboi :Hotel Supervisor Grade I(2008) :4 years

Notice	26,404
Leave	11,177
Underpayment	68,662
Compensation	79,212

185,405

Florence M Kombe: Farm work Grade I (2008) :4 years

Notice	26,404
Leave	11,127
Underpayment	68,662
Compensation	79,212

185,405

Victoria K Katana:Laudry Attendant GradeI(2008) :4 years

Notice	26,404
Leave	11,127
Underpayment	62,722
Compensation	79,212

179,465

Joshua MMwinga:Watchman Grade I (2005): 7 years

Notice 39,606

Leave 11,127

Underpayment 99,022

Compensation 79,212

228,967

Alex M Jumbale:Carpenter Grade I(2009) :3 years

Notice 29,870

Leave 12,909

Underpayment 33,385

Compensation 89,610

165,774

Paul Karisa Kahindi:Mashon Grade II(2009): 3 years

Notice 29,870

Leave 12,909

Underpayment 24,365

Compensation 89,610

156,598

Safari Kasiwa Mangale:Dairy Attendant grade I(2010) :2 years

Notice 13,202

Leave 11,127

Underpayment 36,322

Compensation 79,212

139,863

Humphrey M Shoka:Cook(2007) :5 years

Notice 39,606

Leave 11,127

Underpayment	62,722
Compensation	79,212
	<u>192,667</u>

Disposition

15 For the reason stated above judgment is entered for the claimant on behalf of the grievants declaring the termination of the grievants employment unlawful and awarding then in aggregate Ksh 4,195,319 plus costs and interest from the time of filing the suit. The claim against the second respondent is struck out as a misjoinder.

Signed, Dated and Delivered at Mombasa this 13th day of November 2015.

ONESMUS MAKAU

JUDGE

13.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE