



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 821N of 2010**

**KENYA UNION OF JOURNALISTS AND ALLIED WORKERS.....CLAIMANT**

**-VERSUS-**

**NATION MEDIA GROUP..... RESPONDENT**

**JUDGMENT**

1. This is the judgment in the case of Kenya Union of Journalists and Allied Workers, the claimant against the Nation Media Group Limited, the respondent.
2. The claimant filed the memorandum of claim on 23.12.2009 and the supplementary memorandum of claim on 24.09.2010. The respondent filed the response on 20.08.2010.
3. The claimant filed the cause on behalf of the grievant one Genesio Njagi who was employed by the respondent by the letter of appointment dated 14.10.2003 being annex EO2 on the statement of claim. The claimant was employed as a Sub-Editor in the respondent's Editorial Department at the Nation Newspapers Division to earn Ksh.50,000 per month and a house allowance. At the time of termination the claimant earned a consolidated monthly salary of Ksh.62,595.00 as per annex EO11 on the supplementary memorandum of claim.
4. The claimant pleaded as follows:
  - a) There were collective agreements between the parties that governed the employment between the respondent and the grievant. A copy of the agreement was marked EO1 on the memorandum of claim.
  - b) By a letter dated 2.01.2007 marked EO3 on the statement of claim the respondent conveyed to the grievant that as earlier discussed the then ongoing re-organisation within the group had resulted in changes that required staff movement in the Editorial Department and consequently the grievant had been identified for release from the respondent's employment. The last day of service for the grievant would be 23.01.2007. the letter informed the grievant that he would be paid as follows less the dues owed to the respondent:
    - i. Salary up to including 23.01.2007;
    - ii. Three months salary in lieu of notice;
    - iii. Salary in lieu of 7 days accrued leave; and
    - iv. One month's salary for each completed year of service with the

company.

The letter stated that the grievant would be paid pension dues under a separate cover and in line with the rules of the trust deed. The grievant would also receive the certificate of service subject to completion of the relevant form and return of the respondent's property in his possession. The claimant then signed against the letter as having read and understood the terms and conditions stated therein and agreed to discharge his employment.

c) The parties reported a trade dispute to the Minister responsible for labour and the Minister appointed a conciliator but the respondent failed to attend. Thus the certificate of disagreement dated 17.12.2009 being annex EO8 on the memorandum of claim was signed and the cause filed in court. The respondent did not sign the certificate.

d) The respondent failed to follow the provisions in the collective agreement in rendering the grievant redundant. In particular the claimant was not served with a thirty days notice as prescribed in clause 17 of the agreement.

e) The respondent also failed to comply with section 40 of the Employment Act, 2007 which provides for redundancy.

f) That upon terminating staff on account of restructuring like in the case of the grievant, the respondent employed new staff with a term of contract that **“your employment shall be outside the scope of union representation and your terms and conditions shall not be subject to representation by or discussion with any trade union affairs except as a representative of the Group”**. Such an agreement was produced marked EO10 on the memorandum of claim.

g) The claimant therefore prayed for orders that:

- i. A declaration that the redundancy was unlawful and wrongful;
- ii. An award of twelve months compensation for wrongful and unlawful redundancy;
- iii. The respondent be ordered to pay the grievant severance at the rate of 15 days for every completed year of service;
- iv. Costs of the claim with interest thereon; and
- v. Any other award the court deems just to grant.

h) In the supplementary memorandum of claim the claimant pleaded that the grievant earned a consolidated salary of Ksh. 62, 595.00 per month as per annex EO11. The claimant also particularized the claim to a sum of Ksh.1,249,593.75.

5. The respondent pleaded as follows:

a) That it was admitted that the grievant was employed by the respondent on 14<sup>th</sup> October 2003.

b) The termination was on 22<sup>nd</sup> January 2007 and the grievant had worked for three years and two months.

c) The grievant was not a member of the claimant and the claimant lacked the standing to file the cause.

d) That the grievant was to be declared redundant but the respondent decided to terminate him normally so as to benefit the more favourable terms under the collective agreement than it would be under

redundancy. That the termination was as per section 14 of the then Employment Act (now repealed) and clause 18 of the collective agreement and therefore lawful.

