



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Brava Food Industries Ltd (Cause 665 of 2018)
[2023] KEELRC 394 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 394 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 665 OF 2018
B ONGAYA, J
FEBRUARY 16, 2023**

BETWEEN

OWEN MACHARIA MAINA CLAIMANT

AND

BRAVA FOOD INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on May 7, 2018 through Enonda & Associates Advocates. The claimant's case is pleaded as follows. The respondent employed him on July 11, 2016 as a Sales Manager, Key Accounts by the contract dated July 8, 2016. The monthly pay was Kshs 210,000.00. On February 6, 2018 his contract of employment was terminated wrongfully, unfairly, and unprocedurally on account of redundancy. The termination was against the contractual terms and the Employment Act, 2007. By letter dated July 3, 2017 the claimant signed accepting reduction of her salary to a gross of Kshs 160,000.00 per month. The claimant's case is that the reduction of her salary was arbitrary and without a just cause. As at termination the respondent owed the claimant Kshs 121, 903.00 being refunds for medical, parking and night out. The claimant claimed for:
 - a. One-month's salary *in lieu* of the notice Kshs 210, 000.00.
 - b. 1 year and 6 months leave payment Kshs 180, 000.00.
 - c. One-month notice *in lieu* of redundancy notice Kshs 210, 000.00.
 - d. *Ex-gratia* payment Kshs 320, 000.00.
 - e. Severance pay at $15/30 \times 210,000.00 \times 1.5$ years Kshs 375, 000.00.
 - f. Salary underpayment from July 2017 for 8 months Kshs 400,000.00.
 - g. Medical, parking and night out refund Kshs 121, 903.00.



- h. 12 months' salary for unfair termination Kshs 210, 000 x 12 = Kshs 2, 520, 000.00.
 - i. Less payment made Kshs 300, 000.00
 - j. Total due Kshs 4, 017, 403.00.
2. The claimant prayed for:
- a. A declaration that the termination of the claimant's contract of employment was unprocedural, wrongful and unfair.
 - b. Payment of Kshs 4, 017, 403.00 as claimed.
 - c. Security for the claim herein (overtaken claim).
 - d. Costs of the suit plus interest from the date of filing suit.
 - e. Any other further and better relief that the honourable court may deem just to grant.
3. The respondent filed the reply to the statement of claim on July 18, 2018 through Hassan N Lakicha & Company Advocates. The respondent admitted employing the claimant at the salary as pleaded for the claimant and further that the claimant signed to agree to the pay cut or reduction due to the economic difficulties faced by the respondent. The respondent stated that it underwent economic difficulties forcing it to restructure. Further, in the process the claimant's position became obsolete amongst other positions. The claimant's redundancy and final dues were computed at Kshs 957, 099.83 subject to acceptance by the claimant and confirmation by the accounts office. The accounts office confirmed the amount as Kshs 808,212.52 communicated to the claimant. An advance payment of Kshs 300, 000.00 was made with balance to be paid on July 10, 2018. The respondent pleaded that the claimant underperformed resulting into respondent's economic loss as shown by his reduction of salary. The respondent denied owing the claimant the sum of money as was claimed. Further, due process had been followed in terminating the claimant on account of redundancy. The dismissal was alleged to have been valid, fair and just. The respondent prayed that the claim be dismissed with costs.
4. The claimant testified to support his case and the respondent's witness (RW) was Ursula Kevogo, the Human Resource Manager. Final submissions were filed for the parties. The court has considered all the material on record. The court returns as follows.
5. To answer the 1st issue, there is no dispute that the parties were in a contract of service. The dispute is whether the pay cut from Kshs 210, 000.00 to Kshs 160, 000.00 per month was arbitrary and unfair as urged for the claimant. By his own testimony the claimant confirmed that he signed the letter dated July 3, 2017 on sales review of remuneration structure. It provided for a consolidated gross salary of Kshs 160, 000.00 per month and, an incentive based on achievement of the target sales given to the claimant on a monthly basis. The claimant while testifying that he was coerced to sign the letter, he never pleaded as much and the court returns that the variation of the pay structure was invariably with the claimant's consent as envisaged in section 10(5) of the Employment Act, 2007 which requires change in terms of service be in consultation of the employee and, the change be notified to the employee in writing. The court finds Kshs 160,000.00 as the valid contractual monthly salary.
6. To answer the 2nd issue, the court returns that the termination was unfair both in substance and procedure. The letter on redundancy was dated February 6, 2018. It stated the reason for redundancy as business difficulties, hard economic times and lack of sales the respondent had to cut back financially through retaining a lean and more efficient staff. The letter stated that following the meeting held on



the same February 6, 2018, the claimant's position of Area Sales Manager, key accounts was therefore redundant. No notice would be served but pay in lieu would be given with final dues as follows:

- a. One-month notice payment Kshs 160, 000.00.
 - b. Annual leave days Kshs 207, 407.20.
 - c. Severance payment 15 days Kshs 88, 888.89.
 - d. Salary for February 01 – March 05, 2018 Kshs 180, 740.74.
 - e. *Ex-gratia* payment Kshs 320, 000.00.
 - f. Total Kshs 957, 099.83.
7. The court has considered the testimony by RW and the documents on record. While alleging that the respondent was undergoing difficult economic times, no evidence was provided to show that position. Further, while alleging that the claimant failed to meet targets leading to respondent's financial difficulties, the same was not one of the reasons set out in the letter of redundancy. The evidence was that the letter dated July 3, 2017 on sales review of remuneration structure acknowledged the claimant's good work and introduced the incentive pay structure to compensate his work. As submitted for the claimant, the respondent has failed to establish the valid reason for terminating the contract of service on account of redundancy.
8. Further, as submitted for the claimant, the respondent failed to serve the relevant and mandatory one-month notice upon the area labour officer and the claimant as was required in section 40(1) of the Act. As submitted for the claimant, the letter of redundancy dated February 6, 2018 was not sufficient notice and the procedure adopted was unfair in view of sections 40 and 45 of the Act.
9. The court upholds the computation by the respondent fixing the redundancy and other dues at Kshs 957, 099.83. The two notices under section 40 appear to have been taken into account when notice payment and salary for 1st February to March 5, 2018 was computed. The prayers for notice pay are determined accordingly. All other claimant's prayers were duly computed. Turning to compensation under section 49 of the *Employment Act*, the court has considered the enumerated statutory factors. The claimant desired to continue in employment. He had served for only one complete year. The respondent's mitigating factor is that ex-gratia payment of 2-months was awarded at Kshs 320, 000.00. In this case, the court considers that only two months' salaries in compensation will meet ends of justice making Kshs 160, 000.00 x 2 = Kshs 320, 000.00. The total then is at Kshs 1, 277, 099.83. The claimant testified that on April 17, 2018 he received Kshs 300,000.00 at the bank account and then on July 10, 2018 he received Kshs 392, 000.00 making a total of Kshs 692, 000.00. The net pay due to the claimant is therefore Kshs 585, 099.83 (less PAYE).

The court has considered all the circumstances of the case and the respondent will pay only 50% costs of the suit.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration the termination on account of redundancy was wrongful, unlawful and unfair.
2. The respondent to pay the claimant a sum of Kshs 585, 099.83 (less PAYE) by April 1, 2023 failing, interest at court rates be payable thereon from the date of this judgment till full payment.
3. The respondent to pay 50% claimant's costs of the suit.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
THURSDAY 16TH FEBRUARY, 2023**

BYRAM ONGAYA

PRINCIPAL JUDGE

