



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 353 OF 2011

JOSEPHINE MUTHONI KAMAU..... 1ST CLAIMANT

FAUSTINE M SUVI2ND CLAIMANT

JOSEPHINE AOKO GOGO3RD CLAIMANT

JAMES KAHIGA4TH CLAIMANT

JUSTUS KAKOMA5TH CLAIMANT

LILY ADERO OBONYO 6TH CLAIMANT

VERSUS

EAST AFRICA SAFARI AIR EXPRESS LIMUITED..... RESPONDENT

JUDGEMENT

This is a claim dated 3rd March 2011 filed by the 6 claimants for wrongful, unlawful and unfair dismissal by the respondent East Africa Safari Air Limited. The respondent filed a reply to the claim dated 16th May 2011. This claim is presented based on provisions of section 40 of the employment Act. The matter proceeded for hearing on 8th august 2011 when Mr. Justus Kakoma the 5th Claimant gave evidence in a representative capacity for and on behalf of the entire claimants the issues being the same apart from the number of years served and the time of employments. All the other facts regarding the circumstance of the application of Section 40 of the Employment Act are the same as regards all claimants herein.

In the claim, claimants state that they were all employed by the respondent on divers dates where the 1st Claimant was employed on 1st September 2007 as check-in Agent, 2nd Claimant was employed on 19th January 2007 as security assistant, 3rd Claimant was employed on 5th December 2006 as Security Assistant, 3rd Claimant was employed on 5th December 2006 as security assistant, 4th Claimant was employed on 27th November 1998 as Aircraft Attendant, 5th Claimant was employed on 1st August 2007 as a Cabin Groomer, and 6th Claimant was employed on 1st September 2008 as a Customer Service Agent. All the claimants were in the service of the respondent when on 20th December 2010 they were all dismissed from employment on the grounds that the respondent was unable to meet its financial obligations. That in their termination, due process in the event of an employer being unable to meet its financial obligations and or in a case of redundancies was not followed as outlined in Section 40 of the Employment Act.

In evidence the 5th claimant submitted for and on behalf of the others that they had served for various years and on 21st December 2010 they were called by human Resource Manager who issued letters of termination dated 20th December 2010. That the termination was due to the fact that the respondent was unable to meet operational costs and salaries as their business was poor. The claimants received salaries for the days worked in December 2010.

That no notice of the intended redundancies had been issued to the claimants. That some employees remained as the respondent is still operational but the claimant's positions were totally abolished. That their pay had not been remitted and statutory dues to NSSF was erratic, inconsistent and not updated. The witness stated that he was the breadwinner to his family and now at his age too old to look for another job.

That the termination suffered was unlawful an unfair as the claimants was not prepared for the redundancy. No notice was issued or payment in lieu of notice, severance pay not given or the process notified to the Labour officer to facility the process. The claimants asserted that they were not allowed to join the Union. They now claim compensation for loss of employment terminated unfairly and unlawfully together with costs of the suit.

On the other hand the respondent submitted that they terminated the services of the claimants based on incapacity to meet financial obligations and operation costs in the previous two years and that the situation was getting worse. It was admitted that the claimants were not paid any of their dues under their contract of service, severance pay or any other pay that thy respondent was under obligation to pay for reason that the respondent could not simply afford to make such payments and had just come under new ownership that was and is still doing all that as possible to meet any of the obligations that I had to the claimants.

In evidence the Respondent called Mr. George Kivindyo the Manager who submitted that the claimants were laid off as they were going through a difficult time for about 4 to 3 years and they almost reached a point of closure due to bad trading results. That the company closed for 3 weeks to rethink its fate. That indeed the management discussed various option one being to close down and send all staff home or the second option was to go through a restricting process. That they preferred the second option and agreed to declare some workers redundant.