e) That the respondent paid the grievant three months salary in lieu of notice, salary up to 23.01.2007, seven dayspay in lieu of accrued leave and one month's salary for each completed year of service as required by the law. That those were better terms than if the claimant had been declared redundant. Thus the claimant had no basis to ask for any further pay against the respondent. The claimant was paid under the gratuity clause.

f) That the grievant received the sums due to him under a settlement of terms and sought a write off from the respondent in respect of sums due under a car loan he had obtained from the respondent. That as per annex 2 on the response the grievant was entitled to a gross of Ksh.492,235.30 and after deductions he was to pay the respondent by way of a refund the sum of Ksh.43, 838.00.

g) The claimant was not a party to the certificate of disagreement and the termination of the grievant had nothing to do with the claimant union.

h) The respondent then prayed that the claimant's case be dismissed with costs.

6. The cause came up for hearing on 16.05.2011 when both parties made submissions as per their respective pleadings. The issues for determination are:

a) Whether the grievant was a member of the claimant union.

b) Whether the termination of the grievant by the respondent was lawful and fair or unlawful and unfair.

c) Whether the claimant is entitled to the prayers made.

7. For the first issue, the court finds that the grievant was a member of the claimant. The collective agreement includes the post of Sub-Editor at clause 30 and the letter of employment in clause 6 on termination clearly stated that on completion of the probationary period, the employment could be terminated by either party giving notice or paying salary in lieu of notice in accordance with the prevailing Kenya Union of Journalists terms. To give effect to the cited provisions, the pay slip produced shows that the claimant was deducted the union dues of Ksh.500.00. The claimant therefore had standing to file the cause on behalf of the grievant.

8. For the second issue, the respondent was not clear on the grounds for termination. In the termination letter there is reference to restructuring and discussions whose proceedings remain unknown to the court. In the pleadings there is reference to normal termination under the collective agreement that entitled the grievant to the gratuity dues which were pleaded for the respondent to have been better than the redundancy dues. Clause 20 of the collective agreement provides for gratuity and it does not provide for the due process of justice leading to the benefits there under. The provisions for redundancy under the agreement are provided for in clause 18. The provisions include 30 days notice to the union on the employer's intention to declare employees redundant; the principle of last in first out to apply subject to merit, suitability and ability being equal; and employees declared redundant to receive 15 days pay for every completed year of service by way of severance pay. The respondent has admitted that the case for the respondent was redundancy only that the respondent decided to engage a process known to it and imagined as more beneficial to the grievant. In that circumstance, the court considers that the respondent made a decision which denied the grievant the due process for redundancy as provided for in the collective agreement and thereby disadvantaged the claimant. The court finds that the termination was unfair as it breached the provisions of the collective agreement providing for due process. The court further finds that the termination was unfair because the respondent alleged restructuring as a reason for termination, but the respondent failed to prove it as envisaged in section 43 of the Employment Act, 2007. In making this finding the court observes that the grievant accepted the termination but such acceptance cannot be construed to have precluded him from challenging its illegality or invalidity. The acceptance did not discharge the respondent from any liability. In any event employees will invariably accept

employers' termination decisions as they have no other option and such acceptance does not preclude the employees from seeking redress from the court arising from the termination.

9. The final issue for determination is whether the claimant is entitled to the remedies as prayed for. The court has considered the particularized claim in the supplementary memorandum of claim and the attached collective agreement and finds that the claimant is entitled as prayed. The court therefore awards the grievant a sum of **Ksh.1, 249,593.75**. It is not disputed that the claimant owed the respondent Ksh.393,333.30 for car loan and insurance premiums of Ksh.23, 600.00 making a total of **Ksh.416, 933.30** and the court finds that the same shall be deducted from the award thereby entitling the claimant to **Ksh.832, 660.45**.

10. It was submitted for the respondent that the cause was time barred. The certificate of disagreement which the respondent for misconceived reasons refused to sign is dated 17.12.2009. The court finds that to be the date the cause of action accrued and therefore the case is not time barred.

11. The court in conclusion enters judgment for the claimant against the respondent for:

- a) a declaration that the termination of the employment of the grievant by the respondent was unfair;
- b) the respondent to pay the grievant **Ksh.832, 660.45**.plus interest at court rates from the date of the judgment till full payment; and
- c) the respondent to pay costs of the case.

Signed, dated and delivered in court at Nairobi this 2<sup>nd</sup> November, 2012.

**Byram Ongaya**

**JUDGE**