Solanki v Hard Tech Industrial Supplies Ltd (Cause E752 of 2021)
[2024] KEELRC 1833 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1833 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E752 OF 2021

JK GAKERI, J

JULY 11, 2024

BETWEEN

SUDHIR SOLANKI ..... CLAIMANT

AND

HARD TECH INDUSTRIAL SUPPLIES LTD ..... RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated 1st September, 2021 alleging unfair termination of employment, unlawful declaration of redundant and non-payment of terminal dues.

2. The Claimant avers that he was employed by the Respondent under various contracts from August 1986 – August 1989, March 1990 to October 2002 and July 2011 to 31st July, 2020.

3. It is the Claimant's case that under the last contract, he was employed as a Sales and Marketing Coordinator and served diligently under a contract dated 1st July, 2011 at Kshs.136,929/= after tax as at February 2020.

4. That from March 2020, the Respondent reduced the Claimant's salary to Kshs.41,079/= and paid the reduced sum till 31st July, 2020.

5. The balance of Kshs.205,395/= was unpaid.

6. It is the Claimant's case that reduction of salary was unlawful as he was not consulted or notified before implementation.

7. That the Respondent stopped issuing payslips in April 2017 and payment was in bits and pieces by petty cash vouchers.

8. That by July 2020, the sum of Kshs.3,408,362/= was outstanding.

9. That the Respondent deducted the sums of Kshs.1,100,000/= as motor vehicle loan, Kshs.2,100,000/= as house loan and Dhirma, Kshs.583,687/=.

10. That owing to the lack of salary, the Claimant was unable to service his loan at Guardian Bank Ltd and suffered penalties of Kshs.350,000/=but the Respondent only paid Kshs.270,000/= leaving a balance of Kshs.80,000/=.

11. The Claimant avers that the letter dated 21st January, 2020 amount to be a declaration of redundancy and no prior discussions had taken place.

12. The Claimant prays for;

    a. A declaration that the termination of employment by letter dated 21st July, 2020 was unprocedural and amounted to an unfair termination.

    b. An order for the Respondent to pay the sum of Kshs.5,518,195/=, being terminal and other dues including compensation for unfair termination as particularised in paragraph 22 of the claim above as follows;

        i. Admitted unpaid remuneration Kshs.3,408,362.00.

        ii. Underpayment (5 months) Kshs.205,395.00

        iii. Balance to Guardian Bank Kshs.80,000.00

        iv. Pay in lieu of leave 2016, 2017, 2019 and 2020 Kshs.318,320.00

        v. Pay in lieu of notice (2 months) Kshs.273,858.00

        vi. Service pay Kshs.616,180.00

        vii. Severance pay Kshs.616,180.00

    c. An order for the Respondent to pay compensation for wrongful termination at 12 months' salary Kshs.1,643,148/=.

    d. An order for the Respondent to pay the Tax Authority Kshs.426,960/= and National Hospital Insurance Fund Kshs.37,200/=.

    e. Certificate of service.

    f. Costs of the suit.

    g. Interest on (b), (c) and (f) at court rates.

    h. Such other or further orders as the court may deem fit to grant.

Respondent's case

13. Strangely, the Respondent filed an unsigned and undated Response to the Memorandum of Claim.

14. In addition to denying the Claimant's allegations, the Respondent avers that the Claimant's position was declared redundant due to the COVID-19 Pandemic as there was no business and the company had no money to meet its obligations.

15. That the Claimant was taken through the redundancy process and the amount payable was Kshs.2,220,912/=.

16. It is the Respondent's case that all employees were called and consented to the pay cut owing to the harsh economic conditions occasioned by the COVID-19 Pandemic and only travelling allowance was removed as employees were at home.

17. That the Claimant proceeded on leave during his employment.

18. The Respondent avers that despite cash flow challenges, all salaries due to the Claimant were paid.

19. The Respondent prays for dismissal of the Claimant's suit with costs.

20. The Claimant's evidence was not challenged by cross-examination as the Respondent did not participate in the hearing owing to its absence on the hearing date and had neither filed a response to the claim nor list of documents or witness statement.

21. On application, the court allowed the Respondent to tender its evidence but declined to re-open the Claimant's case.

22. On cross-examination, RWI, Mr. Jauyant Kumar Patel admitted that he did not file evidence in support of the Respondent's case.

