



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)

CAUSE NO. 119 OF 2013

KENYA PETROLEUM OIL WORKERS UNION

CLAIMANT

v

MAKEDI INVESTMENTS & PAUL OHANY

1st RESPONDENT

TOTAL KENYA LIMITED

2nd RESPONDENT

JUDGMENT

1. Innocent Mosota, Everlyne Mwinzi, Dan Okello, Thomas Nzioka and Daniel Mati (Grievants) were employees of Paul Ohany trading as Makedi Investments (1st Respondent) until 11 July 2012 when their services were terminated.
2. The Grievants' approached their Union, Kenya Petroleum Oil Workers Union (Union) for assistance. On 8 August 2012 the Union wrote to the 1st Respondent asking it to pay all the dues payable to the Grievants. There was no response and on 9 October 2012 the Union reported a trade dispute to the Minister for Labour. The issue in dispute was stated as redundancy.
3. On 8 November 2012 the Chief Industrial Relations Officer, Ministry of Labour confirmed acceptance of the trade dispute and willingness to endeavour to resolve the dispute through conciliation. Mr. J.N. Mwanzia was appointed as the Conciliator. The letter of appointment also requested the parties to submit their written proposals within seven days.
4. On 29 November 2012 the Conciliator wrote to the parties informing them of a conciliation meeting scheduled for 13 December 2012. The Conciliator again wrote to the parties on 31 January 2013 to attend a follow up meeting on 13 March 2013.
5. The Conciliator also asked the 1st Respondent to file his written submissions before the meeting. On 26 April 2013 the Union wrote to the Conciliator complaining that no certificate pursuant to section 69(a) of the Labour Relations Act had been issued.
6. According to the Affidavit of Raphael Olala sworn on 20 May 2013 the Conciliator had not issued a certificate despite the request by the time of presenting the Claim to Court and the 30 days for resolving the dispute having expired.
7. However the Union secured and filed in Court on 17 July 2013 the report by the Conciliator dated 3 June 2013. The report found that the Grievants were employees of the 1st Respondent and that they were declared redundant and recommended that they be paid redundancy benefits

Union's case

8. The case of the union is that the Grievants were employees of the 1st Respondent who was a

- contracted dealer of the 2nd Respondent and that they were wrongfully and unlawfully terminated on 11 July 2012 through redundancy contrary to section 40 of the Employment Act.
9. This, it was pleaded, was so because no notice was given and one month pay in lieu of notice was not paid.
 10. It was also pleaded that the Grievants were being underpaid and were not issued with certificates of service.
 11. The Union called one Everlyne Mwinzi to testify. The witness testified that she was employed by the 2nd Respondent on 28 September 2009 until 1 September 2010 when the 1st Respondent employed her as a customer/pump attendant.
 12. On the termination, the witness stated that on 11 July 2012 she reported to work as usual and that at about 8.00am the 2nd Respondent's Territorial Manager, a Mr. Isaboke came to the station together with a Mr. Ngari. The 1st Respondent's station Manager Mr. Paul Ohany was not present.
 13. According to the witness, stock was taken and thereafter they were asked to remove their uniforms and hand over the same to new employees with a promise that a meeting would be held. The meeting was never held.
 14. On 12 July 2012 the employees sought the assistance of the Union but no resolution was reached.
 15. The witness stated that the termination was not fair because they were not given written notice of termination.
 16. The witness mentioned a Mr. Mosota as one of the employees who were terminated.
 17. Consequently, the witness stated that they were seeking 10 days pay for days worked in July 2012, accrued leave, underpayments, terminal dues/service pay and maximum compensation.
 18. During cross examination, the witness testified that the 1st Respondent was her employer and that the 1st Respondent was an agent of the 2nd Respondent.
 19. She further stated that the employees were being paid by Mr. Paul Ohany every month with Mr. Isaboke signing and approving the salaries, and that she had been issued with written contract by the 2nd Respondent but she did not have a copy in Court. When pushed the witness stated she did not know who her employer was between the two Respondents.

1st Respondent's case

20. The 1st Respondent opted to give submissions and not sworn testimony. He stated that Makedi Investments is his business name and submitted that he was employed by 2nd Respondent in 2003 and that later he was promoted to a Young dealer at Likoni Elf Station thus inheriting the staff from the 2nd Respondent and that he used to pay the staff from sales.
21. The 1st Respondent also submitted that due to shortages, the 2nd Respondent terminated the Market License Agreement it had entered into with him and that currently he is not able to pay the Grievants any dues.

