Koskei v Ministry of Works Sports Club (Cause E117 of 2023)
[2024] KEELRC 1822 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1822 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E117 OF 2023

SC RUTTO, J

JULY 12, 2024

BETWEEN

JOHN KOSKEI ..... CLAIMANT

AND

MINISTRY OF WORKS SPORTS CLUB ..... RESPONDENT

JUDGMENT

1. The Claimant brought the instant suit through a Memorandum of Claim filed on 15th February 2023 in which he avers that he was employed by the Respondent as a security officer with effect from 1st May 2011. It is the Claimant's case that in March 2020, following the outbreak of the COVID-19 global pandemic, the Respondent sent him home together with other employees. While at home, they were to await new instructions on the way forward.

2. The Claimant further states that there was uncertainty as to how long they would be home and there were no instructions as to whether or when they would receive their pay. He further states that they were not informed that they would be on unpaid leave during that period.

3. That his employer kept hope alive that once things returned to normal, they would resume work. Days turned into weeks and weeks into months and life started returning to normal.

4. That sometime in August 2021, 18 months down the line, he received a call from his employer to report to his place of work the following day. This aroused his hopes of resuming work.

5. When he reported to the club early in the morning, he realized that there were new employees from the security to the office clerks. He was somehow lost as he realized that the Club had resumed and hired other staff while keeping him in suspense.

6. The Claimant further states that after being kept for a while together with his colleagues, they were called and informed of their redundancy. They were given letters and they did not have a chance to

query the decision of the Respondent. According to the Claimant, the letter did not indicate when the redundancy was to take effect.

7. The Claimant further avers that having been out of work for 18 months and the Respondent having given them less than one hour to decide, many of his colleagues decided to take the money and sign that they had agreed to the terms of the redundancy.

8. It is the Claimant's contention that the Respondent contravened Section 40 of the *Employment Act* on how it managed the declaration of redundancy as he was given the letter at the last moment and excepted to accept it without any questions. That as a member of the Kenya Hotels and Allied Workers Union, he was expecting the Respondent to follow the *Employment Act*.

9. He further avers that according to the letter of declaration of redundancy, his service was terminated on 30th March 2020 and it was completely silent on all the months between March 2020 and August 2021 when they kept telling him that once patrons resumed, he would go back to work.

10. It is on account of the foregoing, that the Claimant seeks against the Respondent the sum of Kshs 350,295/= being outstanding salary, leave pay and severance pay. He has further sought to be paid his deductions to the MOW welfare and to Shirika SACCO as well as penalties incurred during 18 months. He further seeks punitive damages against the Respondent for withholding his Pay As You Earn (PAYE) remittances to the Kenya Revenue Authority (KRA) and failure to submit his deductions to the MOW Welfare Group and Shirika SACCO.

11. The Respondent did not enter appearance despite being served with the Summons and Statement of Claim. In this regard, the Claimant filed an Affidavit of Service sworn by James Ngang'a on 8th March 2023, confirming service.

12. The Court being satisfied with the return of service, set the matter down for formal proof hearing on 7th March 2024.

13. During the hearing, the Claimant adopted his witness statement and the documents filed alongside his Memorandum of Claim to constitute his evidence in chief.

14. Upon close of the hearing, the Claimant filed written submissions which I have considered.

Analysis and Determination

15. At the outset, it is worth pointing out that the Claimant has not prayed for a declaration that his redundancy was unfair and unlawful. Similarly, he has not sought the reliefs attendant to a finding that the redundancy was unfair and unlawful. In the circumstances, the Claimant's submission to that extent is immaterial as it is trite that parties are bound by their pleadings.

16. Therefore, it is evident that the singular issue that stands out for consideration by the Court is whether the Claimant is entitled to the reliefs sought.

17. The record bears that the Claimant was declared redundant through a letter dated 26th August 2021 on grounds that the COVID-19 pandemic had occasioned a downturn in the Respondent's patronage and business which had lasted for a very long time.

18. The Claimant was further advised that he would be paid as follows:

    1 Salary upto and including 31st March 2020 if not already paid;

    2. -3 days salary in lieu of accrued leave/off days/accrued public holidays valued at Kshs -1,785.00.

3 3 months salary in lieu of notice valued at Kshs 54,300.00.

