



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 908 of 2011

NJOROGE MUIGAI.....CLAIMANT

VERSUS

SYSTEM INTEGRATION LIMITED.....RESPONDENT

***Rika J
cc. Elizabeth Anyango***

Mr. Nyabena instructed by Nyabena Nyakundi and Company Advocates for the Claimant; and

Mrs. Maureen Onyango instructed by the Federation of Kenya Employers, Advocate for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL REDUNDANCY

AWARD

Preview

1. Njoroge Muigai filed this dispute on 14th July 2011. He alleges he was employed by the Respondent as Sales Representative on 1st March 1987. The Respondent, part of the Da Gama Rose Group of Companies, promoted the Claimant through the ranks. On 23rd November 2010, Muigai received a redundancy notice from Fernanda Da Gama Rose, the Respondent's Director of Human Resources. Termination was effective from 31st December 2010. His last basic monthly salary was Kshs. 75,000. His claim is that the decision by the Respondent did not conform to the redundancy law under Section 40 of the Employment Act 2007. He seeks-

A.

§ Severance pay at 15 days' salary for each of the 23 years completed in employment, at Kshs. 995,192;

§ Pro rata leave of 23 days at Kshs. 82,142;

§ 2 months' salary in lieu of notice at Kshs. 150,000;

§ 12 months' salary compensation for unfair termination at Kshs. 1,035,000;

§ House rent allowance at Kshs. 11,250 for 41 months at Kshs. 461,250;

TOTAL: KSHS. 3,503,924

B

§ Reinstatement without loss of benefits, allowances, promotions or continuity in service;

§ Such other order as the Court may deem fit;

§ Costs; and

§ Interest on the above at Court rates.

2. The Respondent filed its Statement of Reply on 7th November 2011. It stated the Claimant was employed with effect from 1st March 1986 as a Store Keeper, by a Company called Computer Applications Limited. He was made a Sales Representative on 1st March 1987 and placed under a Second Company named Magnetical Limited. His services were transferred to System Integration Limited T/A Symphony on 1st July 2007. He was designated as the Area Sales Manager, at a salary of Kshs. 75,000. It was conceded the different companies are subsidiaries of the Da Gama Rose Group of Companies. He was entitled to other benefits in addition to his salary. Sometime in 2010 the Respondent decided to close down several non-profit making companies. The result was that certain positions were declared redundant, while other employees were retired on attaining their retirement age. The Claimant was informed of the intention to declare redundancy. He was notified, and expressed his understanding of the reasons informing his employer's decision. He was offered severance pay as made in his claim; pro-rata leave of 23 days; and balance of 1 month salary in lieu of notice. He is not entitled to compensation for unfair termination. House rent allowance was a gross basic salary, which means it was all inclusive. The Respondent asked the Court to dismiss the claim.

3. The Claimant testified and closed his case on 20th January 2012. Fernanda Da Gama Rose testified for the Respondent on 28th March 2012, when proceedings closed. The Parties were granted the opportunity to file their closing submissions between March and September 2012. The dispute was last mentioned on 24th September 2012, when the Court advised that its Award would be delivered on notice.

The Claim

4. Muigai testified he is presently out of work. He was employed by the various companies in the capacities given in the statement of reply. The companies were about 7. They merged, and the employees were issued new letters of employment in 2007. The Claimant was given a new letter dated 21st July 2007. The new company employing the Claimant from 1st July 2007 was described as, 'Symphony..... harmony in IT.' The new contract specified that there was to be continuity of service. The salary was given to be Kshs. 75,000, described in the contract as basic gross salary. He was granted Kshs. 10,000 per month, explained to be a fixed 'in lieu of incentives.' He was provided with essential car user expense of up to a maximum of Kshs. 22,500. Other benefits included permanent accident cover; family medical scheme; mobile phone airtime; and leave travel allowances. On termination, the Claimant testified that he was paid nothing. He did not receive any communication on payments. When he called the Respondent, he was shown a cheque of Kshs. 505,626 drawn in his favour by the Respondent. He did not accept this as the totality of his redundancy benefits. He did not take the cheque. The service pay and leave days offered did not meet his expectation. He was entitled to a fixed pay in lieu of incentive of Kshs. 10,000 per month. Previously, he earned commissions. He did not understand why the Respondent proposed to deduct the pay in lieu of incentives from his terminal dues. No one ever approached him from 2007, with the advice that this incentive was to be recovered from his terminal benefits by the Respondent. Notice pay was given at 2 months' salary under the contract. The Respondent offered 1 month salary as notice pay in the redundancy package. No reason was given to him to justify redundancy.