Following the decision to declare some workers redundant the respondent allegedly wrote to the Minister for Labour advising on their intention in a letter dated 21st December 2010. That there was a list of earmarked employees for termination whose salaries were paid up to 20th December 2010. That the dues owing to each employee were to be paid once debtors paid up. Before the termination letters were issued, each affected employee was taken through the process on 21st December 2010. That out of the 36 employees affected, 29 were happy ad accepted their letters but 7 opted to pursue a different option.

Mr. Kivindyo further admitted that the respondent was committed to paying the claimants their leave dues, one month notice, 15 days pay for each year served as severance pay. That the claimant should have gone to seek this payment in 90 days a fact that had been communicated to the claimant's lawyers.

Court notes that the provisions of Section 40 of the Employment Act are very clear on the procedure regarding redundancies. Such termination must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair:

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.

Thus these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers livelihoods and where this must be done by an employer, the same must put into consideration the following:

1. Give notice to the Union or labour officer a month before the process commences
2. For those not unionised, personal letters copied to the labour Officer;
3. Use a criteria of seniority, abilities and reliability of each employee;
4. Where there is a CBA the same should not disadvantage any employee;
5. Leave days due should be paid in cash;
6. One month notice or one month pay in lieu of notice; and
7. Severance pay not less than 15 days for each year of service.

These are important steps for each employer wishing to pursue redundancies that can be a useful tool.

Did the respondent herein apply these legal guidelines? Was the respondent in a position to comply with these legal guidelines? Were there reasonable steps taken to ensure the respondent took these legal guidelines?

In evidence the claimants are clear that they were individually summoned on 21st December 2010 and taken through the termination process then issued with a letter dated 20th December 2010. Hence there was no notice of this process as this seems to have been an afterthought before the issuance of the termination letters. It was the evidence of Mr. Kivindyo that indeed management had earlier convened and closed operations for 3 week to discuss the available options. But it is not indicated that the claimants were informed of this process or they were given notice of this process. Further, court notes that even if the workers were aware of this closure, there were no notices personally given to the affected employee of this impending eventuality.

Court further notes that the alleged list of affected staff members under the redundancy provisions has not been shared with the Court. Not even the list of the 29 employees who walked away on 21st December 2010 happy with being terminated. The only have the claim of 6 in court and based on their submissions and the admissions of the respondent that indeed they were to pay their dues, Court finds that the respondent was aware that they failed to undertaken their legal obligations under section 40 and the Court must therefore find for the claimants in this regard.

Further the Court notes that even with the admission of Mr. Kivindyo that the claimants should get pay for leave dues, one month notice, 15 days pay for each year served as severance pay the fact that the respondent did not share a criteria upon which these particular claimants were targeted for the redundancy makes the process unfair. Even though there is an admission, the law requires that before a termination of whatever kind takes place whether for poor business or for any other ground the same must be legal and or valid to justify a termination. Even in the case of a valid reason, fairness of reason for the termination must be applied based on operational requirements of the employer or related to the Employees conduct, capacity or compatibility. In the case of redundancies, the criteria of seniority, abilities and reliability must be applied and contradiction with others with similar positions, qualifications and or number of years. Further there must be use of fair procedure in termination where an employer shows there was just and equitable process in the final determination.

The procedure adopted by employer in reaching a decision to dismiss the claimants was unfair as it was not based on any procedure that could be assessed in evidence or attached to the response before Court. The manner of communication of the decision and the handling of termination was most unfair as the meetings held on 21st December 2010 were only meant to share a decision already made by management and not what is envisaged under the law. The termination had already been done on 20th December 2010 and events of 21st were just a formality. The Labour officer and the letter to the ministry of Labour were only done after the event. This is not what the law intended. The role of the Labour officer or the Minister of Labour was to help in outlining the guidelines to be followed in declaring workers redundant and reference to these government officers in this case would have guaranteed the right procedure was followed. The respondent opted otherwise. It is not indicated what role the Minister for Labor played here.

