



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAKURU
ELRC CAUSE NUMBER 374 OF 2015
SAMWEL OKWEMBA OLEMBO.....CLAIMANT
-VERSUS-
CATHOLIC DIOCESE OF NAKURU.....RESPONDENT
(BEFORE HON. JUSTICE DAVID NDERITU)
JUDGMENT

I. INTRODUCTION

1. The Claimant commenced this cause by way of memorandum of claim dated 23rd November, 2015 which was received in court on 25th November, 2015. Along with the memorandum of claim were filed several documents (14) and a verifying affidavit.
2. The Respondent entered appearance on 16th February, 2016 and filed a response to the claim on 15th April, 2015.
3. On 28th August, 2018 the claimant filed an amended memorandum of claim praying for:-

“(a) THAT the notice given in this redundancy be found to be less than, the notice in the meaning of Section 40 of the Employment Act and that the court order for a payment of one (1) month’s salary in lieu of notice based on the correct government recommended Basic Minimum Wage order in force then, the Legal Notice No. 117 of 1st May, 2015.

(b) THAT the court be pleased to order the Respondent to pay the Claimant underpayment of wages between 2008 upto 31st June, 2015, a period of seven (7) years the Claimant worked with the Respondent.

(c) THAT appropriate payment of gratuity on right minimum basic pay given by the legal notice No. 117 of 1st May, 2015 be ordered to be paid to the Claimant.

(d) THAT Pending annual leaves.

(e) THAT the Court to order for a payment of wages salary upto 31st December, 2016 as agreed on by the Respondent and the Claimant, See appendix SOO 11.

(f) THAT the court to order for a payment of compensation as given by the provisions of Section 49. 1. C of the Employment Act No. 11 of 2007.

(g) THAT the Respondents to issue the Claimant with a certificate of service in the meaning of Section 51 of the Employment Act.

(h) THAT the respondents to pay the costs of this suit.”

4. The Respondent filed an amended response to the claim on 21st September, 2018 in which it prayed that the Claimant’s cause be dismissed with costs.

5. The Claimant was represented by MS. Ndeda & Associates while Rodi, Orege & Company Advocates appeared for the Respondent.

6. The Counsel for both parties filed a statement of agreed issues dated 7th June, 2012 on 30th June, 2016 but it is worth noting that the agreed issues were not amended after the parties amended their respective pleadings as stated above.

7. This cause came up in court for hearing on 24th November, 2021 when both sides tendered their evidence. The Claimant (CW1) testified alone in support of his cause relying on his witness statement dated 23rd November, 2021 and produced the documents filed with the claim as exhibits 1 to 14.

8. The Respondent called one witness **JIMNAH KIMANI MWANGI (RW1)** who adopted his statement dated 14th April, 2016 and produced exhibits 1 to 5 which were filed by the Respondent with its response to the claim.

II. CLAIMANT'S CASE

9. The Claimant (CW1) testified alone in support of his case. Based on the statement of claim, witness statement, and oral testimony in court, as well as the documentary evidence produced, and the written submissions by his Counsel, the Claimant's case is that he was employed by the Respondent as a waiter in March, 2007. He testified that his starting salary was Kshs.4,500/= per month.

10. The Claimant testified that he used to sign a new contract each year. He stated that the last contract in his employment was to run from 1st January, 2014 to expire on 31st December, 2016. However, the Claimant stated that this contract was terminated by the Respondent 18 months to its full life. He testified that his last day at work was on 2nd July, 2015.

11. On Cross-examination the Claimant stated that he was not a member of a trade union and that he was terminated on alleged redundancy. He further stated that although the notice of termination was to run from 15th June, 2015 to 14th July, 2015 he was terminated on 2nd July, 2015.

12. The Claimant testified that as at the time of his termination his gross salary was Kshs.10,500/=.

13. The Claimant admitted that upon termination he was paid terminal dues amounting to Kshs.75,259.80. He admitted that before the termination he was called for a series of meetings by the Respondent wherein the issue of termination on redundancy was discussed.

14. The Claimant testified that the termination on redundancy was unfair because the Respondent's business was allegedly doing well, that he was denied a hearing, and that although a notice of 30 days was issued the Respondent effected the termination mid-way the notice period. However, the Claimant admitted that he was paid for the unexpired notice period. Further, the Claimant stated that he was not allowed to ask any questions during the meetings wherein the eminent redundancy was discussed.

15. It is on the basis of the foregoing that the Claimant reiterated his prayers as set out in the amended statement of claim.

III. RESPONDENT'S CASE

16. The Respondent called one witness **JIMNAH KIMANI MWANGI (RW1)**, the human resource manager of the Respondent. He based his testimony on the amended reply to the claim and his witness statement dated 14th April, 2016.

17. **RW1** testified that the Claimant and the other employees were engaged in at least two meetings prior to termination on redundancy. He stated that the manager of the cafe met with the employees and also there was a meeting with the human resource manager.

