



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 120 OF 2010

KENYA UNION OF JOURNALISTS AND ALLIED WORKERS CLAIMANT

-VERSUS-

NATION MEDIA GROUP LIMITED RESPONDENT

AWARD

By a Memorandum of Claim dated 12th February 2010 and filed in Court on 15th February 2010 the Claimant union pleads that it is a union registered to cater for employees in the Media Industry, that it has a Recognition Agreement with the Respondent and had negotiated a Collective Bargaining Agreement with the Respondent for a 2 year period of 2008 and 2009 which was signed on 27th June 2008 and was duly registered by the Industrial Court for the exclusive terms and conditions of employment for all unionisable employees of the Respondent.

ONESMUS MUSYOKA KILONZO 1ST GRIEVANT

The Claimant alleges that the 1st Grievant Onesmus Musyoka Kilonzo was employed by the Respondent on 15th March 1995 as a trainee reporter of Nation Newspapers on terms and conditions of service on the said agreement, a copy of which is annexed to the Memorandum of Claim as Appendix KUJ 2. That the Grievant was declared redundant on 15th April 2009. That at the time the Grievant was declared redundant he was a Deputy Chief Sub-Editor earning a consolidated salary of Kshs.180,000 per month. That on 15th April 2009 the Grievant received a redundancy letter signed by the Respondent's Group Human Resource Director offering him payment of salary up-to 30th April 2009, pay in lieu of 41 days accrued leave, 3 months' salary in lieu of notice, 1 months basic salary for each completed year of service and 15 days salary for every year remaining to retirement. The letter is annexed as Appendix KUJ 3. That the Grievant protested to the Respondents Chief Executive Officer his redundancy by his letter dated 20th July 2009 in which he alleges victimization on account of his union activities and that his protests were dismissed.

The Claimant seeks reinstatement of the Grievant or in the alternative payment of Kshs.8,545,220 on account of salary up-to April 2009, 41 days accrued leave, 3 months' salary in lieu of notice, 15 days salary for every remaining period to retirement, severance pay, 12 months' salary compensation and leave traveling allowance.

REBECCA NANDWA

The Claimant alleges that the 2nd Grievant Rebecca Nandwa was employed on 11th February 2000 as a trainee Reporter for Nation Newspapers Division on terms and conditions of employment as detailed in her appointment letter attached as Appendix KUJ 7. She was terminated on 16th April 2009 by letter dated the same date and annexed as KUJ 9. She was offered payment of salary up-to 30th April 2009, 27 days accrued leave, 3 months' salary in lieu of notice and 1 month's basic salary for each completed year of service. That her last consolidated salary was Kshs.105,679/=. The Claimant seeks orders for reinstatement or in the alternative payment of Kshs.3,605,385.25 made up of salary up-to 30th April 2009, 27 accrued leave days, 3 months' pay in lieu of notice, 1 month basic salary for each completed year of service, leave travelling allowance, severance pay at 5 days salary per year worked and 12 months' salary compensation.

The Respondent filed its Memorandum of Response on 16th April 2010 in which it states as follows:-

ONESMUS KILONZO 1ST GRIEVANT

The Grievant was Deputy Chief Sub-Editor for the Daily Metro, that the decision to discharge the Grievant was reached after the Respondent's management decision to discontinue publication of the Daily Metro, that after discussion the Claimant accepted the terms of the discharge unconditionally and signed his acceptance without any reservation, that the Grievant's protest letter was made 3 months after the redundancy. He was paid 3 months notice, severance pay, exgratia pay and pay in lieu of one standing leave of 41 days all totally shs.3,964,103.00

REBECCA NANDWA 2ND GRIEVANT

The Grievant was discharged after discussions regarding re-organization and that she agreed to the discharge unconditionally. The Respondent denies refusing to co-operate with the conciliator and alleges that it responded to the letter from the Conciliator to the effect that there was no proper dispute to be resolved as the Grievants had accepted the terms of discharge without reservation and that the discharge was in compliance with the law. The Respondent further denies that the discharge of the Grievants had anything to do with union activities, that there was no discrimination in respect of payment to the 2nd Grievant and that the additional head of payment to the 1st Grievant was given gratuitously. The Respondent further pleads that payment of severance pay to the Grievants was at 30 days which was over and above the rate of 15 days provided by the law and the Collective Bargaining Agreement.

The Respondent prays that the Claim be dismissed with costs to the Respondent.

