



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 140 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 21<sup>st</sup> November, 2014)

ERIC KAYESI NANDWA ..... CLAIMANT

**-VERSUS-**

INSTEEL LIMITED ..... RESPONDENTS

**JUDGMENT**

The claimant herein Eric Kayesi Nandwa filed his memo of claim on 3.6.2013 through the firm of Otieno Ragot & Co. Advocates. He contends that he was employed by the respondents as Regional Salesman in respondent's Sales & Marketing Department Kisumu Sales Centre on 12.2.2007. He apprehended his appointment letter as **App 1**. He avers that he worked well until 3.8.2012 when he was accused of loss of some plates used in making windows. He explained to respondents what had happened and he was told to report to Central Police Station in Kisumu which they did. On 16.8.2012 their senior came from Nairobi and they had a discussion. It was agreed that independent investigations be held. Investigations by police were never carried out. On 16.8.2012 he was given a show cause letter (**App 2**). On 18.8.2012 he responded to the notice (**App 3**). On 28.3.2013 he was served with a redundancy letter (**App 7**). He was not a member of a trade union and had not been informed of the intended redundancy. He says the redundancy being restructuring was not true as 4 other people were employed in Sales Department at the same time and only claimant and another Mr. Madote were declared redundant. The 4 employed were all of Asian origin. The claimant consulted his advocate who wrote a letter to respondents complaining of the redundancy.

The respondents replied indicating that the redundancy was normal. However in respondents reply to memo they responded that the redundancy was because of disciplinary action being taken against the claimants. The claimant avers that he is not aware of any disciplinary action against him.

The claimant wants the redundancy declared illegal and he wants to be compensated for the illegal action. At the time he was earning Kshs 33,000/= gross pay. In cross-examination claimant avers that he was not charged with any case of theft with Madote. He says he acknowledged 40 plates were missing but how was the question. Investigations were not conducted.

The respondents filed their response on 24.7.2013 through the firm of Siganga & Co. Advocates. It is their contention that they never acted with malices against claimant. They also contend that they acted procedurally, legally and economic foresight in termination of claimants employment considering all staff requirements. They aver that at the time of declaring claimant redundant, they computed his benefits which he refused to collect. They also aver that before the redundancy, the claimant had been engaged in activities deleterious to the business of the respondents.

Having heard the parties and upon consideration of their submissions, the issues for determination are:-

- 1. Whether the action of declaring claimant redundant was justified and fair and,**
- 2. What remedies if any, the claimant is entitled to.**

On 1st issue, S. 40 of Employment Act 2007 is clear on how termination on account of redundancy is to be effected. The Section states as follows:-

**“40(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—**

**(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed 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;**

**(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**

**(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**

**(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**

**(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**

**(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**

**(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.”**

In the case of claimant he was not a member of a trade union and so S. 40(1) (b) was to apply to him. The respondents has not shown that this was done. Even the criteria used in selecting him and not others is not demonstrated. The respondents have alleged some disciplinary action against the claimant which has not been demonstrated. It therefore follows the redundancy meted out in claimant was illegal and unjustified. The claimant has asked court to order he be reinstated.

Under S. 12 of Industrial Court Act, reinstatement is one remedy that this court can grant. In relation to this prayer the respondents did not seem to reply. They do not seem to have a problem with the same I therefore order as envisaged under S. 49(4) of Employment Act or in alternative re-engagement:-

- 1. Reinstatement of claimant within 30 days from today without interference of any accrued salary rise and or promotion.**
- 2. Payment of salary due and pending since the illegal redundancy on 28.3.2013 to-date being Kshs 33,000 X 20 = 660,000/= less statutory deductions.**
- 3. Respondents to pay costs of this suit.**

**HELLEN S. WASILWA**

**JUDGE**

**21/11/2014**

**Appearances:-**

Claimant present

N/A Respondents

CC. Wamache