18. **RW1** testified that the café had to close because it was making continuous losses and it could not sustain itself financially. He stated that a notice of termination on redundancy was served upon the Claimant and copied to the County Labour office, Nakuru. He stated that it was not the Claimant alone who was declared redundant but all the employees who worked at the café. He stated that the Bishop in his capacity as the CEO of the Respondent also met with the employees and that the Claimant attended all the above meetings.

19. **RW1** testified that the Claimant and other employees signed off and were paid their terminal dues and that the Claimant received a sum of Kshs.75,269.80. He further testified that a certificate of service was issued to the Claimant.

20. In cross-examination **RW1** admitted that there were minutes of the meetings held between the Respondent and the Claimant together with the other employees. He admitted that the Claimant and the others were terminated before the expiry of the notice but stated that payment was made *in lieu* of the unexpired period of the notice. He stated that if there was any underpayment the same was taken care of in the sum of Kshs.17,509.80 in the Claimant's final dues. He prayed that the Claimant's cause be dismissed with costs.

IV. ISSUES FOR DETERMINATION

21. This court has carefully and dutifully gone through the pleadings, oral and documentary evidence tendered from both sides, and the written submissions by Counsel for both parties. The following issues commend themselves for determinations:-

- (i) Was the termination of the Claimant by the Respondent on redundancy unfair and unlawful?

(ii) If the answer to (i) above is in the affirmative, is the Claimant entitled to the remedies prayed for?

(iii) Costs.

V. TERMINATION

22. The employment relationship between the Claimant and the Respondent was founded on a fixed term mutual contract executed on or about 29th May, 2014. The contract was to run from 1st January, 2014 to 31st December, 2016. This contract was produced as exhibit by both parties.

23. The monthly salary was agreed at Kshs.10,500/= and Clause 4 of the contract provided that either party may terminate the contract by giving a one month notice or payment of one month's salary in lieu of such notice.

24. The Claimant produced as exhibit his payslip for the month of May, 2015 which indicates that the monthly salary of Kshs.10,500/= was the gross pay made up of basic salary of Kshs.7,913/=, house allowance of Kshs.1,187/=, and medical allowance of Kshs.1,400/=.

25. Vide a notice of termination dated 15th June, 2015 the Respondent terminated the contract and the notice was to take effect on 14th July, 2015. The Respondent listed the reason for termination as its decision to wind up the cafeteria business as the same was not financially viable. The notice was served upon the Claimant on 18th June, 2015 and the same was copied to the labour office, Nakuru.

26. **RW1** testified that by 2nd July, 2015 the business was completely unable to sustain itself and as such the Claimant and the other employees were terminated on that date on redundancy. **RW1** testified that before the notice of termination of the contract was issued there were a series of meetings between the employees and top management of the Respondent and the employees, including the Claimant, wherein the eminent redundancy was discussed at length and agreed upon. **RW1** cited at least three separate meetings involving the management of the cafeteria, the human resource manager, and the Bishop meeting with the employees, including the Claimant.

27. The Claimant has not denied that the said meetings took place and that he attended along with other employees. Although no minutes were produced in respect of the said meetings, this court is convinced that indeed the said meetings took place and that the Claimant and the other employees were fully aware and informed of the redundancy. Further, this court is convinced that it is on the basis of the mutual understanding and consensus between the Respondent and the employees, including the Claimant, that the notice of termination on redundancy dated 15th June, 2015 was issued.

28. It is common ground that the Claimant was terminated on redundancy. The question is whether the redundancy was fair and lawful both in substance and procedure.

29. **Section 40(1) of the Employment Act (the Act)** provides for the conditions that an employer shall meet before declaring an employee(s) redundant. As noted above, the Respondent issued a notice to the Claimant stating the reasons for declaration of redundancy and copied the said notice to the Labour office, Nakuru. The reason for the intended redundancy is indicated as winding up of the business purportedly due to continuous losses which were unsustainable.

30. There is evidence on record by **RW1** that all the employees were declared redundant and that the terminal dues for each employee, including the Claimant, were tabulated, agreed upon, and paid out. The evidence on record as produced by both sides is that the Claimant was paid a total Kshs.75,259.80 which included the unexpired days of the notice, pending leave days, severance pay and underpayments.

31. This court finds and holds that the Respondent complied with **Section 40(1) of the Act** in declaring the Claimant and the other employees redundant.

32. Although no audited accounts were produced as exhibit by the Respondent to illustrate the financial standing of the business as at the time of termination of the Claimant and the other employees, there is evidence on record from **RW1** that after the said termination the café business was closed for over four (4) years before the same was taken over by a new entity. Logically, if the business was not making losses and the same was viable, the Respondent would not have closed or wound up the same. The Respondent could not have closed or wound up the business for the sake of it if the same was profitable and would not have handed it over to new management after closing for four (4) years.

33. This court finds that the Respondent had a good reason and proof in terminating the Claimant and the other employees.

34. **Section 2 of the Act** defines redundancy as “**the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.**”

35. Essentially, the above definition when read in conjunction with **Sections 41 and 43 of the Act** grants an employer the right to terminate an employee as long as the employer complies and abides by the provisions in those sections. It is the view of this court that the Respondent substantially and procedurally complied with the law in declaring and terminating the Claimant and the other concerned employees on redundancy—See **Aviation and allied Workers Union Vs. Kenya Airways Limited & 3 Others (2012) eKLR**.