23. The witness confirmed that the Claimant was declared redundant as the Respondent could not afford to pay him.

24. The witness could not recall how much the Respondent paid the Claimant by petty cash vouchers.

25. The witness testified that the amount due to the Claimant as agreed is Kshs.2.2 million.

26. Finally, on re-examination, the witness testified that the documents the Claimant filed are the same as those he had.

Claimant's submissions

27. As to whether declaration of the Claimant redundant was procedurally fair, the Claimant relied on the decisions in Cargill Kenya Ltd V Mwaka & 3 others (2021) eKLR and Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & 3 others (2014) eKLR to underscore the essence of notice and consultations and urge that the Respondent did not comply with the prescribed procedure when it declared the Claimant redundant as it did not issue the requisite notice to the Labour Officer and the Claimant and there were no consultations or selection criteria among other requirements.

28. Counsel urges the court to find that the unprocedural redundancy amounted to an unfair termination of employment.

29. Concerning the reliefs sought, the Claimant submits that he is entitled to all the reliefs as prayed for. However, the amount prayed for as service pay is reduced to Kshs.205,395.00.

30. Finally, as regards compensation, reliance is made on the Court of Appeal decision in *Co-operative Bank of Kenya Ltd V Banking, Insurance & Finance Union CA No. 188 of 2014* to urge the court to award maximum compensation.

Respondent's submissions

31. On 17th April, 2024, the Claimant's counsel informed the court that he would rely on submissions dated 16th May, 2024.

32. On its part, the Respondent prayed for 14 days to file and serve submission and the court agreed but had not filed by 21st May, 2024 when the court retired to prepare this judgment.

Analysis and determination

33. It is common ground that the Claimant and the Respondent had an employer-employee relationship from 1st July, 2011 to 21st July, 2020 when the Claimant's employment was terminated.

34. Strangely, the termination letter dated 21st July, 2020 states that the termination was effective on 31st December, 2019 and the Claimant had been given 2 months' notice.

35. Paragraph 2 of the letter of termination of employment states as follows;

> " After reviewing our options, we have concluded that we must eliminate some positions. It is with deepest regret that I inform you that your position is one that will be eliminated effective 31st July, 2020. As you know, we have recently faced hard financial times in the current economy. We are taking this action to means that the budget cuts within all department. Due to this we deepest regret that I must notify you of your position being eliminated from the organization. . ."

36. The foregoing, in the court's view is a redundancy statement by the Respondent as the Respondent was abolishing the Claimant's position from the organization.

37. As part of his evidence against the Respondent, the Claimant attached copies of petty cash vouchers of the amounts he received as salary from December 2017 to 2nd March, 2020.

38. It is evident that the Respondent company was not doing well.

39. Finally, the termination letter expressly acknowledges that Respondent owed the Claimant unpaid salaries.

40. The issues that commend themselves for determination are;

    i. Whether termination of the Claimant's employment on account of redundancy was fair.

    ii. Whether the Claimant is entitled to the relief sought.

41. On the 1st issue, the Claimant's counsel faults the termination of the Claimant's employment on the ground that the provisions of *the Constitution* of Kenya, 2010, *Fair Administrative Action Act* and the *Employment Act*, 2007 were not complied with.

42. It is common ground that redundancy is one of the legitimate ways of terminating an employment relationship, exclusively at the disposal of the employer.

43. An employee may be declared redundant on account of re-organization, restructuring, technological changes or cost cutting among others.

44. These activities are typically undertaken to enhance sustainability of the organization.

45. The *Employment Act*, 2007 recognizes and provides for separation by way of redundancy.

46. In addition to the definition of the term redundancy in Section 2 of the *Employment Act*, 2007 and reference to "operational requirements of the employer" as a ground or reason for termination of employment under Section 45(2)(b)(ii) of the Act, Section 40(1) of the Act prescribes the conditions to be fulfilled for a redundancy to pass muster.

47. In Freight In Time Ltd V Rosebell Wambui Munene (2018) eKLR, the Court of Appeal underlined the significance of the provisions of Section 40(1) of the *Employment Act*, 2007 as follows;

> "In addition, Section 40(1) of the *Employment Act*, prohibits in mandatory tone the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely . . ."