The case was heard by Justice Chemuttut by way of oral submissions and award reserved on notice. The court was however reconstituted before Justice Chemuttut prepared the award and the case was allocated to me to prepare the award.

Parties were invited for mention of the case before me on 11th October 2013 when Mr. Nyaosi appeared for the Respondent but there was no appearance for the claimant. Mr. Nyaosi informed the court that the Respondent had no objection to preparation of the award by me. The court directed that parties file written submissions.

On 5th November 2012 Mr. Omwoya for the Claimant appeared before me for mention. There was no appearance for the Respondent. He informed the court that he had spoken with the Respondents' advocate and they had agreed that the court proceeds to prepare the award.

On 29th November 2012 parties appeared before me for mention to agree on way forward as there seemed to have been some confusion as the respondent had filed an application by way of Notice of Motion seeking orders to have the case heard afresh. This was at variance with the orders that had been made in court by consent of the parties on 11th October 2012 when Mr. Nyaosi appeared for the Respondent and on 5th November 2012 when Mr. Onuonga appeared for the Claimant.

On 29th November 2012 Mr. Onuonga appeared for the Claimant and Mr. Nyaosi for the Respondent. The court expunged the Respondents notice of Motion from the record as parties had ahead agreed that they will file and exchange written submissions based on which the court would prepare the award.

In its written submissions filed on 28th January 2013 the Claimant submits as follows;

The redundancy failed to comply with Section 40 of the Employment Act and Clause 18 of the parties Collective Agreement as the Claimant was not notified of the intention to terminate the employment of the Grievants and they were thus denied the right of representation.

The Claimant further submitted that the Respondent had other positions in which the Grievants could be redeployed after the stoppage of production of the Daily metro, the publication under which they worked. That is confirmed by the fact that soon after the redundancy of the Grievants the Respondent advertised positions similar to those held by the Grievants in associated companies, that Mr. Kilonzo's letter provided transfer to any of the company's branches, departments, sections, subsidiaries or associated companies, that before transferred to the Daily Metro Mr. Kilonzo worked at Taifa Leo. That the Respondent had not given reasons for termination of Ms. Nandua's services, only stating it was due to re-organization. Ms. Nandwa was a sub editor of Taifa Leo at the time of her redundancy.

The Claimant submitted that the redundancy of the Grievants was victimization and discrimination due to union activities as both of them were works committee officials.

The Claimant further submitted that Mr. Kilonzo's proper salary should have been Shs.180,000 per month, that the Respondent failed to factor in his anniversary increment of shs.360 due on 15th March each year which was Mr. Kilonzo's anniversary increment of shs360 due on 15th March each year which was Mr. Kilonzo's anniversary. That Mr. Kilonzo was entitled to gratuity as the termination of his employment was not due to misconduct. The Claimant was submitted that the 15 days salary for each year remaining to retirement paid to Mr. Kilonzo was a gift as stated in the letter of termination.

For Ms. Rebeca Nandwa the Claimant submitted that the submission in respect of Mr. Kilonzo applied to her.

The Claimant referred the court to Cause No. 82 (N) of 2009 Kenya Union of Journalist and Allied Workers Union versus Nation Media Group and cause 746(N) of 2009 Kenya Union of journalists and Allied Workers Union versus Standard Group Limited. In both cases the court held that signature of a discharge certificate does not bar an employee from claiming his rightful terminal dues. The Claimant prayed that the court awards as prayed for the Grievants as follows;

MR. ONESMUS KILONZO'S CLAIM

1. Salary up to and including 30 April 2009 Kshs.180,000
2. Salary for 41 accrued leave Kshs.246,000

41days x 180,000

30

3. 3 months salary in lieu of notice 3 x 180,000 Kshs.540,000
4. One month salary for each complete year of service

180,000x14 years Kshs.2,520,000

5. 15 days salary for every remaining period to retirement

15 days x 14 years x 180,000

30 Kshs.1,530,000

6. Severance pay for every year worked at the rate of 15 days

6. 15 days x 14 years x 180,000

30 days Kshs.1,260,000

7. 12 months salary compensation for unlawful termination 12x180,000 Kshs.2,160,000

