



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 555 OF 2010

BANKING INSURANCE & FINANCE UNION.....
CLAIMANT

Versus

HARAMBEE COOPERATIVE SAVINGS & CREDIT SOCIETY LIMITED**RESPONDENT**

JUDGMENT

1. The case was heard by two judges of this Court under two different regimes. Prior to my taking over the matter, the case proceeded on 18th July 2011 before Judge Paul K. Kosgei who had continued to sit as a judge pending the appointment of Judges of the Industrial Court to the Constitutional office of judge. Judge Kosgey together with Judges Rika, Mukunya, Madzayo and Chemuttutt had held for under the tribunal established under the Trade Disputes Act and later the Labour Relations Act before transition to the Industrial Court Act 2011. The appearances before Judge Kosgey were Mr. Cyprian Onyony for Claimant and Mr. Harrison Okeche, for the Respondent. When the matter came up before me, the same advocates represented the parties. Their erudite submissions and presentation of evidence made it possible for an easy flow of the evidence from my predecessor to the proceedings before me
2. Mr. Onyony was first off the bat and stated that he would rely on the Memorandum of Claim filed on 19th May 2011 and Supplementary Memorandum filed on 17th June 2011 and the reply to Memorandum of Defence filed on 21st October 2010. He also called a witness to give an image of what occurred. He stated that the issue is unlawful redundancy of 52 employees. The issues are: was the redundancy lawful and fair? Were the staffs entitled to damages? He submitted that the redundancy was procedurally unlawful and malicious. Definition of redundancy in the statutes has two elements:
 1. The substance – economic or financial reasons or technological reasons affecting work relations.
 2. Procedural elements – section 40 and 45. These relate to notice and consultation. They were not followed.
3. He stated that the parties have a Collective Bargaining Agreement. He claimed Clauses 13, 15 and 14 that relate to redundancy were violated. He asserted that a CBA is constitutionally protected by Article 41 of the Constitution on fair labour practices. This, to him, renders the redundancy unlawful. He stated that there is admission by Respondent in their Memorandum that it was unlawful. Memorandum of defence contains reports done by Respondent's representative (Annexure 6) in 2005. The Commissioner presented a report done by Respondent's representative annexed to Annexure 5 dated May 2002. He stated that the early inquiry of 2000 annexed by the Respondent at page 5 thereof contains recommendations that the Respondent society be re-

organised and some staff to be removed. He urged that there was no input of union yet employees were not consulted. He stated that the Claimant Union is a party to Collective Bargaining Agreement. He opined that redundancy was not the only way out. Recommendations were disregarded i.e ways to avoid redundancy. He stated that EPD filed a report Appendix 19(a) which says the Respondent was performing well and had started paying dividends to members. Annexed financial statements for the year ending 31st December 2007 show that Respondent was financially healthy and Annexure BIFU 5 – shows surplus accumulated of Ksh. 48,958,565. He thus submitted that the redundancy was malicious and unfounded, there was no consultation with the union. The Letters issued to notify union are annexed. The short notice was given on 13th November 2007. It was hand delivered. This suit commenced upon declaration of redundancy when the people to be laid off became known, when they were served with letter of redundancy. BIFU 13 – are the redundancy notices and the letters dated 31st October 2007 were issued on 16th October 2007 and Mr. Onyony held that this was inefficient issuance of notification and was not consultative. BIFU 14 are the departmental meeting minutes on the day the employees were declared redundant. Strategies could not be discussed with employees but with the union. He asserted that the summary recovery of SACCO liabilities is malicious and wrong.