5. Testifying on cross-examination, the Claimant told the Court he served the Respondent for 24 years, from 1st July 1986 to 31st December 2010. Complete years of service were 23. His last salary was Kshs. 75,000. He disputed severance pay. His own computation was based on 23 years. He did not see the Respondent's computation until he was served was the statement of reply. The computation of severance

offered by the Respondent is the same as claimed by Muigai. He had 23 days of untaken/ unpaid leave. The Respondent offered 23 of leave days at Kshs. 82,142. It was the same as claimed by Muigai. He conceded he worked up to 31st December 2010, and was offered 1 month as notice pay. This computation by the Respondent was correct. He seeks house rent allowance at Kshs. 11,500, which was advised to him by his Advocate to represent 15% of his basic pay. The salary in the contract of Kshs. 75,000 was a gross figure. Clause 4 [b] of the contract stated incentive pay would be adjusted against earned incentives. There was no claim to be made with the Respondent before the incentive was paid. He received the redundancy letter and acknowledged receipt. He questioned the Director why he was selected and not the new people, but was advised that a decision had been made. In an email to Fernanda, Muigai thanked the Respondent for having been given the opportunity to work. He stated that the Respondent was a good employer. He considered his contract was terminated unfairly. He collected his certificate of service. The Claimant was aware of out court negotiations between the parties. The Respondent offered to increase the amount of money payable to the Claimant to a net of Kshs. 748,989. Re-directed by Mr. Nyabena, Muigai explained that the salary mentioned in the letter of employment did not include house rent allowance. Basic pay in the pay slips was indicated to be Kshs. 75,000. He was given neither a house, nor a house rent allowance. The email from the Respondent asking the Claimant to forward commission claims was erroneous, because the Respondent used to pay a fixed pay in lieu of incentive. The Respondent had been blacklisted by the government, losing clients who used to pay commissions. There was no variation in the clause contained in the contract that offered a fixed rate of pay in lieu of incentive. The contract stipulated notice period, or notice pay of 2 months. The letter given to the Claimant served as a notice of termination and notification of redundancy. Muigai asked the Court to allow his prayers.

The Response

6. Fernanda informed the Court that Symphony is an IT solutions provider. She serves as its Human Resources Director. The Claimant worked with her from 1987 to 1999, then for another period between 2000 and 2010. His position was declared redundant in 2010. The Board decided to declare certain positions redundant. By November 2010, 8 employees were retired, while 8 positions were declared redundant. The Respondent consulted the employees and the Federation of Kenya Employers. It issued the notice in accordance with the law. He served for 1 month in December 2010, and was paid 1 month for the balance of the notice period. He was offered 15 days' salary for each completed year of service. The net payable to him was Kshs. 505,626. He disputed the computation and rejected the cheque, demanding for the total sum of Kshs. 1,227,335.17. He did not take into account taxes and incentive in lieu. He was advised his terminal benefits would be ready by the 1st week of January, and on 7th January 2011, his cheque was ready for collection. The Claimant rejected the offer and instructed his lawyers to make demands on the Respondent. The Respondent then offered a different figure of Kshs. 748,989- in good faith and on a without prejudice basis. This was similarly rejected. Sales persons worked for a salary and also, through an incentive system. This system changed with time. Fernanda shared the workings of the scheme with Muigai. It was a computerized scheme where every person made his own claim. Sales persons were allowed to have advances which were deducted against commissions. The Respondent did not lose any business due to blacklisting as alleged by the Claimant. Someone had complained that the Respondent was not complying with customs and excise regulations. It was later confirmed that the Respondent was compliant. The Ministry of Finance continued to deal with the Respondent. Muigai was asked to make his claims for sales commissions for 2009 and 2010, in an email from the Managing Director dated 16th October 2010. He was advised that after 30th November 2010 no commission claims would be entertained. He was paid a consolidated salary. House rent allowance was not reflected separately. In all the 22 years, he did not complain about house rent allowance. The Respondent is willing to pay to him the initial offer of 505, 626. Other subsequent offers have lapsed.

7. Fernanda testified on cross-examination that Muigai worked for 22 years. He was in the sales department throughout. The notice of redundancy issued on 30th November 2010. The letter of termination and notice of redundancy were on the same date. He was told his last day would be 30th December 2010. The Labour Ministry was notified on 26th September 2010. Redundancy was caused by severe economic problems. The Respondent was not making money. Muigai sat down with Fernanda and her Managing Director husband Da Gama, and consulted on 30th November 2010. The contract of 21st

July 2007 referred to incentives in lieu, fixed at Kshs. 10,000 per month. It was an advance. It was stated it would be adjusted against earned incentives. It was adjusted immediately a claim was made. It took Muigai 4 years to make a claim. It was not true that it took 4 years to deduct. His pay slips showed earnings in lieu of incentives. There was no item for house rent allowance; it was all inclusive. Gross basic salary includes house rent allowance. There were no documents given to Muigai by the Respondent to indicate poor financial position. Redundancy was for legitimate reasons and was carried out fairly. 16 employees remain. On re-examination, the witness stated that Muigai was angry after being asked to put his commission claims by end of November 2010. The Respondent enjoyed cordial relationship with its employees. Fernanda urged the Court to dismiss the claim.

