



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 220 OF 2013

**IN THE MATTER OF : THE EMPLOYMENT ACT, 2007 & THE LABOUR INSTITUTIONS
ACT, 2007**

RACHEAL NUNGARE & 15 OTHERS.....CLAIMANT

VERSUS

BAKE "N" BITE LIMITED.....RESPONDENT

BAKERY, CONFECTIONERY, FOOD MANUFACTURING & ALLIED WORKERS

UNION.....INTERESTED PARTY

J U D G M E N T

Introduction

This is a suit seeking payment of accrued employment benefits plus compensation for unlawful termination of employment. The employment dues sought include one month salary in lieu of notice, gratuities leave plus 12 months gross pay as compensation for unlawful termination. The respondent never filed any defence but only a Notice preliminary objection to the suit followed by a Notice of Motion seeking stay of the suit proceedings both of which were never prosecuted. The gist of the objection was that the claimants were union members of the Interested Party with whom she had a Collective Bargaining agreement (CBA).The Interested Party also never filed any pleadings either to support or oppose the suit.

The main issue for determination is whether an unionized employee has the right to sue in a court of law without involving his trade union. This court is of the opinion that there is no legal bar contemplated in the present Kenyan legal framework.

Facts

The claimants were employed by the respondent in the slice department at a monthly salary of Kshs. 14520. They worked continuously until 15th July 2011 when the respondent terminated their employment without any notice and without being accorded any hearing. By letter dated 5.8.2011 to the respondent, the Interested Party deemed the termination to have been through redundancy and demanded employment benefits namely; gratuity, accrued leave and leave travelling allowance. Going by the said letter, all the 22 employees affected by the alleged redundancy were ladies.

In an effort to save judicial time the court requested the parties and they consented to attempt out of court settlement in line with the Constitution of Kenya, the Industrial Court Act and the Procedure Rules. In what appeared either as misconception of the court's direction or outright mischief the respondent and the Interested Party negotiated settlement and filed a consent order on 19.12.2013 without involving the claimants and their counsel.

The claimants objected to the alleged settlement unless other items were added including salary in lieu of notice, compensation for unfair termination and costs of the suit. The Interested party contended that the claimant had no right of attending the negotiation because the union represented them fully. The court stayed the adoption of the consent order pending hearing of the suit in relation to the 3 items raised by the claimants. By consent the parties agreed to file written submissions on the said items for the court to determine without calling witnesses.

Claimants' Submissions

It was submitted for the claimants that the claim is uncontested because no defence was ever filed by the respondent. The claimants are never the less agreeable to the consent order dated 16.12.2013 in so far as the calculations and the items are concerned in addition to their claim for notice pay, compensation for unfair termination and costs.

On the claim for notice pay, the claimants relied on clause 5 of the CBA filed by the respondent to prove that they were entitled to notice before termination. The said clause provided for one month notice for employees who had served 5 years or less. They further submitted that under section 36 of the Employment Act they were entitled to notice before termination or salary in lieu. They prayed for one month's salary in lieu of notice under section 49 (1) (a).

As regards the compensation for unfair termination the claimants contended that their termination was in violation of section 45 of the Employment Act for want of a justified reason and fair procedure. They submitted that the abrupt discharge without a hearing and payment of dues and issuance of Certificate of Service to the Claimants as required under sections 41 and 51 of the Employment Act amounted to unfair termination. They prayed for 12 months gross pay for the unfair termination which they described as not far-fetched considering the suffering and the indignity they were exposed to by the sudden discharge from employment.

On costs, the claimants submitted that they were entitled to costs because the suit was occasioned by the respondents actions and omissions. They contended that they incurred costs on numerous occasions travelling to Nairobi before the suit was transferred to Mombasa. They however appreciated that costs are awardable at the courts discretion.

Respondent's submissions

The respondent admitted that she never filed any defence but an application dated 2.11.2012 seeking to strike out the suit on the basis that the claimants were union members of the Interested Party with whom she had signed a Recognition Agreement and a CBA which governed dispute resolution between the claimants and the respondent. She submitted that under section 59 of the Labour Relations Act, the claimants were bound by the CBA and the Interested Party was entitled to act for them any time there was a dispute relating to their rights. In that regard, the respondent submitted that following the courts order on 8.11.2013, she negotiated settlement with the interested Party and signed a consent order on 16.12.2013 and filed it in court on 19.12.2013.