48. The seven conditions include notice to the union and the local Labour Officer or the employee and the Labour Officer if the employee is not a member of the union, selection criteria, equity where a collective agreement is involved, payment of leave in cash, one month's notice or pay in lieu and severance pay.

49. Courts have in addition held that consultations are an integral part of the redundancy process. (See Cargill Kenya Ltd V Mwaka & 3 others (2021) KECA 115 and Kenya Airways Ltd & others V Aviation and Allied Workers Union (Kenya) (Supra).

50. Puzzlingly, RWI confirmed on cross-examination that the Respondent did not file a single document in its endeavour to defend the claim by the Claimant.

51. From the documentary evidence availed by the Claimant which the Respondent did not contest, it is evident that the provisions of the *Employment Act* were not complied.

52. For instance, although the termination letter makes reference to meetings and discussions with the Claimant, the Respondent did not avail any supportive evidence. See Cargill Kenya Ltd V Mwaka & 3 others (Supra).

53. Second, the letter dated 21st July, 2020 lacks particulars on the reasons for and extent of the redundancy as demanded by Section 40(1)(a) of the *Employment Act* and the same were not provided subsequent to the letter.

54. Third, other than the letter of termination dated 21st July, 2020, no other letter was availed. The letter makes reference to a two months' notice which was not evidentiary demonstrated.

55. See Thomas De La Rue (K) Ltd V David Opondo Omutelema (2013) eKLR.

56. Fourth, the Respondent availed no evidence of a selection criteria or payment for leave, pay in lieu of notice or severance pay. However, the Claimant availed a copy of a letter signed by RWI as a director of the Respondent and the Claimant.

57. The Respondent's witness Mr. Jauyant V. Patel admitted that the amount owed to the Claimant is Kshs.2,220,912.00 as per the agreement dated 29th July, 2020.

58. From the foregoing, it is evident that the mandatory provisions of Section 40(1) of the *Employment Act*, 2007 were not complied with by the Respondent as a consequence of which termination of the Claimant's employment on account of redundancy transitioned to an unfair termination of employment within the meaning of Section 45 of the *Employment Act*.

Whether the Claimant is entitled to the reliefs sought

a. Declaration

59. Having found that termination of the Claimant's employment on account of redundancy was unfair for non-compliance with the provisions of the *Employment Act*, 2007, a declaration to that effect is merited.

b. Admitted unpaid remuneration

60. The Respondent admitted that it owed the Claimant Kshs.3,408,262.00 and undertook to pay the same vide letter dated 29th July, 2020, a promise the Claimant acknowledged.

    The sum of Kshs.3,408,262/= is awarded.

c. Underpayment for 5 months

61. Although the Respondent's witness statement states that Claimant and other employees consented to a salary reduction owing to the COVID-19 Pandemic, the witness provided no evidence of the agreement or minutes of the meeting.

62. On the contrary, the Claimant testified that the salary reduction was without justification and the reduced salary was paid until the date of termination. That the sum of Kshs.205,395/= was not paid.

63. Section 10(5) of the *Employment Act*, 2007 provides;

    > Where any matter stipulated in sub-section (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

64. The Respondent provided no evidence of having consulted the Claimant, revise the contract nor notified the Claimant. The sum of Kshs.205,395.00 is awarded.

d. Balance to Guardian Bank Kshs.80,000/=

65. In his written statement, the claimant states that he incurred penalties due to late mortgage payment to Guardian Bank Ltd amounting to Kshs.350,000/= and Kshs.270,000/= had already been paid by the Respondent after it accepted responsibility and the balance of Kshs.80,000/= was outstanding.

66. RWI did not deny the claim and the same is awarded Kshs.80,000/=.

e. Pay in lieu of notice

67. The Claimant's letter of appointment provided for a two calendar months' notice or pay in lieu of notice in cases of termination.

68. The Respondent tendered no evidence of payment or 2 calendar months' notice.

69. The Claimant is awarded the sum of Kshs.273,858/= as pay in lieu of notice.

f. Pay in lieu of leave

70. Neither the Claimant's written statement nor the oral evidence adduced in court make reference to the fact of the Claimant not having proceeded on leave and why, including whether he applied and it was denied.