4. The Claimant called their first witness Zachariah Noah Ngaira who testified that he was Respondent's employee from 16th February 1984. He was employed as clerical officer and was promoted to Accounts Assistant and later Administrative officer 3. He worked upto 16th November 2007 but letter was received on 19th November 2007 declaring him redundant. The letter is dated 31st October 2007. Prior to 19th November 2007 he had no notice of termination. He was a member of the Claimant union (BIFU). The Union never informed him of any termination. He was paid terminal dues of Kshs. 632,439/- as per cheque attached to letter. He stated that he wasn't given chance to verify the figures and that Administration Police escorted him out of building after receiving letter. They were under instructions to escort him out. He stated that he objected to the termination. The letter of 3rd December 2007 communicated to him that he had been overpaid. He stated that taxation of Kshs. 699,560/- is contrary to letter of termination of 31st October 2007. The staff sought expert opinion on the taxation and Goal Consultants computed the taxes. On 17th December 2007 Respondent demanded payment of the money paid to him. It was not explained how the payment became erroneous. He had applied for a Kshs. 1.6 million loan which was given in June 2007 and he had repaid only for 4 months. It was attracting interest of Kshs. 720,000/-. It was loaded on his loan and recovered. It was recovered in 60 months from his benefits. His payslip of October 2007 shows amount of shares as Kshs.457,426/- accumulated over 24 years and they proceeded to demand what was recovered. Interest which had not accrued was wrongly loaded on his account. He thus sought reinstatement to his job plus return of his shares. He stated that he was not aware of any redundancy agreement but was aware that the Collective Bargaining Agreement had provision for redundancy clause.
5. He was cross-examined by Mr. Okeche and stated that he did not know why his services were terminated. He stated that he was escorted out by police. Prior to this there was no indication that he was not liked. He had earned promotions and his last position was Accountant III. He admitted that he did not have a CPA certificate. He did not know why he was moved to Accounts from Administration. He stated that he was a competent employee trained on management and staff evaluation and that he was promoted in recognition. He stated that he was appointed on relief duties on 24th March 2003 and that he used to relieve his seniors. He testified that he was competent and that on 14th November 1997 was transferred to Loans department. He admitted that on 15th September 2006 – he was given a Final warning. He apologized on 14th September 2006. He agreed that when you have a final warning the next stage is exit.
6. Regarding the letter of 17th December 2007 he said that it was hand delivered. He stated that the Union didn't inform him about redundancies. He asserted that there was a good working relationship. He agreed that the Union knew about the redundancy. He stated he was not aware of Respondent's bylaws which require employer to pay loan when one is terminated.

7. In his re-examination by Mr. Onyony, he stated that to qualify for a loan one have to be staff to qualify for service number. He stated that the Respondent is a custodian of employment records. He stated that he was moved to various departments because he was experienced. He said that a CPA certificate was not required on employment. He stated that he never saw 1st and 2nd warning, just final warning. He was not served with show cause letter before the 1st warning. He stated that he has been a member of NSSF since 1984.
8. The Respondent wished to rely on the Memorandum of Defence filed in Court and annexures thereto. The Respondent intended to call 2 witnesses, the General Manager Mr. Wandera and Robert Luvasi. The first witness to testify for the Respondent was James Maloba Wandera the Chief Executive Officer of the Respondent. He testified that the Respondent is a Sacco dealing in Savings and Credit and it was registered in 1970 as per Appendix 1 and draws its members from Public Service, Office of the President, the Defence Forces, Kenya Police, Administration Police and other Ministries and Parastatals. Appendix 2 is list of member organizations. By 1998 it had over 106,800 members. When the Government reduced its workforce the Respondent's membership reduced. By 2007 it had 80,200 members. It has a Recognition Agreement and CBA with BIFU the Claimant. The applicable CBA is Respondent's appendix 3A. He testified that the redundancy of the Claimant's members was occasioned by:
 1. Reduced membership arising from the retrenchment and natural attrition from the Civil Service.
 2. Stiff competition from commercial banks which are into Respondent's membership and reduced demand for loans.
 3. Advanced technology in ICT which were faster, accurate, convenient. This reduced the manual work that used to be done by the Claimant's members.
9. Due to poor performance of SACCOS in the 1990s the Ministry of Cooperatives in 2002 appointed a Commission of Inquiry to ascertain the causes of poor performance. The Mwalukwa Commission recommended that society was overstaffed, that it needed to be automated and improved. It also recommended the Respondent society had people with skills mismatch with the jobs they were holding. The Mwalukwa report was produced as an exhibit. There is another report known as the Nyatiku Report on underperformance of the Respondent. The Respondent took the report to the Annual General Meeting (AGM) which is the supreme body of the Respondent and the AGM adopted and approved it in October 2002. The Annual General Meeting gave the Management of the Respondent the mandate to look for a Budget to conduct organization structure. Appendix 5 are the minutes of the Annual General Meeting. Subject to the approval of the budget in the AGM, the Respondent took the report which had been approved by the AGM to undertake an organization review with a view to establish the skills within the organization vis-à-vis the jobs held. This was done and this was worked out to meet the redundancy programme and the cost of installing an integrated ICT system in the Respondent. Following the approval of the budgets to undertake staff rationalization the Respondent advertised to have ICT providers. There was a tender and a system was identified by the Tender Committee to be implemented. After computerization programme was done and commissioned on 1st October 2007 the Claimant filed a dispute to the Minister for Labour alleging the Respondent was intending to lay off staff. According to Mr. Wandera this caught the Respondent by surprise and that poisoned the mind of the staff. The Respondent wrote to the Ministry protesting there was nothing the matter. The Ministry again wrote inviting the Respondent's officials to a meeting. The situation at the time was chaotic at the Respondent and a letter was written to the Minister on this. The matter ended after the meeting and the Respondent wrote to the Claimant union notifying it of the action of Redundancy and asked the Claimant for a meeting. The letter was copied to the Ministry of Cooperatives and FKE. The Claimant was invited to a meeting on 14th November 2011 but the meeting did not take place. Nairobi Safari Club had been booked and officials of the Respondent went for the meeting but the Claimant union never attended by the time and all the officials phones were off. The letter was delivered by hand as per the copy of delivery book for 14th November 2011. The letter was addressed to the Secretary General of the union. Mr. Robert Luvasia delivered the letter. The Respondent then wrote to Minister for Labour seeking guidance