8. Leave Travelling allowance Kshs.7,220

Total Claim

Kshs.8,543,220

REBECCA NANDWA'S CLAIM

Consolidated salary 105,679.20 x 12%(2009/010) Kshs.118,360.70

1. Salary up to and including 30th April 2009 Kshs.18,360.70

2. Salary for 27 days accrued leave 27 days x 118,360.70 x 3 months Kshs.106,524.60

3. 3 months salary in lieu of notice 118,360.70 x 3 months Kshs.335,082.10

4. 1 month basic pay for each completed year

of service 118360.70x 9 years. Kshs.1,065,246.30

5. Leave traveling allowance Kshs.7,220.00

6. Severance pay every year worked at the

rate of 15 days 15 days x 9 x 118,360.70 30 days kshs.532,623.15

7. 12 months compensation for wrong fultermination Kshs.1,420,328.40

Total Claim Kshs.3,605,385.25

The Respondent filed its written submissions dated 9th January 2013 on 10th January 2013. The Respondent submitted as follows;

Mr. Kilonzo was employed as Deputy Chief Sub-Editor of the Daily Metro, a newspaper owned by the Respondent whose last edition was the issue of 17th to 19th April 2009, that there was extensive consultations before the publication was discontinued, that the separation between the Respondent and Mr. Kilonzo was mutual and this is evidenced by the Mr. Kilonzo's signature on the redundancy letter on 24th april 2009.

That Ms. Rebecca Nandwa's termination was also mutual that there were discussions where the decision to terminate her services was reached.

It was submitted for the Respondent that the prayer for re-instatement cannot be granted as it is more than 3 years since the termination of the Grievants, that section 12(3) of the Industrial Court Act provides for reinstatement within 3 years from the date of termination which lapsed in april 2012. That the allegations of the duress are facts which have to be proved and the Grievants had not testified to prove

that they were forced to sign the discharge. That the allegations of victimization have not been proved as no evidence was adduced to prove that, the Grievants held any positions in the Union. That the Grievants did not complain about the redundancy until 20th July 2009 when Mr. Kilonzo wrote a letter to complain which Ms. Nandwa never complained at all. That the decision to bring this claim was an after thought. The Respondent also denied that it had agreed to re-engage Mr. Kilonzo.

It was further submitted for the Respondent that the redundancy were by consent hence it was not deemed necessary to inform the claimant. That the Grievants were paid over and above what was provided in the CBA. That what was paid to the Grievants is also more than what they would be entitled to by way of maximum compensations and that the Claimants cannot seek both compensation for unlawful dismissal and enjoy redundancy dues.

Having considered the pleadings and submissions by both parties and the documents attached to the pleadings, the issues for my decision are the following;

- i. Whether the redundancy of the claimants was in accordance with the law and the Collective Bargaining Agreement.
- ii. Whether the salary of Grievant Mr. Onesmus Kilonzo was Kshs.180,000/= as alleged by the Claimant or Kshs.144,225.60 as submitted by the Respondent.
- iii. Whether the Claimants were victimized and discriminated for union activities.
- iv. Whether the Grievants are entitled to their prayers.
- v. Whether Grievants are entitled to compensation.

ISSUE NO. 1 Whether the Redundancy was in accordance with the law and the parties' Collective Bargaining Agreement.

Section 40(1) of employment provides for the procedure for redundancy. It reads as follows.

40. Termination on account of redundancy

(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.

Clause 18 of the Collective Bargaining Agreement states as follows;

18. REDUNDANCY

a) The union shall be notified of an employer's intention to declare employees redundant by giving 30 days notice before such redundancy takes effect.

b) The principle of last in first out shall apply subject to merit, suitability being equal.

c) Employees declared redundant shall receive 15 days pay for every completed year of service by way of severance pay.

In its submissions the Respondent has admitted not complying with both the law and the Collective Bargain Agreement at paragraph 9 which states that "As earlier submitted, the termination of the Grievants was mutual. It was as a result of consultations and everything was done by consent. In fact none of the parties deemed it fit to inform the Claimant as everything was agreed".

It is the responsibility of the employer to comply with the law. As submitted by the Claimant the provisions of the law are couched in mandatory terms. Even if a redundancy is by consent, which was obviously not the case herein, the Respondent has an obligation to comply with the law. It could not have been contentious if the Claimant was not involved. Once an employee is a member of the Union, the Union must be involved in any redundancy consultations as provided by the law and the Collective Bargaining Agreement.

I find that the Respondent did not comply with both the law and the Collective Agreement. The redundancy was therefore unlawful.

