REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 281 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

KENYA SCIENTIFIC RESEARCH INTERNATIONAL

TECHNICAL AND INSTITUTIONS WORKERS UNION.....CLAIMANT

VERSUS

KENYA AGRICULTURAL AND LIVESTOCK

RESEARCH ORGANISATION (SUGAR RESEARCH INSTITUTE).....RESPONDENT

JUDGMENT

The Claimant Union filed suit on behalf of fifty (50) Claimants whose claims are for payment of benefits having been terminated on account of unlawful redundancy. In the Amended Memorandum of Claim the claims are broken down as notice pay, leave, overtime, house allowance and compensation.

It is alleged that the Respondent declared the Grievants redundant without observing the redundancy procedure set out under Section 40 of the Employment Act. That the said Grievants were to be paid all their terminal benefits according to section 40 of the Employment Act, 2007, but the Respondent only paid severance pay and part of the accrued leave which was not properly calculated according to the years the Grievants had worked with the Respondent.

That the Claimant drew attention of the Respondent to other benefits that were not paid but the Respondent was adamant leading the Claimant to write a letter to the conciliator at Kisumu County Labour Office who deliberately also failed to respond to their letter. The claimant was thus compelled to file this dispute in Court.

In the Amended Memorandum of Claim dated 13th March 2017, the claimant prays that: -

1. The Court to order and direct the respondent to pay the 49 grievants their terminal dues as according to the services they rendered to the Respondent and 12 months' salary as compensation for loss of employment

2. The Court to order and direct the Respondent to pay the 49 grievants according to section 40 of the Employment Act, 2007.

3. The Court to order and direct the respondent to pay the cost of the suit.

The Claim is opposed by the Respondent in a response filed in Court on 2nd November, 2016, wherein it admits the employment relationship but denies that the same was unlawful. The respondent states that the termination of the employees was on account of redundancy due to restructuring and outsourcing of the security function. The respondent avers that it followed the proper procedure and paid the Grievants all their dues as recommended by the labour office which fact is admitted by the claimant.

The respondent admits that a complaint was lodged at the labour office and the parties were invited for a conciliation meeting. That the labour office marked the matter as settled upon confirming that due process had been followed. The respondent contends that the suit lacks merit and prays for the same to be dismissed with costs.

The matter was disposed of by way of written submissions.

Claimants' submissions

It is submitted that the 50 grievants were terminated on various dates on account of redundancy. That a dispute was reported to the Ministry of Labour resulting in the payment of Kshs.3.115.324.50. That this payment was in line with the recommendations of the Kisumu Labour Officer who recommended final payment without taking into account other benefits that were to be paid to the Grievants.

Further that the Respondent did not communicate to all the 50 grievants regarding their termination contrary to Section 45 of the Employment Act, 2007. The claimant cites the case of ***Kenya Scientific Research International Technical and Allied Institutions Workers Union -Vs- Kenya Sugar Research Foundation*** where the Court found the redundancy unlawful for laying off workers without communication.

That the Respondent did not report the redundancy to the Ministry of Labour prior to effecting redundancy and the Ministry was only informed after the Claimant made a complaint. It is also submitted that the Claimant flouted sections 41 and 43 of the Employment Act, 2007, and ILO Convention No. 158 on hearing before termination.

That the benefits so far paid are less than what the grievants are entitled to and the Court should order the Respondent to pay the grievants as particularised in the memorandum of Claim.

Respondent's Submissions

It is submitted that the grievants' claims in respect of leave, overtime, underpayment and house allowance is beyond 3 years and time barred. That the respondent is irreparably disadvantaged by being asked to defend such claims whose documents are not available due to lapse of time. That the claim herein arises from redundancy termination and any unrelated relief such as unpaid leave, underpayments and overtime are statute barred and are for dismissal.

The Respondent submits that notification to the employees is evident by an internal memo dated 11th February 2014, minutes dated 11th February 2017, and the attendance register, and that the issue of redundancy and the reason was explained to the grievants. That consultations were also held and the County Labour Officer was notified vide a letter dated 26th February 2014.

It is further submitted that there was substantive justification for redundancy which was that the Respondent was outsourcing the security function as was outlined in the letter of 26th February 2014 to the County Labour Officer, Kisumu. That it is a right of the respondent to restructure. The respondent relies on the Court of Appeal decision in ***Kenya Airways Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR*** to buttress this position.

It is the Respondent's submission that the grievants are not entitled to the reliefs sought for the reason that the grievants were issued with sufficient notice as they were notified of the intended redundancy on 11th February, 2014 and the redundancy was effected on 30th March, 2014. That all leave days not taken were paid for and that this fact is admitted by the Claimant. That the Claimant was enjoined to prove the claim for outstanding leave days which it failed to do, that the documents on record show that the grievants took their leave and outstanding leave days were settled.

That the claim for overtime was not proved. The muster roll produced was not sufficient evidence to prove that the overtime was not paid. The respondent referred to a specific instance of one Mr. Henry Amadadi in the month of March 2011. He worked on a public holiday and an amount of Kshs.460/= was paid in lieu thereof which was double the rate provided under Rule 9(2) of the Regulation of Wages (Protective Security Services) Order.

As to house allowance it is submitted that the daily and hourly rates are all inclusive and therefore the claim should fail. The Respondent prays that the suit be dismissed with costs.

Determination

Section 40 of the Employment Act, 2007, provides:

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.

Was the procedure envisaged under section 40 of the Employment Act adhered to"

The notification on record is a memo dated 11th February 2014, in which the internal casual security guards were invited for a meeting. The agenda was to be communicated at the meeting. The meeting was held on 12th February, 2014, and from the attached attendance register 33 people were present including the senior human resource officer. The agenda of the meeting was "*transition of the internal security/outsourcing*".