and the Ministry gave an okay for the redundancy and gave vide the letter of 13th November 2007. The Reply by Minister was on basis of Cap. 226 Employment Act S.16(A)(i)(a). The Respondent thus complied with requirements as stated in the letter dated 13th November 2007 and as per the CBA.

10. He testified that he attended dispute resolution before the Ministry of Labour which was reported by letter as a trade dispute between Claimant and Respondent. The recommendation after the dispute resolution was that the Respondent had acted within the law and the dispute should be set aside as settled. The state of finances at Harambee SACCO was deplorable. In the audited accounts for 2006 only a profit of 35,000/- was made. Accumulated surplus was 35,015/=. The previous year 2005 the Respondent had made a loss of 86.8 million and had been doing badly. The Respondent followed procedure and paid as per the CBA procedure which was in force at the time. There is no obligation that if a person has outstanding claim they cannot be declared redundant. The Respondent is not a commercial entity. The interest charged is as at the period of redundancy and not for the entire period. The loan repayment is amenable to parties agreement. The Respondent as employer remits deductions and has no obligation to settle dispute between the borrower and lender. If employee of SACCO takes loan the loan repayment is through salary. The loan must be guaranteed and all applicable rules apply. There is no exemption for SACCO staff. They are treated equally.
11. Mr. Wandera testified that the Respondent did not increase number of staff and any allegations that there was an increase of staff is far fetched. At the time of redundancy there were 1482 remaining staff as at 16th November 2007 with operations in Nairobi and Mombasa. To date the society has on its payroll 129 employees in Nairobi, Nakuru, Eldoret, Kisumu and Mombasa. There have been further staff reduction through natural attrition – retirements, resignations and deaths. The jobs left by the 52 do not exist today. Skill matrices have changed, the job specifications, technological advances and dynamics of the positions have changed. The position were abolished and they may not be able to fit. There was no regulation or requirement to pay until retirement. One has to earn from his sweat. There is no way the payment can be made until retirement age of the Claimants. In the letter of employment, an employee on probation is entitled to one month or payment in lieu or 2 months notice or pay in lieu of notice after confirmation. Severance pay is not payable for the years one would have served. The Claimant's were paid in full.
12. The matter proceeded before me in October 2012. Mr. Wandera got back on the stand and reminded he was on oath. He was then cross-examined by Mr. Onyony Advocate. He testified that the society was not doing very well financially and in 2006 the Respondent made a net profit of 35,015/= only before appropriation. The figure in 2007 was 48.9 million. The grievants were declared redundant in 2007 November. Dividend is a return on investment. In 2006 there was none. In 2007 the amount shown is 419 million. The society made a profit of 35,015/= which was not retained within the society. Regarding implementation of the reports and recommendations, he testified that some of the reports were implemented in bits. Training was to be for the new staff. The old staff in place did not require training. Recommendations were geared to perhaps instill discipline. Capital budget is under 11.2. Under 112(1) 85 million was set aside to the activities enumerated. In capacity training only the trainable are trained. All staff were trained in computerization to enable them acquire skills. Computerization caused redundancies. The issue of bloated staff was identified in 2000. The consultants came to see what was inside. The opinion of the EPD in 2007 was that Society was doing well.
13. The union declined consultations and there was no agreement because the union when invited for a meeting on 14th November 2007 declined. After Society paid the salary and benefits arrears it could not meet the wage bill and at the time the Respondent invited the Claimant to compare notes. When this happened the Ministry was consulted clarifying the issues and Respondent asked what was to be done. The Claimant unfortunately incited the unionisable staff and situation became hectic and the Administration Police were invited to guard the building as the staff wanted

to even burn the building. The Respondent wrote on 24th October 2007, the Ministry replied on 13th November 2007 and the Notices were to take effect on dates to be agreed between parties. Termination was from 16th November 2007. The payments were subject to other liabilities and the payment of SACCO liabilities was a financial transaction. Loans were calculated as at the time. The document relates to October 2007. Redundancy was because of:

1. Stiff competition from banks
2. Automation leading to redundancy
3. Ability to pay – Society did not have capacity to pay.

14. All the employees declared redundant was after FKE consultants carried out the exercise which revealed skill mismatch. The redundancy declared was across the organization in all departments in all ranks. There was no focus on any particular section.