ISSUE NO. 2: What was the salary of Mr. Kilonzo.

The Claimant alleges Mr. Kilonzo's salary was Kshs.180,000/= at the time of termination while the Respondent alleges his salary was Kshs.144,225.60. In the tabulation of his terminal dues attached to the Respondents further Memorandum of Response dated 30th June 2010 and filed in court on 1st July 2010, the figure used to tabulate the Mr. Kilonzo's terminal benefits is Kshs.160,490 (481,470 divide by 3). The Claimant has however annexed a copy of an inter-office Membo signed by Mr. Swaleh Shariff, Senior HR Manager adduced to the Group Financial Controller titled "Union Increment – Onesmus Kilonzo" dated 26th February 2009 in which he advises that Mr. Kilonzo had been awarded union and anniversary increment as per the 2008/10 CBA agreement as follows new salary w.e.f April 2008 Kshs.160,490.46. New salary w.e.f April 2009 Kshs.179,749.32. The memo is copied to the Claimant. The Respondent paid the Claimant at the rate of pay for April 2008 instead of April 2009.

The Respondent has not denied the authenticity of this memo or made any comment about it in their submissions.

From the foregoing, I find that the correct salary for Mr. Kilonzo for April 2009 was Shs.179,749.32 and this is the rate that should have been used to calculate all the benefits payable to the 1st Grievant.

ISSUE NO. 3: Whether the Grievants were victimized and discriminated for union activities.

The Claimant alleges that the Grievants were members of the works committee with Mr. Kilonzo being the Chapel Father and Ms. Nandwa the secretary. The Respondent denies the allegations. No evidence was adduced by the Claimant to prove these allegations.

I therefore find that the Claimant has not proved the allegation of discrimination and victimization on account of union activities.

ISSUE NO. 4: Whether the Grievants are entitled to the prayers sought.

The Claimant prays for the following orders;

- a. An order for reinstatement of the two employees without loss of benefit or alternatively the Respondent/employer to pay.
- b. 12 months compensation for wrongful/unlawful termination.
- c. Severance pay of 15 days for every year worked.
- d. Fifteen (15) days salary for every year remaining period to retirement for Miss Rebecca Nandwa.
- e. Certificate of service to be given to the employees.
- f. That any other award that seems fit to the ends of natural justice be awarded to the employee.
- g. Leave traveling allowance for Miss Rebecca Nandwa.
- h. That the Honourable court to order the Respondent to withdraw the employment letter with instructions that the employees should not to join the union.

The total claim in respect of Mr. Onesmus Kilonzo the Claimant prays for a total of Kshs.8,543,220 while the Claim in respect of Ms. Rebeccah Nandwa is Kshs.3,605,385.25.

According to Section 40 of the Employment Act and the CBA the Grievants were entitled to the following;

1. 1 month notification of the intention to be declared redundant.
2. Leave due and leave travelling allowance.
3. Notice or pay in lieu
4. Severance pay
5. Gratuity

According to the breakdown attached to the Respondent's further Memorandum of Response the Grievants were paid as follows;

Onesums Kilonzo

3 months notice Kshs.481,470.00

Severance Kshs.962,940.00

Ex gratia Kshs.2,300,365.65

41 days leave Kshs.21936.35

Rebecca Nandwa

Notice Kshs.317,037.00

Ex gratia Kshs.959,917.00

Leave pay Kshs.95,111.10

In the letter of redundancy the Respondent offered to pay the Grievants the following;

- a. Salary up to 30th april 2009
- b. Accrued leave
- c. 3 months salary in lieu of notice

- d. 1 months basic pay for each completed year of service for Onesmus Kilonzo.
- e. 15 days salary for every year remaining to retirement.

Apparently both Grievants were paid notice, leave and ex-gratia but only Mr. Onesmus Kilonzo was paid severance pay, albeit at the salary of march 2009 without adjusting the salary to the CBA rate.

40. Termination on account of redundancy

(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.

Both Grievants were paid 3 months salary in lieu of notice. This therefore covered item 1 and 2 above i.e 1 months notification and 2 months salary in lieu of notice as provided in clause 15 and 18(a) of the Collective Bargaining Agreement.

The Grievants were also paid leave days not taken. However, they were not paid leave, travelling allowance. I therefore award each grievant the sum of kshs.7,220 being leave travelling allowance as provided in clause 6 of the CBA.

