



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 201 OF 2018

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

DESERT ROSE RESORT.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this claim on the 21st of May, 2018 seeking a declaration that his redundancy is unfair and that he be awarded 12 months' salary as compensation for the unfair termination. He further seeks payment of accrued leave of 2 years and 6 months, 2 years and 5 months' public holiday compensation, salary underpayment and Severance pay for the 2 years worked.
2. The Respondent filed a response to the Claimant's statement of Claim on 13th July, 2018, wherein he wholly denied the Claimant's claim.
3. The Claimant filed this suit on behalf of Mr. Alex Bulima and Mr. Hezron Okulo, but only the latter appeared to testify in support of his case. Mr. Hezron Okulo adopted his witness statement and produced his bundle of documents as evidence in the matter.
4. The Respondent presented a Mr. Boniface Kungu, its Operations Manager to testify on its behalf. Mr. Kungu adopted his witness statement and produced his bundle of documents in support of the Respondent's case.

The Claimant's Case

5. The Claimant's case is that Mr. Hezron Okulo the grievant herein, was employed on a 6 month's contract from 5th October, 2014 as a plant operator earning a basic salary of Kshs. 9000. He states that his salary at the time of termination was Kshs. 10,000.
6. The grievant states that he continued working for the Respondent even after his contract had expired.
7. It is the Claimant's case that the grievant joined its membership on 6th November, 2015 and privately paid his Union subscription until the time of his termination.
8. It is the Claimant's case that the grievant was issued with a one-month termination notice on 1st March, 2017. He states that the reason given for the termination was that the tractor he was operating had broken down and the Respondent was not in a position to repair the same.
9. The Claimant states that the grievant was thereafter on 1st April, 2017 terminated on ground of redundancy. He further states that the declaration of redundancy was unprocedural.
10. The Claimant's case is that the grievant did not utilize his leave days and neither was he compensated for the leave during his time in the service of the Respondent. He further states that he worked on public holidays but which work was not compensated.
11. The Claimant states that it reported the grievant's dispute to the Ministry of Labour and Social Security and Services in accordance with Section 62 of the Labour Relations Act, 2007 and that the Minister appointed Mr. L.K. Bii, the Kisumu County Labour Officer to conciliate the dispute.
12. The Claimant states that the Respondent declined to comply with the conciliator's recommendation without valid reasons, hence the filing of this suit.

13. On cross examination, the grievant admitted receiving payment of one-month salary for the notice period.

14. The Claimant prays that the grievant be awarded the prayers as per his witness statement.

The Respondent's Case

15. The Respondent's case is that it begun its operations in the year 2014 and that it employed the grievant on 5th October, 2015 and not 2014 as alleged.

16. It is the Respondent's case that it gave the grievant a one month notice of termination premised on the fact that the tractor he operated had broken down and that it had declared redundancies which affected the grievant and other employees.

17. The Respondent states that at the end of the notice period, the grievant was paid one-month salary for the notice period.

18. The Respondent states that the grievant took his leave from October, 2016 when the tractor broke down, as he had no work and this resulted in the decision to terminate his contract.

19. The Respondent admitted on cross examination not having evidence of payment of both the leave allowances and severance pay.

20. The witness stated that the grievant was terminated on account of redundancy. He further stated that no communication was made to the Labour officer in respect of the declaration of redundancy.

21. The Respondent states that it did not violate any law in terminating the grievant's contract. It further states that it had no knowledge that the grievant was a member of the Claimant's Union.

22. The Respondent further states that the grievant is bound by the terms of his contract of employment as he had signed signifying acceptance of the same, and is estopped from making claims contrary to the terms of his appointment.

Determination

23. The issues for determination in the matter are:

- i. Whether the grievant was lawfully declared redundant
- ii. Whether the grievant is entitled to the reliefs sought

Whether the grievant was lawfully declared redundant

24. Section 40(1) of the Employment Act provides for redundancy in the following terms: -

“ 40. Termination on account of redundancy

(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.