4. 9 years severance pay @ 20 days for every completed year of service valued at Kshs 107,112.00.

19. As it is, the Claimant did not state whether or not he had received his final dues as aforestated hence the Court presumes that he was paid accordingly.

20. That said, I will proceed to consider the reliefs sought by the Claimant.

Salary from March 2020 to September 2021

21. With respect to this relief, the Claimant has sought to be paid the sum of Kshs 325,800/= being salary from March 2020 to September 2021. It is worth noting that the Claimant acknowledged in his witness statement and Statement of Claim that he was sent home together with his colleagues following the outbreak of the COVID-19 global pandemic.

22. As the Court found in ELRC Cause No. E119 of 2023; Jane Kathure v Ministry of Works Sports Club and ELRC Cause No. E118 of 2023; Joseph Okeyo v Ministry of Works Sports Club, it is a matter of public notoriety that the outbreak of the COVID-19 global pandemic caused massive disruptions in business operations. The Court further determined in the aforementioned cases that it is common knowledge that in Kenya, the Government adopted drastic response measures to contain the spread of the pandemic. Such measures included restriction of movement and social distancing.

23. The Court further observed that the COVID-19 global pandemic and the attendant measures imposed by the Government resulted in decreased business operations.

24. As a matter of fact, the Claimant herein has acknowledged that the Respondent was not spared by the effects of the COVID-19 pandemic hence the reason they were sent home indefinitely in March 2020 following the outbreak of the pandemic.

25. In view of the foregoing observations, it is evident that at the onset of the COVID-19 global pandemic and in the period that followed, the Respondent was not undertaking its normal operations.

26. To this end, the Court returns as it did in ELRC Cause No. E119 of 2023; Jane Kathure v Ministry of Works Sports Club and ELRC Cause No. E118 of 2023; Joseph Okeyo v Ministry of Works Sports Club, that it would not be conscionable to order the Respondent to pay the Claimant salary for 18 months from March 2020 up to September 2021. This is further noting that the Claimant did not render any service to the Respondent during the period in question.

Unpaid Leave

27. On the question of leave pay, it is apparent from the record that the Claimant was notified through the letter dated 26th August 2021, declaring him redundant, that his outstanding leave pay was in the negative. In any event, it is apparent that the Claimant has not specified the period with respect to which he is claiming the 21 leave days. For the foregoing reason, the claim for leave pay is declined.

Deductions to MOW Welfare Group and Shirika SACCO

28. The claim for deductions to the MOW welfare is similarly declined as the Claimant failed to specifically plead and prove the same despite being a specific claim in nature. In this regard, the Claimant did not indicate how much money he was claiming against the Respondent in terms of the deductions in question. As such, I cannot help but question how the Court is supposed to ascertain what should be paid to the Claimant and the basis thereof.

Punitive Damages

29. The Claimant has further sought punitive damages against the Respondent on the basis of withholding his PAYE remittances to KRA and his deductions to the MOW Welfare Group and Shirika SACCO. This relief is similarly denied for want of proof. In so finding, the Court observes that there is no evidence in the form of a demand to confirm that the remittances to KRA were not made. In the same vein, it is notable that the Claimant did not adduce evidence to prove that his deductions to the Welfare Group were effected from his salary but not remitted as appropriate.

Severance Pay

30. The only claim that succeeds is with respect to severance pay as it is evident that the Claimant was still in the service of the Respondent up to and including 26th August 2021, when he was declared redundant. This being the case, the Court returns that the period falling between March 2020 and August 2021 is a relevant period for purposes of computing severance pay in terms of Section 40(1)(g) of the *Employment Act*.

Orders

31. In the final analysis, the Court allows the Claim to the extent that the Claimant is entitled to the sum of Kshs 12,200.00 being severance pay for one completed year of service at the rate of 20 days. Interest shall apply on the amount awarded at court rates from the date of filing the suit until payment in full.

32. The Claimant is further entitled to a Certificate of Service in accordance with Section 51(1) of the *Employment Act*. This shall issue within 30 days from the date of this Judgment.

33. As the Claimant was self-representing, the Respondent shall bear the costs of the Claim limited to the actual expenses incurred by the Claimant in terms of filing.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant No appearance

For the Respondent No Appearance

Court Assistant Millicent Kibet

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

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