When the Court looks at the conduct and capability of the claimants up to the date of termination, this Court is convinced that these were highly skilled employees who have served the respondent with dedication even when they noticed that business was low. The respondent's admission that for 3 to 4 years business was low is an indicator that there were signs on the need to retrench but they did not act on this as good managers and instead waited until 20th December 2010 to undertake a summary procedure. The respondent thus failed to comply with any statutory requirements connected with the termination. The previous practice of the employer in dealing with the type of circumstances which led to the termination is indicative of bad faith. No warning or notices or a criteria was used to identify the claimants as the suited employees that should have been terminated in the circumstances.

Court will award the admitted claim of leave dues, one month notice, 15 days pay for each year served as severance pay. However, the claimants have worked for different durations, they are of different agents and court will award damages for loss of employment based on this criteria. Court also notes that the letters of appoint were not fixed term contract under which the prayer for payment for the remainder of the contract is based and will not award this.

Court therefore finds that the termination of the claimants was wrong and unfair and will award the following;

To the 1st claimant:

- a. **That the claimant suffered unlawful loss of employment**
- b. **The respondent is directed to pay the claimant the following final dues;**
 1. **One month pay in lieu of notice at Kshs. 15,000.00**
 2. **Severance pay equivalent 15 days for 2 years worked at Kshs.15,000.00**
 3. **One month salary as compensation for unlawful loss of employment amounting to Kshs. 15,000.00**

Total due Kshs.45,000.00

c. Costs of the suit

To the 2nd Claimant:

- a. That the claimant suffered unlawful loss of employment**
- b. The respondent is directed to pay the claimant the following final dues;**

- 1. One month pay in lieu of notice at Kshs. 14,000.00**
- 2. Severance pay equivalent 15 days for 4 years worked at Kshs.28,000.00**
- 3. two months' salary as compensation for unlawful loss of employment amounting to Kshs. 28,000.00**

total due Kshs.60,000.00

c. Costs of the suit

To the 3rd Claimant:

- a. That the claimant suffered unlawful loss of employment**
- b. The respondent is directed to pay the claimant the following final dues;**

- 1. One month pay in lieu of notice at Kshs. 17,000.00**
- 2. Severance pay equivalent 15 days for 4 years worked at Kshs.34,000.00**
- 3. two months' salary as compensation for unlawful loss of employment amounting to Kshs. 34,000.00**

total due Kshs.85,000.00

c. Costs of the suit

To the 4th Claimant:

- a. That the claimant suffered unlawful loss of employment**
- b. The respondent is directed to pay the claimant the following final dues;**

- 1. One month pay in lieu of notice at Kshs. 28,600.00**
- 2. Severance pay equivalent 15 days for 12 years worked at Kshs.85,000.00**
- 3. nine months' salary as compensation for unlawful loss of employment amounting to Kshs. 258,400.00**

total due Kshs.371,000.00

c. Costs of the suit

To the 5th Claimant:

- a. That the claimant suffered unlawful loss of employment**
- b. The respondent is directed to pay the claimant the following final dues;**

- 1. One month pay in lieu of notice at Kshs. 15,000.00**
- 2. Severance pay equivalent 15 days for 3 years worked at Kshs.22,500.00**
- 3. three months' salary as compensation for unlawful loss of employment amounting to Kshs. 45,000.00**

total due kshs.82,500.00

c. Costs of the suit

To the 6th Claimant:

- a. That the claimant suffered unlawful loss of employment**
- b. The respondent is directed to pay the claimant the following final dues;**

- 1. One month pay in lieu of notice at Kshs. 15,000.00**
- 2. Severance pay equivalent 15 days for 2 years worked at Kshs.15,000.00**
- 3. one months' salary as compensation for unlawful loss of employment amounting to Kshs. 15,000.00**

total due Kshs.45,000.00

c. Costs of the suit

These are the Orders of this Court.

Dated and delivered at Nairobi this 2nd day of October 2012

M. W. Mbaru

JUDGE

INDUSTRIAL COURT OF KENYA

In the presence of:

Court clerk.....

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