25. It is not disputed that the grievant herein was issued with a one month's termination notice and thereafter, paid one month's salary for the notice period. The Respondent's case is that the one month notice issued prior to the grievant termination was made pursuant to the employment agreement between it and the grievant. The Respondent's witness admitted that the grievant was declared redundant together with other employees of the Respondent and hence the termination notice.

26. The Respondent's evidence was that it was not aware that the grievant was a member of a trade union and this was confirmed by the grievant on cross-examination.

27. Section 40 (1)(b) of the employment Act states: -

“(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer”. The Respondent herein was by this provision duty bound to inform the labour officer of the intended declaration of redundancy even when the employee is not a member of a trade union.

28. The Respondent's failure to inform the labour officer of their intended declaration of redundancy, is a violation of Section 40 of the Employment Act, which renders the redundancy unlawful and unfair.

29. The court finds and holds that the termination of the grievant (Mr. Hezron Okulo) on account of redundancy, is unlawful and unfair for failure by the Respondent to adhere to the provisions of Section 40 of the Employment Act, 2007.

Whether the grievant is entitled to the reliefs sought

30. The Claimant has sought that the grievant be awarded the following reliefs: 12 months' salary as compensation for the unfair redundancy, payment of accrued leave of 2 years and 6 months, 2 years and 5 months' public holiday compensation, salary underpayment and Severance pay for the 2 years worked.

Payment of accrued leave of 2 years and 6 months

31. The Claimant's case is that the grievant never took his leave for the time he was in the service of the Respondent and thus claim to be awarded leave pay for the 2 years and 6 months 'served.

32. The Respondent's case is that the grievant took his leave in October, 2016, being the time the tractor he operated broke down, until the time he was terminated.

33. The Respondent being the employer, bears the burden of proving that the grievant utilized his leave days being the one mandated to maintain records of employees in its service. No evidence was produced to show that indeed the grievant used his leave days prior to his termination.

34. The court finds and holds that the grievant is entitled to leave pay for the two and half years he was in the service of the Respondent at 21 days for each year served.

2 Years and 5 Months' Public Holiday Compensation

35. The Claimant's case is that the grievant worked on public holidays during his time in the employ of the Respondent.

36. The grievant did not tell the court the particular public holidays he worked, and no prove was provided to show that he worked at all during public holidays. The Claimant/grievant is the burden bearer and has not discharged this burden in this respect and the claim fails and is dismissed.

Salary underpayment

37. The grievant's monthly salary at the time of employment was Kshs. 9,000/-. This was later increased to Kshs. 10,000 by the time he was terminated. The grievant did not render any evidence to show that he was under paid and the claim fails and is dismissed.

Severance pay for the 2 years worked

38. The Respondent admitted declaring the grievant redundant. Section 40(1)(g) provides thus: -

“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.”

39. The contract of employment between the Respondent and the grievant indicates, that the same was to commence on 8th October, 2014, and that the nature of employment was permanent. The grievant was terminated on 1st April, 2017 having been in the service of the Respondent for over two years.

40. The court finds and holds that the grievant is entitled to and is hereby awarded 15 days pay for each of the two years worked.

12 months' salary as compensation for the unfair redundancy

41. The court has made a finding of unlawful declaration of redundancy. It then follows that the grievant was unfairly terminated on account of redundancy.

42. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the Employment (**See Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR**)

43. The Respondent told this court that the tractor that the grievant operated had broken down and which resulted in the termination of the grievant as the Respondent no longer had work for him.

44. Guided by the holding in the case of **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR** where the Court cited the case of **D.K. Marete v Teachers Service Commission Cause No. 379 of 2009** and held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but are meant to redress economic injuries in a proportionate way, I award the grievant two months' salary in compensation for unfair termination.

45. In whole, Judgment is entered for the Claimant against the Respondent as follows:

- i. Accrued leave at Kshs. 17,649 (333x 53 days)
- ii. Severance pay at Kshs. 9,990/- (333 X 30)
- iii. Two (2) months' salary in compensation for unfair termination at Kshs. 20,000/-
- iv. Costs of the suit and interest until payment in full.

46. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3RD DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

Mr. Odhiambo present for the Respondent

Christine Omollo- C/A