2nd Respondent's case

22. The 2nd Respondent called its Territorial Manager, Mr. Philip Isaboke to testify on its behalf. The witness testified that he knew Everlyne Mwinzi and that she served as Customer attendant at Elf Likoni Station. The witness also stated that the said Everlyne was not an employee of the 2nd Respondent but was employed by the 1st Respondent.
23. On the relationship between the Respondents, the witness stated that the 1st Respondent was a Young dealer who was financed by the 2nd Respondent and was given a Young Dealer Marketing License signed on 1 June 2010.
24. Because the 1st Respondent did not run the station profitably and was in breach of the license, the 2nd Respondent terminated the dealership agreement on 11 July 2012.
25. He further testified that under clause 25 of the License, the 2nd Respondent was to assist the 1st Respondent in recruitment of staff but the 1st Respondent was solely responsible for payment of salaries.
26. The witness confirmed that Innocent Mosota and the other Grievants were employees of the

- NETCO Management Ltd prior to their engagement by the 1st Respondent.
27. He further stated that the 1st Respondent was an independent contractor and that he did not pay employees salaries in July 2012 and that the salaries were above the prescribed minimum statutory wages.

Issues for determination

28. Several issues arise for determination. The issues according to me are whether the Grievants were employees of the 1st or 2nd Respondent, whether the Grievants were terminated through redundancy, whether the terminations were fair, who are the Grievants and appropriate relief.

Evaluation

Whether Grievants were employees of 1st or 2nd Respondents

29. The answer to this issue will in the end determine which of the Respondents' will bear liability should the Court find in favour of the Union/Grievants.
30. The case for the union was that the 2nd Respondent owns Total petrol and service stations countrywide including Elf Likoni Station. Further that the termination of the Grievants was as a result of the 2nd Respondent terminating its dealership with the 1st Respondent.
31. The 2nd Respondent produced a Young Dealer Marketing License it entered into with the 1st Respondent. Clause 25 of the License provided that the 2nd Respondent would jointly with the 1st Respondent interview, and recruit employees and that the 2nd Respondent would train the employees but clause 25(c) and 25(e) of the License was explicit that the Young Dealer would be pay staff salaries and the staff of the station would be employees of the 1st Respondent and the 2nd Respondent would have no liability towards the employees.
32. On the basis of the License, I do find that the 2nd Respondent was not the employer of the Grievants and cannot bear any liability for any dues which the Court may find in favour of the Grievants. That liability must lie with the 1st Respondent.

Whether the Grievants were terminated through redundancy

33. It is not disputed that the Grievants were terminated. Although it did not come out explicitly in evidence under what circumstances the Grievants were terminated, it was the evidence of the 2nd Respondent's witness that the 1st Respondent did not run the station profitably. The 2nd Respondent actually produced documents to show the 1st Respondent was not accounting for sales and was generally in breach of the license terms.
34. The Conciliator in his report found that the Grievants had been declared redundant because the day of their termination was the same day that the 2nd Respondent had terminated the License agreement it had with the 1st Respondent.
35. Redundancy has been defined in both sections 2 of the Employment Act and the Labour Relations Act. The Grievants were terminated through no fault on their part. In my view the termination of the Grievants is a classic case of redundancy and I do find that the Grievants were declared redundant.

Whether the terminations were fair

36. Determining whether the terminations through redundancy were fair in this case is straight forward. Section 40 of the Employment Act has outlined seven conditions that an employer should comply with in cases of redundancy. In the case of the Grievants, their union and the local labour officer should have been notified in writing a month in advance. There was no suggestion this was done. Because all the employees were terminated selection on the basis of seniority, skills, ability and reliability does not apply. Outstanding leave should have been paid in cash. One month's

- wages should have been paid in lieu of notice. Severance pay should have been paid. All these conditions were not complied with.
37. Besides section 40 of the Employment Act, an employer who terminates the services of an employee on the basis of operational requirements is expected by section 45(2) of the Employment Act to prove that the reasons were valid and fair. There was no attempt to do this.
38. The terminations through redundancy were not compliance with the law and were unfair.

Who are the Grievants

39. During testimony of Everlyne Mwinzi she stated that she was one of the employees/Grievants. She also mentioned Innocent Mosota. She did not mention any other Grievant by name.
40. The Memorandum of Claim stated that the issue in dispute was *redundancy of Mr. Innocent Mosota & 4 others*. The names or identities of the 4 others was not mentioned anywhere in the body of the Memorandum of Claim.
41. The affidavit of Mr. Raphael Olala did not mention the names of the Grievants. The correspondences exchanged between the parties did not mention or identify the other 4 Grievants.
42. Even the report by the Conciliator did not mention or identify the Grievants.
43. The names are only mentioned in a letter dated 8 February 2013 from the 1st Respondent to the Ministry of Labour and an annexure to the Memorandum of Claim titled Redundancy Claims for former Staff of Makedi Investments Ltd (annexure MK 9).
44. The annexure has a computation of what each Grievant is claiming.
45. This is not how claims should be pleaded nor evidence led. I accept that the Grievants were terminated for the same reasons on the same day. But the Memorandum of Claim and testimony called by the union was wanting in as far as the identities of the Grievants were concerned.
46. But because the Court is not bound by strict rules of evidence and the Respondents did not make any point on this issue I will accept the document titled Redundancy Claims for former Staff of Makedi Investments Ltd as embodying the Grievants respective heads of claim.

