



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**  
**CAUSE NO. 23 OF 2012**  
**(FORMERLY INDUSTRIAL CAUSE NO. 1316 OF 2012 AT NAIROBI)**  
**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED  
WORKERS.....CLAIMANT**  
**- VERSUS -**  
**UKWALA SUPERMARKET LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 18<sup>th</sup> July, 2014)

**JUDGMENT**

The claimant filed the memorandum of claim on 03.08.2012. The claimant filed the amended statement of claim on 31.08.2012. The claimant prayed for judgment against the respondent for a sum of **Kshs.6,520,962.85** and urged that the amount may go up after the underpayments for the period 1.05.2010 to April, 2012 for each of the grievants is worked out and paid. The prayer was with respect to terminal dues following termination of employment of the claimant's members by the respondent on account of redundancy. The claims included for each member, one month's pay in lieu of the termination notice; annual leave due and not granted or paid at termination; underpayment of wages; and 12 months wages being compensation for unfair termination.

The respondent's memorandum of defence was filed on 18.07.2013 through Karanja-Mbugua & Company Advocates. The respondent prayed that the claimant is not entitled to the reliefs sought and further prayed that the suit be dismissed with costs.

The claimant filed another amended memorandum of claim on 19.11.2013 making similar claims for 16 further employees being its members and praying for a sum of **Kshs.2,419,942.00**. The respondent filed on 25.11.2013 its memorandum of defence to that amended memorandum of claim.

At the hearing, Mr. Nyumba for the claimant made opening remarks and stated as follows:

1. The dispute was traceable to 30.06.2012 when the respondent issued a redundancy notice addressed to the Ministry for Labour with a view to declaring 25% of all its workers redundant.
2. By the time the claimant filed the suit, the respondent had already terminated employment of 30 workers on account of redundancy effective 30.07.2012. Another lot of 61 workers were terminated in October, 2012.
3. The terminated workers were paid redundancy benefits including severance pay, notice pay, pending leave, salary and all dues accrued at redundancy date.

4. The claimant's case before the court was on three issues namely:
  - a. Whether the termination by way of redundancy was fair under the relevant legislation.
  - b. Whether there are any other due payments in view of the minimum wage orders and on account of underpayment.
  - c. Whether there was discrimination during the redundancy.

The claimant's witnesses included Edward Mokuo Ochieng (CW1); and Ezekiel Kipkoskei (CW2).

Learned Counsel, Ms. Muthoni for the respondent in her opening remarks stated that the respondent observed section 40 of the Employment Act in undertaking the redundancy. The Employees were given redundancy notices with copies to the Labour officer in Eldoret and the claimant's branch secretary at Eldoret. She urged that there was no victimization, intimidation or harassment and no discrimination in the selection process as urged for the claimant because union members were not selectively targeted. The respondent's witness was Barrack Fanuel Maganda.

The court has considered the pleadings, the evidence, the documents filed for the parties and the submissions on record and makes findings as follows:

1. The court finds that the members of the claimant have been paid off the due leave in cash, one month's pay in lieu of notice, and severance pay as provided for in section 40 of the Employment Act, 2007.
2. At all material times, the parties to this suit had filed Industrial Court Cause No. 1362 of 2011 at Nairobi and at all material times during the redundancy, there was no recognition and collective agreement between the parties. Section 40 (1) (d) of the Employment Act, 2007 provides that where there is in existence a collective agreement between an employer and a trade union setting out terminal dues payable upon redundancy, the employer will not place an employee at a disadvantage for being or not being a member of the trade union. The court finds that as there was no collective agreement at all material time, the application of the section could not accrue in the redundancy in issue.
3. Section 40 (1) (a) of the Act provides that if an employee is a member of a trade union, the employer shall notify the union and the area Labour officer of 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. The court holds that as submitted for the claimant, the section does not peg the notice to the union on existence of a collective or recognition agreement but on simply the employee being a member of the union. The notice in this case was undisputedly addressed to the County Labour Officer and copied to the claimant's branch secretary at Eldoret. The claimant protested by exhibit 5 on the initial claim bundle being the letter dated 2.07.2012 referring to the notice of 30.06.2012. The court finds that the protest letter confirms that the claimant had received the copy letter. The court holds that it is prudent for the notice to be addressed to the union's top official being the union Secretary General but the section does not prescribe the official but that the notice is issued to the union. In the circumstances of this case including that there was no recognition and collective agreement between the parties, the court finds that the union received a sufficient notice and section 40 (1) (a) of the Act was sufficiently satisfied.
4. The claimant has not established that the respondent failed to comply with the selection criteria for redundancy as prescribed in section 40(1) (c) namely seniority in time and the skill, ability and reliability of each employee affected by the redundancy.
5. The court has considered the material on record and finds that the claimant has failed to establish the alleged underpayment for the employees who were terminated in the redundancy especially in circumstances whereby it has not been shown that during the employment relationship there had been grievances about underpayment.

6. It is not disputed that the 1<sup>st</sup> lot of 30 employees who were declared redundant on 30.07.2012 were each not paid Kshs.10,000.00 being token gratuity that was to each of the 68 employees terminated on 25.11.2013 under the same redundancy scheme. The court finds that in view of that varying payment, the 1<sup>st</sup> lot was discriminated and the 30 employees are entitled each to the **Kshs.10,000.00**. In making that finding, the court holds that the respondent was bound by section 5(2) of the Act to promote equal opportunity in employment and to strive to eliminate discrimination in its employment policy or practice including throughout the redundancy process that was undertaken.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The respondent to pay **Kshs.10,000.00** to each of the 30 employees declared redundant on 30.07.2012 being a sum of **Kshs.300,000.00** by 1.09.2013, failing, interest to be payable at court rates from the date of their redundancy 30.07.2012 till the date of full payment.
2. The respondent to pay the claimant's half costs of the suit.

**Signed, dated and delivered in court at Nakuru this Friday 18<sup>th</sup> July, 2014.**

**BYRAM ONGAYA**

**JUDGE**