71. The evidence on record make no reference to the particular number of leave days outstanding.

    The claim lacks particulars and is declined.

g. Service pay for 9 years

72. The Claimant's payslip on record show that the Respondent was deducting National Social Security Fund dues and the Claimant was arguably a member of the NSSF.

73. The Claimant availed no statement or record as to when the Respondent stopped making payments.

74. Significantly, the Claimant tendered no evidence to prove that deductions were made and not remitted to the NSSF.

75. Puzzlingly, the Claimant is claiming service pay for the entire 9 years of employment from 2011 as if he was not a member of the NSSF yet his payslip betrays him.

76. A statement from the National Social Security Fund (SSF) would have effortlessly proved the factual position.

77. Section 35(6)(d) of the *Employment Act*, 2007 disqualifies members of the NSSF from service pay.

78. The claim lacks supportive evidence and is declined.

h. Severance pay for 9 years

79. Having found that termination of the Claimant's employment on account of redundancy transitioned to an unfair termination of employment, the prayer for severance pay is unsustainable as it is only payable in a redundancy under Section 40(1)(g) of the *Employment Act*, 2007 as opposed to an unfair termination of employment.

    The prayer is declined.

i. 12 months compensation

80. Having found that termination of the Claimant's employment on account of redundancy was unfair for want of compliance with the provisions of the *Employment Act*, 2007, the Claimant qualifies for the relief under Section 49(1)(c) of the Act.

81. In accessing the sufficient quantum of compensation, the court has taken into consideration the fact that the Claimant was an employee of the Respondent from 1st July, 2011 to 31st July, 2020, a duration of 9 years which is a reasonable duration and had no documented misconduct. Second, the Claimant did not contribute to the termination of employment.

82. Third, the Claimant did not express his wish to remain in the Respondent's employment or appeal the decision.

83. Fourth, the Claimant has not demonstrated how he mitigated the loss of employment.

84. Finally, the termination of employment appear to have been hastened by the COVID-19 Pandemic as the Respondent would appear to have had financial challenges from the 2nd half of 2017.

85. In the circumstances, the equivalent of five (5) months gross salary is sufficient, Kshs.975,660/=.

j. Order for Respondent to pay Kshs.426,960/= to the Tax Authority

86. Needless to emphasize, Income Tax is governed by the *Income Tax Act*, 1974 as variously amended which falls under the jurisdiction of the Kenya Revenue Authority (KRA), which is established under Section 3(i) of the *Kenya Revenue Authority Act*, 1995.

87. Section 5 of the Act sets out the functions of the Kenya Revenue Authority as follows;

    1. The Authority shall, under the general supervision of the Cabinet Secretary, be an agency of the Government for the collection and receipt of all revenue.

2. In the performance of its functions under sub-section (1), the Authority shall –

a. administer and enforce –

i. all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenue in accordance with those laws.

b. the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws.

88. The *Income Tax Act*, 1974 is one of the acts of Parliament identified in Part I of the First Schedule to the *Kenya Revenue Authority Act*, 1995.

89. It requires no belabouring that matters of taxation and revenue are entrusted by law to the Kenya Revenue Authority and the Cabinet Secretary, the National Treasury.

The prayer is declined.

k. Order for Respondent to pay Kshs.37,200/= to the National Health Insurance Fund

90. Under the now repealed National Health Insurance Fund, 1998, the mandate to administer the National Health Insurance Fund Act and ensure deductions and remission of deductions was vested in the National Health Insurance Fund Board.

91. Its successor is the Social Health Authority which administers the Social Health *Insurance Act*, 2023.

This claim lacks particulars and is declined.

l. Certificate of service

92. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.

93. In conclusion, judgment is entered in favour of the Claimant against the Respondent as follows;

i. Declaration that termination of the Claimant's employment on account of redundancy was unfair.

ii. Admitted remuneration Kshs.3,408,262.00.

iii. Underpayment of salary, Kshs.205,395.00.

iv. Balance to Guardian Bank Kshs.80,000.00.

v. Pay in lieu of notice Kshs.273,858/=.

vi. Equivalent of 5 months' gross salary Kshs.975,660/=.

Total Kshs.4,943,178/=.

vii. Certificate of service

94. For the avoidance of doubt, the award is subject to statutory deductions.

95. In light of the circumstances of this suit, it is only fair that each party bears its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

DRAFT