VI. REMEDIES

36. The Reliefs that the Claimant is seeking are set out in part I of this judgment as extracted from the amended statement of claim dated 27th August, 2018. This court shall now consider each one of those prayers.

37. Prayer (a) is that the notice issued by the Respondent was less than the statutory period provided for under **Section 40 of the Act** and hence the Claimant prays for one (1) month's salary *in lieu* thereof based on Legal Notice No. 117 of 1st May, 2015.

38. However, the legal notice alluded to by the Claimant was neither produced as an exhibit during the hearing nor attached to the written submissions. This court is in the circumstances not able to establish if indeed such a legal notice exists and the contents thereof.

39. The evidence on record is that the Respondent issued a 30 days notice to the Claimant and the other employees and the same was to run from 15th June, 2015 to 14th July, 2015. However, RW1 testified that by 2nd July, 2015 the Respondent was completely unable to continue keeping the Claimant and the others in employment and hence terminated them on that date. Consequently, the Claimant was paid the salary for the month of June and the unexpired period of the notice running from 2nd to 15th July, 2015.

40. **Section 40(1)(a) of the Act** provides that an employee is entitled to a notice of “**not less than a month, prior to the date of the intended date of termination.**” The word “month” in this context is not synonymous to a calendar month and this court holds that the 30 days notice issued by the Respondent suffices for the intended purpose. In any event the tabulation of the final dues produced and relied on by both parties clearly indicate that the Respondent paid the Claimant for the unexpired portion of the 30 days notice being 15 days.

41. In the circumstances and for the reasons stated above this court holds that the Claimant is not entitled to prayer (a).

42. On prayer (b) this court shall not dwell on the same as the alleged legal notices that were supposed to demonstrate and illustrate salary underpayments were not availed by the Claimant in his testimony or in the written submissions from his counsel. In any event, the tabulation of the final dues as captured in the table dated 1st July, 2015 which was relied upon by both parties clearly indicate that the Claimant was paid a sum of Kshs.17,509.80 as the agreed underpayments.

43. The Claimant voluntarily signed off for the sum of Kshs.75,259.80 being the agreed final dues. There are no allegations of fraud, duress, or misrepresentation, and particulars thereof by the Claimant and hence this court may interfere with the agreed settlement only if the settlement is found to offend the law and this court has found no such infringement. In view of the foregoing prayer (b) is denied.

44. Prayer (c) is on gratuity. This court (ELRC) has held that gratuity is not a right but a privilege. It is a gratuitous payment by the employer to an employee in good gesture thanking an employee who, in the opinion of the employer, has served well. Gratuity is hence voluntarily paid at the instance of the employer except where the same is provided for in the contract.

45. The contract between the claimant and the Respondent alluded to above did not provide for gratuity and hence the Claimant is not entitled to gratuity as prayed in prayer (c) - See the holding in **Pathfinder International Kenya Limited Vs. Stephen Ndegwa Mwangi (2019) eKLR, Bamburi Cement LTD Vs. Farid Aboud Mohamed (2016) e KLR, and H. Young & Company EA Limited Vs. Javan Were Mbago (2016) e KLR.**

46. No evidence was adduced by the Claimant on pending leave days. The Claimant did not challenge (either in pleadings or evidence adduced) the Respondent to produce any records that would have aided in establishing that there were pending leave days. Had the Claimant challenged the Respondent to produce such records, this court would have dealt with the issue in accordance with the law, including issuance of notices to produce, and/or summoning of witnesses. This court could also have presumed the evidence to be against the Respondent if it failed to comply.

47. In view of the foregoing paragraph this court is unable to grant prayer (d) on pending annual leave. In any event, the evidence on record indicates that the Claimant was paid and accepted a sum of Kshs.5,250/= for pending leave days. This court holds that the issue of pending leave days was agreed and amicably settled by and between the parties.

48. In prayer (e) the Claimant is seeking for payment of salary for the remaining life term of the contract that was to end on 31st December, 2016. This court has already found that the contract was fairly and lawfully terminated and so far it is clear that the parties amicably computed the final dues and the Claimant was paid accordingly. That being the case, there exists no legal basis upon which the Claimant may be paid for the balance of the life term of the contract and hence prayer (e) fails.

49. For the reason that the employment relationship between the Claimant and the Respondent as expressed in the written contract executed on 29th May, 2014 was fairly and lawfully terminated as expounded in another part of this judgment, prayer (f) on compensation under **Section 49 (1) (c)** of the Act must fail.

50. Respondent's exhibit 1 as produced by RW1 is a certificate of service issued in the name of the Claimant on 24th July, 2015. In the Circumstances, if the Claimant has not collected the same he is free to do so. In the alternative the Respondent is hereby directed to deliver the same through its Counsel to the Counsel for the Claimant within 30 days of the date of delivery of this judgment.

51. Flowing from the foregoing, the net effect is that the Claimant's cause is hereby dismissed but each party shall meet own costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF MARCH, 2022

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DAVID NDERITU

JUDGE