According to the respondent, the consent order was the full and final settlement and was based on the computation made by the union vide letter dated 5.8.2011. She submitted that the consent order could not be set aside except if there was proof of fraud, collusion or some other ground that would entitle the court to set aside an agreement. She cited *Jimmi Nhlapo Masege vs Aiation & Allied workers Union [2014] eKLR* to support her contention that the consent order executed between her and the union should not be interfered with.

In response to the claim of notice pay and compensation for unfair termination the respondent submitted that the same could not be awarded unless the suit was reopened and heard on the merits. She further contended that compensation could not be awarded because it is not provided for under the CBA. According to her the only dues payable on termination are those provided for in clause 5 of the CBA.

As regards costs of the suit the respondent submitted that the claimant should not be awarded any costs. She cited *Kenya Chemical and Allied workers Union vs East African Portland Cement Company Ltd [2013] eKLR* in which Rika J held that when parties select one of the dispute mechanisms given under the law, they ought to exhaust that mechanism before moving to court or other dispute resolution mechanism. The court was therefore urged to find that the claimants were on the wrong by filing this suit in violation of the agreed procedure between the union and herself and as such they should not get costs.

Interested Party's submissions.

The union confirmed that the claimants were all unionized employee of the respondent. She also confirmed that there existed a CBA and a Recognition Agreement which governed dispute settlement between all the claimants and the respondent. She also appreciated that on 7.11.2013 the parties were directed to negotiate settlement or go for full hearing of which she and the respondent executed a consent order on 16.11.2013 and filed on 19.11.2013. The interested party submits that the claimant are agreeable to the calculations and items in the consent but demands for addition of more items including notice pay, compensation for unfair termination and costs of the suit.

On the additional items aforesaid, the union reiterated that the suit was in violation of the CBA and the Recognition Agreement. In addition she submitted that the claimants were bound by the settlement negotiated with the respondent even if done without the claimants' presence. She cited *Bernard Mutunga David vs Kings Kitchen Kenya Ltd [2012] e KLRB* in which Mbaru J held that absence of the employee from the negotiation table is not a ground good enough to refuse the dues negotiated between his union and the employer. The union urged the court to find that the settlement reached between herself and the respondent was in discharge of her obligation under the CBA and the interest of the claimants.

As regards the prayer for costs the union submitted that costs are not a right but only awarded at the discretion of the court.

Analysis and determination

Upon careful reading of the pleadings and the submissions on record the following issues arose for determination:

- a. Whether the claimants were entitled to bring this suit without involving their union
- b. Whether the consent order dated 16.11.2013 was in compliance with the courts direction dated 7.11.2013 and whether it binds the claimants.
- c. Whether the claimants are entitled to salary in lieu of notice, compensation for unfair termination and costs of the suit in addition to the sum contained in the consent order dated 16.11.2013.

Right to sue

It is common knowledge that the PO to this suit and all the application for stay of proceedings in this suit were never prosecuted. The court therefore makes the obvious finding that the respondents and the interested party submitted and committed themselves to the determination of the dispute herein by the court. However, the foregoing finding notwithstanding, the court has considered the CBA and the Recognition Agreement which have been cited as the basis for limiting the claimants right to sue.

Clause 2 of the Recognition Agreement provided for full recognition of the Interested Party as the only labour organization to represent the respondent's unionsable employees and specifies the disputes covered by the said agreement. The court finds the said clause to be irrelevant in this case because the claimants are not represented by any union in this case.

They have come to court in their own names. Clause 3 of the agreement however, is relevant in that it provides for dispute resolution procedure in cases touching on the disputes specified under clause 2 aforesaid. On a balance of probability, the court finds that both the union and the respondent never complied with the procedure provided under clause 3(b) of the agreement. The said clause provides that the union shall raise collective claims in writing with the management through her general secretary or an authorized representative. There after the respondent shall reply in writing within 2 weeks and if no settlement is reached within 14 days, the dispute shall be referred to the negotiation committee comprising representatives from the respondent and the union. If no settlement is reached by the committee, either party is entitled to refer the dispute to the Labour Minister under the Trade Disputes Act.

Respectively the court has considered the letter by the union to the respondent dated 5.8. 2011 demanding redundancy dues for the claimants. That is the only step that was taken by the union in compliance with the Recognition Agreement. The respondent defied the agreement when she declined to reply and the out of court dispute settlement mechanism was abandoned by the two parties until 21.11.2011 when the claimants brought this suit in person. Can the claimant be turned away from the seat of justice in such circumstances? Can they turn a blind eye in cases were their union is not acting for their best interest on allegation that by joining the union they signed away their rights to agitate for their grievances?