Section 40(1)(a) and (b) envisages a notice to an affected employee in person or to a trade union where the employee is a member. The Labour Officer in her report recommended that 2 weeks' notice be given to the affected employees, a recognition that they were never given notice by the respondent. There is no evidence on record that such notice was ever given nor payment in lieu thereof made.

In Civil Appeal 46 of 2013 cited above the court relied on the case of ***Aoraki Corporations Limited V. Collin Keith McGavin; CA 2 of 1997 [1998] 2 NZLR 278*** in which the Court of Appeal of New Zealand stated:

"…It is convenient in other termination cases, and essential in redundancy cases, to consider whether the dismissal was substantively justified. Thus if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subject to significant procedural irregularity as to cast doubt upon the outcome….

Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment possibilities."

In ***Thomas De La Rue (K) Limited v David Opondo Umutelema [2013] eKLR*** the Court stated:

"It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer…

In the instant case, the only notice that is evident is the notice to the labour officer which was not copied to the affected employees. The labour officer recommended that 2 weeks' notice would be sufficient which the Respondent does not seem to have given. The claim for notice pay therefore succeeds.

Although the Labour Officer recommended notice of two weeks, Section 40 provides for a minimum of one month's notice.

The grievants are thus entitled to one month's pay in lieu of notice as provided under Section 40(f) of the Act.

House Allowance

In the case of ***Joshua Lihanda v Outdoor Occasions Limited [2014] eKLR*** it was held:

"In this dispute the Parties agree the Claimant was paid Kshs.10,000 per month. The Claimant argues this did not take into account house rent allowance, while the Respondent argues this was consolidated. The law tilts the argument in favour of the Claimant. It was for the Employer to show that the salary was consolidated. Consolidation would have to be captured in a provision contained in the written contract of employment. The Claimant was a Supervisor and even taking into account the basic minimum wages for 2011 under the Regulation of Wages [General] [Amendment] Legal Notice No. 64 of 2011, Kshs.10,000 per month as a consolidated wage or salary would be a gross underpayment. The Claimant is allowed 15% of the Kshs.10,000 basic salary paid to him, as house rent allowance, with effect from 1st August 2008 to 1st September 2011- a period of 37 months, amounting to Kshs.55,500."

The Regulation of Wages (General) Order provides for consolidated daily and hourly rates. Since the grievants were paid daily wages, the same was consolidated and they are not entitled to house allowance.

Overtime

The muster rolls on record by the respondent show that the grievants worked for a maximum of 16 days a month. No evidence to the

contrary has been produced.

The clock-in sheet annexed shows that most of the grievant clocked out between 1700 hours and 1843 hours. This is on random days which in the Defendants response was within their working hours. There were only two shifts in 24 hours. This of necessity means a shift was for a minimum of 12 hours. The maximum statutory working hours per week are 52. The grievants did 72 hours per week thus they did 20 hours of overtime per week. The burden of disproving the claim was with the Respondent and no document was availed to prove that the grievants did not work up to the times indicated on the clock in sheets. The claim for overtime therefore succeeds.

According to the letter by the respondent to the labour office date 26th February 2014, the grievants worked for 3 months then took a break of one month. They therefore did overtime for 9 months every year. They are entitled to 16 days overtime per month for 9 months being 9 weeks x 20. They are thus each entitled to 780 hours of overtime limiting the overtime to a period of one year.

Underpayments

The redundancy in this case occurred on 31st March, 2014. The applicable Wages Order is Regulation of Wages (General) (Amendment) Order, 2013 which came into operation on 1st May 2013.

The Respondent submitted that it applied the Wages Order for 2010 and 2011. Day watchman in the 2010 Order was to be paid a minimum daily wage of 298.15 whereas a night watchman was to be paid Kshs.336.35. The 2013 Order provides that the daily rate for a day watchman is Kshs.470.60 whereas a night watchman is 523.60. The difference in what was paid and what was legally due is payable as underpayments using the rate of Kshs.523.60 per day as they worked both day and night shifts.

Leave and Severance Pay

On leave pay and severance pay the Respondent has provided computations showing that the same was paid and no evidence to the contrary was provided. The payments were however made based on 2011 statutory minimum rates of pay instead of 2013 minimum rates of pay. The difference is payable to the claimants as an underpayment of both leave and severance pay.

Conclusion

In view of the fact that the payments made were based on the tabulation by the Labour Officer, this file is referred back to the Labour Officer to carry out on fresh tabulation based on the following –

1. All payments to be based on statutory minimum wages effective from May 2012.

2. All payments to be based on minimum rate of pay for night watchman as the grievants worked both day and night shifts being Kshs.523.60 per day.

3. Overtime to be based on 780 hours being 20 hours per week.

4. Pay in lieu of notice to be one month’s salary under Section 40(1)(f).

5. Grievants to be paid a further one month’s salary in lieu of notification under Section 40(1)(a) and (b).

Upon receipt of the tabulation of the Labour Officer the court will render the final judgment. The Labour Officer is given 30 days to complete the tabulation and file it in court. The court will set a return date at the time of delivery of this judgment.

Both the claimant and respondent are directed to co-operate with the County Labour Officer to ensure the tabulation sent to court is made in consultation with them within the timelines given by the court.

DATED AND SIGNED AT NAIROBI ON THIS 26TH DAY OF APRIL 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 20TH DAY OF MAY 2019

MATHEWS NDERI NDUMA

JUDGE