Severance pay

Mr. Kilonzo was paid Severance pay of Kshs.962,940.00 instead of Kshs.1,258,245.24 while Ms. Nandwa was not paid Severance pay. Ms. Nandwa's Severance pay at 15 days salary per completed years of service of Kshs.532,623.15. The union alleges in the further Memorandum of claim that the Ms. Nandwa's last salary was shs.118,360.70 after factoring in the CBA increment of 12% for the year

2009/2010 of the CBA. This fact has not been denied by the Respondent. This adds up to Kshs.118,360.70.

Both Grievants were also not paid gratuity at the rate of 30 days salary per completed year of service. Onesumus Kilonzo is entitled to gratuity of Kshs.2,516,490.50 while Ms. Nandwa's gratuity is Kshs.1,065,246.30.

Based on the foregoing each of the Grievants is entitled to the following;

Onesumus Kilonzo

- i. 3 months salary in lieu of notice Kshs.539,248.00
- ii. Pay in lieu of leave (41 days) Kshs.245,657.40
- iii. Leave travelling allowances Kshs.7,220.
- iv. Severance pay Kshs.1,258,245.24
- v. Gratuity Kshs.2,516,490.50
- vi. Ex gratia (as offered and paid by Respondent) Kshs.2,300,356.65

Total Kshs.6,867,217.80

Less payment received Kshs.3,964,103

Balance due Kshs.**2,903,114.80**

Rebecca Nandwa

- i. 3 months salary in lieu of notice Kshs.355,082.10
- ii. Pay in lieu of leave (27 days) Kshs.106,525
- iii. Leave travelling allowance Kshs.7,220
- iv. Severance pay Kshs.532,623.15
- v. Gratuity Kshs.1,065,246.30
- vi. Ex gratia as already paid by Respondent Kshs.959,917

Total due Kshs.3,026,613.55

Balance due Kshs.**1,654,547.85**

ISSUE NO. 5: Whether Grievants are entitled to Compensation

The Claimant has prayed for maximum compensation of 12 months salary for each of both Grievants.

Section 49 of the Employment Act provides for payment of compensation where termination of an employee's employment is found to have been unjustified.

In the present case the redundancy was unprocedural as admitted by the Respondent for whom it was submitted that neither the Claimant union nor the Labour officer was notified of the reasons for or extent of the redundancy at least a month before the redundancy was effected.

Apparently only the two Grievants were declared redundant.

For Mr. Kilonzo the reason given for his redundancy was the discontinuation of publication of the Daily Metro. The grievant in his letter dated 20th July 2009 objecting to the redundancy termed it unfair and malicious. His reasons were that his contract was never with the Daily Metro, there were suitable positions within the Nation Media Group, his last performance appraisal rated him better than other employees who had been retained in employment, other employees of Daily Metro were redeployed to other publications and the Principles of last in first out was observed. He alleged that he was targeted for

speaking up against mal practice in the company.

For Ms. Nandwa there was absolutely no reason given for signing her out for redundancy.

The Claimant has pointed out that the Respondent had other suitable positions that the Grievants could have been redeployed to as the Respondent advertised for such positions in the Daily Nation of 3rd June 2009 and 14th May 2010. The Claimant submitted that the Grievants were targeted for participation in Union activities.

I find that the redundancies of the Grievants was wrongful both in substance and procedure and therefore constituted unfair termination in terms of section 45 of the Employment Act. The Grievants therefore qualify for compensation as provided under Section 49 of the Act.

I have considered the grounds enumerated in Section 49(4) and especially the fact that the Grievants have already been paid to the Grievants, the other payment awarded herein above and the fact that the Respondent paid them exgratia payment at the time of leaving employment. I find that nominal compensation would be reasonable. I therefore award Mr. Kilonzo 4 months salary and Ms. Nandwa 3 months salary as compensation for unfair termination for employment as follows;

Mr. Kilonzo Kshs.718,997.30

Ms. Nandwa Kshs.355,082.10

In summary therefore, I give Judgment to the Grievants against the Respondent as follows;

Mr. Kilonzo Kshs.3,622,112.10

Ms. Nandwa Kshs.2,009,630.00

Each party shall bear its costs.

The above sum should be paid within 30 days from date of Judgment failing which interest shall accrue at court rates.

Orders accordingly.

Read in open Court this 24th day of September 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:-

Lawrence Adera, Administrator of _____ Claimant

Mwangi _____ for Respondent