The answer to the above questions is in the negative. Firstly, the pre-industrial dispute process was delayed beyond the time schedules provided for under clause 3(b) and (d) of the Recognition Agreement as mentioned above. Secondly, the respondent breached the CBA and thereby abandoned the agreement when she declared the claimants redundant before discussing it with the union as per clause 8 of the CBA. Thirdly, the unions demand letter dated 5.8.2011 was not in the interest of the claimants because it was not in accordance with their entitlements under the CBA and the Employment Act. This issue will be addressed in details below. Lastly, the pre-industrial mechanism was abandoned when the union and the respondent failed to proceed after demand letter dated 5/8/2011.

In conclusion to this issue, the court is of the view that where a trade union defaults to discharge its obligation of representing its members in a dispute involving separation with their employer, the said employees becomes entitled to sue the employer on their own to recover their employment benefits in addition to their right to sue the defaulting union for damages. This right to sue is underscored by the fact a trade union is only an agent for members mandated to represent them in negotiating with the employer and if the union abuses or abandons that mandate the principal (employees) can represent themselves. Consequently the court finds and holds that the claimants had all the right under the constitution, statutes and common law, to access this court to agitate for the rights under the employment contract between them and the respondent. That scenerio is now common in this court since the passing of the Labour Institution Act in 2007 and now under the Industrial Court Act of 2011.

Status of the consent order dated 16.11.2011

This case was mentioned before this court on 28.8.2013 after a transfer from Nairobi. On that day the parties agreed to file written submissions for the court to determine the Interested Party's notice of motion dated 2.9.2012 which was challenging the competence of the whole suit. When the case was mentioned again on 4.10.2013 to confirm filing of submissions, Mr Onyony and Mr Nyange counsel for the Interested party and Claimants respectively told the court that they had agreed to act together for the claimants and thereby the Motion dated 2.9.2012 was abandoned.

On 8.11.2013, Mr Onyony attended the court with the counsel for the respondent for mention and he informed the court that he had received a proposal for settlement from the respondent and sought for a further mention to record settlement. The case was back in court on 13.12.2013 when the counsel for all the three parties attended. The court was asked to adopt the consent order dated 16.11.2013 between the union and the respondent but the claimants' counsel objected on grounds that the claimants and their counsel were not parties to the consent and that the order had left out 3 important items in the suit.

The foregoing chronology leaves no doubt that this court never at any time stayed the proceedings in this

suit to allow union and the respondent discharge their obligations under the CBA and the Recognition Agreement by negotiating at the exclusion of the claimants. The two had no defence on record and had abandoned their objection to the suit when they failed to prosecute them and instead the two appeared before the court on 8.11.2013 and fixed the suit for hearing even in the absence of the claimant. In that regard and in view of the earlier finding that the claimants had a right to sue, the negotiations between the union and the respondent were subject to pleadings, contract of employment, the law and the claimants approval. The union's contention that the claimants were bound by settlement negotiated in their absence is therefore misconceived and must be rejected. Consequently, the court finds that the settlement coming under the consent order dated 16.11.2013 was an attempt to restrain an horse after it has already bolted. The same can only bind the claimants if they accept it is because the same is not founded on any pleadings. In this case the claimant gave conditional acceptance and as such the court declines to adopt it and it is expunged from the record to pave way to the full determination of the suit.

Claimants entitlements

In this case the claimants pray for one month in lieu of notice, terminal benefits, leave allowance and compensation for unfair termination. It is trite law that parties are bound by their own pleadings and as such the claimants cannot benefit from any reliefs they did pray for. Unfair termination occurs where an employer discharges his employee through breach of statutory obligation regarding procedure and the reason for the termination. In this case the reason was redundancy and the procedure followed was summary termination affecting only female employees.

In Kenya redundancy is governed by section 40 of the Employment Act and the respective contract of employment. The said statutory provision requires that before redundancy is done, an employer must serve at least one month written notice upon the employee or his trade union where one is a member, and the labour officer. It further requires that the procedure for selecting the employees to be discharged must be fair in addition to the requirement for payment of benefits arising from the redundancy. Clause 8(a) of the CBA provided for a fair selection of the employees to be declared redundant. Clause 8(b) of the CBA provided that in the event of redundancy the respondent and the union were to discuss the reasons for and the extent of the redundancy. Clause 8(c) provided for notice for termination in addition to payment of separation dues.