The Court Finds and Awards:-

8. The parties agree they were in an employment relationship for 23 years. It was a cordial relationship, resting on the foundation of mutual confidence and even affection. The Respondent appears to have experienced some financial difficulties, retiring some of its employees in the fall of the year 2010, while a section of positions held by a section of the employees fell redundant. The Respondent wrote a letter dated 23rd November 2010 to the Claimant, informing him that his contract of employment would be terminated with effect from 31st December 2010. He did not take this unkindly; in an email dated 23rd December 2010, to Human Resources Director Fernanda Da Gama Rose, he accepted the situation in good grace. His good grace and depth of affection for the employer, are revealed in this email that reads,

“Dear Fernanda,

It has been a long time since 1986. I am grateful for the opportunity to serve in the Da Gama Rose Group. Now perhaps, I should take you down memory lane. When we joined you at Caledonia Shopping Centre, we hardly knew you, so I sought to know you from one of the disabled ladies you were working with in the Kiondo business. She told me in Kikuyu- uria mama atuuikire no Ngai ungimuriha [what mama has done for us only God can reward her]. I say now again, 24 years later that what Mr. and Mrs. Da Gama Rose has done for me and others, only God can reward you. My prayer again is that someone else will say those words to you and Horatius 24 years later from now. I will always remember you and your family in my prayers. Pass my kind regards to your mum and do let her know that her kindness and respect has taken her this far. I know she celebrated her birthday recently-how wonderful! And finally, I wish everybody and the company greater success and prosperity in the years to come.

Best Regards,

N. Muigai.”

The letter suggests that separation, at least up to the date of this letter, was mutually acceptable and free of acrimony. The problem arose when the Respondent wrote to the Claimant on 7th January 2011, proposing the totality of the Claimant’s redundancy package at Kshs. 505,626.

9. The Claimant disputed the computation, demanding through his Advocates for a total of Kshs. 1,227,335. The good relationship enjoyed between employer and employee was shaken, but not completely shattered. On 4th May 2011, the Respondent wrote to the Claimant’s counsel, proposing on ‘without prejudice’, to pay the Claimant a gross of Kshs. 1,500,000, which after deducting PAYE of Kshs. 450,011 and advances in lieu of incentive/commission claims, settled at a net of Kshs. 748,989. Most of the claims in this dispute were met under this proposed settlement. The Claimant’s Advocates replied on 12th May 2011. They proposed the Respondent pays a net of Kshs. 850,000, in full and final settlement. The Claimant suggested he receives Kshs. 820,000; Kshs. 15,000 is paid to Talitha Kum Children’s Home; and Kshs. 15,000 to Imani Children’s Home. The difference between what was offered by the Respondent and the Claimant’s proposal was Kshs. 101,011. It is not clear why parties did not explore their respective proposals further. They have had a long history marked by mutual respect, trust and confidence. They demonstrated a mutually charitable spirit, and they should not have ended up in Court, seeking an imposed solution.

10. In the circumstances of this dispute, the Court will not dwell on the legal and factual issues raised by the parties, and seek to make a judicial pronouncement on findings of law and fact, and will not demarcate the rights and obligations of the disputants as invited by the parties to do; the Court will merely work from where the parties left off and adjust the figures proposed by the parties as their final offers. From the correspondences exchanged between Muigai and Fernanda, it is clear this was an employment relationship that bordered on a family relationship. Employee and employer interests are frequently diametrically opposed. The parties tend to make no investment in the other, beyond the immediate exchange of a shilling for labour. The dealing is at an arms' length and the employment relationship ignores the realities of interdependence, intimacy and mutual investment of work. Long service in employment such as enjoyed by Muigai, engenders a familial bond. It is not preposterous therefore, for employment law to borrow from family law, and encourage the recognition and investment in what relationship the parties have over the years built. The letter of Muigai to Fernanda communicates strong family ties, rather than a cold contractual relationship. Notwithstanding Fernanda's Asian ancestry, Muigai writes to her in affectionate Gikuyu language. In the field of Labour and Employment, solutions to disputes do not always call for legal determinations; there are social dimensions. The parties' give-and-take in the subsequent out of Court negotiations, does not suggest this dispute is crying out for a legal solution, where one party wins it all. No! In the interest of good family ties and good industrial relations, sometimes the Court is compelled to ignore the strictures of the law.

11. The difference that brought the parties here, at the end of a 23- year old employment/ family relationship is a sum of Kshs. 101,011. The Respondent offered a net sum of Kshs. 748,989, while the last counter-offer from Muigai was Kshs. 850,000. The Court orders:-

[a] The Respondent to pay to the Claimant a net figure of Kshs. 800,000 in final and full settlement of the dispute;

[b] The Claimant is at liberty to determine what portion of this amount will go to charities of his choice;

[c] Parties are encouraged to guard the firm family friendship; and

[d] No order on the costs

Dated and delivered at Nairobi this 13th day of February 2013

James Rika

Judge