Appropriate relief

Severance pay

47. Annexure MK 9 reflected the earnings of the Grievants and it was not challenged or disputed. Unions witness also testified she was earning Kshs 11,950/- at the time of termination. This is the same for Dan Okello and Thomas Nzioka. She further testified she had served the 1st Respondent from 1 September 2010 until 11 July 2012. That is about two years. Dan Okello and Thomas Nzioka also served for two years.
48. The severance pay for the three would be equivalent to about 30 days wages.
49. Using the correct and accepted formula of basic pay plus house allowance divided by twenty six to get the daily rate which is then multiplied by the number of days, these 3 Grievants are entitled to Kshs 13,788/- as severance pay each.
50. Innocent Mosota did not claim severance pay according to the annexure.
51. Daniel Mati would be entitled to severance pay of Kshs 19,211/- based on two years' service based on his monthly pay of Kshs 16,650/-.

One month pay in lieu of notice

52. Section 40(1)(f) of the Employment Act require employers to pay employees declared redundant at least one month wages in lieu of notice.
53. Everlyne Mwinzi, Dan Okello, Thomas Nzioka and Innocent Mosota are each entitled to Kshs 11,950/- as one month wages in lieu of notice.
54. Daniel Mati is entitled to Kshs 16,650/- as one month wages in lieu of notice.

Leave

55. No foundation was laid for this head of claim and it is dismissed.

Underpayments arrears

56. Again no evidential foundation was laid for this and it is dismissed.

10 days worked

57. Everlyne Mwinzi, Dan Okello, Thomas Nzioka and Innocent Mosota are each entitled to Kshs 4,599/- under this head.

58. Daniel Mati is entitled to Kshs 6,400/- under this head.

Compensation

59. Section 49(1)(c) of the employment Act provides the equivalent of a number of months gross wages not exceeding twelve months wages as one of the primary remedies for unfair termination. I have found the termination of the Grievants through redundancy was unfair.

60. The award under section 49 of the Employment Act is discretionary. In my view this would not be a just case to make an award under this head.

Certificates of service

61. Under section 51 of the Employment Act, a certificate of service is an entitlement of employees on separation with an employer. The Grievants are entitled to certificates of service.

Costs

62. Costs do not follow the event in the industrial Court. This is not a fit case to make an order on costs.

Conclusion and Orders

63. In conclusion I do find that the Grievants were employees of the 1st Respondent and not the 2nd Respondent.

64. I do further find and hold that the termination of the Grievants through redundancy was unfair and award

Everlyne Mwinzi

- | | |
|--------------------------------------|---------------|
| a. Severance pay | Kshs 13,788/- |
| b. One month wages in lieu of notice | Kshs 11,950/- |
| c. 10 days earned wages | Kshs 4,599/- |

TOTAL

Kshs 30,337/-

Dan Okello

- | | |
|--------------------------------------|---------------|
| a. Severance pay | Kshs 13,788/- |
| b. One month wages in lieu of notice | Kshs 11,950/- |
| c. 10 days earned wages | Kshs 4,599/- |

TOTAL

Kshs 30,337/-

Thomas Nzioka

- | | |
|--------------------------------------|---------------|
| a. Severance pay | Kshs 13,788/- |
| b. One month wages in lieu of notice | Kshs 11,950/- |
| c. 10 days earned wages | Kshs 4,599/- |

TOTAL

Kshs 30,337/-

Innocent Mosota

- a. One month wages in lieu of notice Kshs 11,950/-
b. 10 days earned wages Kshs 4,599/-

TOTAL

Kshs 16,549/-

Daniel Mati

- a. Severance pay Kshs 19,211/-
b. One month wages in lieu of notice Kshs 16,650/-
c. 10 days earned wages Kshs 6,400/-

TOTAL

Kshs 42,261/-

65. The prayers for leave and underpayment arrears are dismissed.

66. The 1st Respondent to issue the Grievants with Certificates of service.

67. The Claim against the 2nd Respondent is dismissed

68. There will be no order as to costs.

Delivered, dated and signed in open Court in Mombasa on this 8th day of November 2013.

Radido Stephen

Judge

Appearances

Mr. Olala, Branch Secretary

Kenya Petroleum Oil workers union

for Grievants

Mr. Paul Ohany t/a Makedi Investments

1st Respondent

in person

Ms. Okata instructed by V.N. Okata

& Co. Advocates

for 2nd Respondent