In view of the foregoing, it is obvious that the alleged redundancy was done in breach of both the CBA and section 40 of the Employment Act. There was never any notice served on the claimant or the union and the labour officer and there selection process was discriminative. Likewise no separation dues were paid to the claimants and as such the alleged redundancy became nothing more than an unfair termination within the meaning of section 45 of the Employment Act. The claimants are therefore entitled to the relief provided for under clause 5 of the CBA and section 49 of the Employment Act. They will all get one month salary in lieu of notice. They will also get six months gross salary for unfair termination. In granting the latter item, the court has considered the rank of the claimants and formed the opinion that with reasonable diligence the claimants could secure alternative employment within 6 months.

The claimants prayed for what they called terminal benefits calculated at the rate of 15 days per year of service. They were not represented by counsel when they brought the suit. They must have intended to recover service pay. In all fairness the court grants them service pay at the rate of 15 days pay per completed year of service. Jane Lundi, Phanice Makokha, Racheal Nungare and Mary Mutindi prayed for leave allowance. Paragraph 8 of the claim talks of leave pay. For reason of lack of legal representation the court will deem that they intended to recover pay in lieu of leave days not utilized. No defence was filed to deny the claim for leave days claimed in the suit. The said four claimants are therefore awarded 30 days pay in lieu of leave as prayed per year because clause 13 of the CBA entitled them to 30 days annual leave.

In conclusion the court makes the following awards to all the claimants respectively:

JANE LUNDI

One month salary in lieu of notice.....kshs.14520
Six months salary for unfair termination.....kshs.87120
Service pay for 4 years x15/30x 14520.....kshs. 29040
Leave for 3 years x 30 days pay.....kshs. 43560
Total **kshs.174240**

ESTHER WAYUA

One month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120
Service pay for 1 years x15/30x 14520Kshs 7260
Total: **kshs108 900**

MARY WANJIKU

Service pay for 1 year x 15/30 x 14520kshs 7260
One month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120
Total: **kshs108 900**

MWANAMKUU COSMUS

Service pay for 1 year x 15/30 x 14520kshs 7260
One month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120
Total: **kshs108 900**

LILIAN MWADIME

One month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120
Total: **kshs101640**

FAITH MBUWA

Service pay for 1 year x 15/30 x 14520kshs 7260
One month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120

Total: **kshs108 900**

PHANICE MAKOKHA

Service pay for 2 years x 15/30 x 14520kshs.14520

Leave for one year x 30 days pay.....kshs.14520

One (1) month's salary in lieu of noticekshs.14520

Six months salary for unfair termination.....kshs.87120

Total: **kshs130680**

JACKUELINE MUTHOKI

Service pay for 1 year x 15/30 x 14520kshs 7260

One month's salary in lieu of noticekshs.14520

Six months salary for unfair termination.....kshs.87120

Total: **kshs108 900**

ROSE KURIA

One month's salary in lieu of noticekshs.14520

Six months salary for unfair termination.....kshs.87120

Total: **kshs101640**

JULIANA WAMBUGHA

Service pay for 1 year x 15/30 x 14520kshs 7260

One month's salary in lieu of noticekshs.14520

Six months salary for unfair termination.....kshs.87120

Total: **kshs108 900**

RACHEAL NUNGARE

Service pay for 2 years x 15/30 x 14520kshs.14520

Leave for one year x 30 days pay.....kshs.14520

One (1) month's salary in lieu of noticekshs.14520

Six months salary for unfair termination.....kshs.87120

Total: **kshs130680**

RUKIA MUPA

ervice pay for 1 year x 15/30 x 14520kshs 7260
SOne month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120
Total: kshs108 900

MARY MUTINDI

Service pay for 2 years x 15/30 x 14520kshs.14520
Leave for one year x 30 days pay.....kshs.14520
One (1) month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120
Total: kshs130680

LIZY BULA

Service pay for 1 year x 15/30 x 14520kshs 7260
One month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120
Total: kshs108 900

CECILIA CHARO

Service pay for 1 year x 15/30 x 14520kshs 7260
One month's salary in lieu of noticekshs.14520
Six months salary for unfair termination.....kshs.87120
Total: kshs108 900

The prayer for Certificate of Service is also granted to each claimant as provided for under section 51 Of the Employment Act.

Disposition

In view of all the matters above stated, the court enters judgment for the claimants at kshs 1,764,180 in the aggregate to be shared among them as calculated above. The claimants will also have Certificate of Service ,costs of the suit plus interest.

Dated Signed and delivered this 30th May 2014.

ONESMUS MAKAU

JUDGE