15. The next witness was Mr. Robert Livasia Savai a messenger. He testified that he was given a letter in the morning of 14th November 2007 to take it to the Claimant BIFU. He stated that he took it immediately and found staff of the Claimant opening the office and met a lady by the name Anyika and she received the letter. She is the one who signed at the place signed “received”. The letter was in an envelope and the witness did not know the contents. He spoke to her briefly and went back to Harambee Sacco. When he delivered the letter he found Anyika with another lady and he knew Anyika as each month he took cheques from Harambee.

16. In his Cross Exam by Mr. Onyony the witness testified that he took the letter quickly because that is how he worked. He was employed by the Respondent in 1989 as a messenger and at the time of testifying worked there as a messenger. He stated he went to BIFU offices at 5th Floor Phoenix House, Moi Avenue. He admitted that nothing on the delivery book shows that he was the one who delivered letter. He testified that he knew Musa a colleague who joined in 1989 and works in the General Manager’s office as messenger. The letter was from Human Resource office where the witness was based. He testified that he took letter early on 14th and Anyika signed the date as 13th November 2007. He stated that he was not lying. That marked the close of the Respondents case.

17. The Claimant’s members numbering 52 allege that their termination was unlawful. For this they seek various remedies. The issues I have distilled for determination are two. These are:-

1. Was the redundancy of the 52 staff members lawful and fair?
2. If not, are the 52 staff members entitled to damages?

18. It is clear that if the resolution of the first issue is in the negative the second will automatically collapse. Mr. Zachariah Ngaira testified on behalf of the 52 staff members that he received on 19th November 2007 a letter dated 31st October 2007 declaring him redundant. He testified that he had no notice of termination and that he was a member of the Claimant union (BIFU). The Union never informed him of any termination. He was paid terminal dues of Kshs. 632,439/- as per cheque attached to the termination letter. He together with other staff members sought expert opinion on the taxation and Goal Consultants computed the taxes. Sometime in December 2007 Respondent demanded payment of the money stated to have been overpaid to him. It was not explained how the payment became erroneous. His loan was recovered from his benefits. He thus sought reinstatement to his job plus return of his shares. He stated that he was not aware of any redundancy agreement but was aware that the Collective Bargaining Agreement had provision for redundancy clause. He was cross-examined by Mr. Okeche and stated that he did not know why his services were terminated. He admitted that on 15th September 2006 he was given a Final warning. He apologized on 14th September 2006 and agreed that once there is a final warning the next stage is exit. He stated that the Union didn’t inform him about redundancies. He agreed that the Union knew about the redundancy. He stated he was not aware of Respondent’s by-laws which require the employer to pay loan when one is terminated.

19. The Respondent called Mr. James Wandera and Mr. Robert Savai. Mr. Wandera testified that the

Respondent communicated the intended redundancies to the Claimant as required under the CBA and also to the Minister and the Federation of Kenya Employers. The Respondent was tanking at the time and financial performance was poor as exhibited by the reports. Skills mismatch and competition made it unviable to maintain a large workforce. There was a decision to downsize and the redundancies declared did not target a particular cadre of staff. He testified that the benefits due were calculated and paid. He testified there was communication to the Claimant. Mr. Savai confirmed that he delivered the letter.

20. The evidence of Mr. Ngaira was that he was notified of the retrenchment and that he was paid. He took umbrage that the loan outstanding was recovered from his benefits. He received a cheque in settlement of his dues. He admitted that the Claimant was aware of the impending redundancy though he did not receive communication from the Claimant. Mr. Wandera testified that the staff of the Respondent were further downsized.

21. At the time of redundancy on 16th November 2007 there were 1482 staff. At present according to the sworn testimony of the Respondent's witness the society has on its payroll 129 employees in Nairobi, Nakuru, Eldoret, Kisumu and Mombasa. There have been further staff reduction through natural attrition – retirements, resignations and deaths. In short, the jobs formerly held by the 52 do not exist today. They were not only properly notified of the redundancy, the Claimant was notified in line with the CBA. The Respondent discharged its burden to notify the staff and the union. There seems to have been a breakdown of communication by the Claimant as it never informed the members of the redundancy though it was aware. As to the first issue, the Court finds that the redundancy of the 52 staff members was not only lawful and fair but critical for the survival of the Respondent given the bleak financial position the Respondent was in. Since the redundancy was lawful and fair the second issue does not lie as there can be no remedies. The repayments of loans and taxes are not ingredients to be factored in an termination to determine its lawfulness or otherwise.

22. The Claimant has miserably failed to prove its case on a balance of probabilities and will therefore pay costs to the Respondent. Suit dismissed with costs.

It is so ordered.

Dated and delivered at Nairobi this 9th day of December 2013

Nzioki wa Makau

JUDGE