



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 2496 OF 2016**

**DERRICK ATOTI ISINDU.....CLAIMANT**

**VERSUS**

**MSPARKS ELECTRICAL LIMITED....RESPONDENT**

**JUDGEMENT**

1. The claimant avers vide a statement of claim filed on 2<sup>nd</sup> December, 2016, that he was employed by the respondent sometimes in January, 2009 as a gardener. That due to his exemplary service, he rose to the position of Workshop Attendant. That his employment was terminated sometimes in September, 2015 by the respondent's manager by the name Mr. Rijenda. He termed his termination as unlawful, unfair and inhumane hence prays for the sum of Kshs 546,600/= being notice pay, salary for September, 2015, service pay, unpaid leave days and compensatory damages.

2. The claim was opposed by the respondent's statement of response filed on 12<sup>th</sup> April, 2018, and through which it admitted laying off the claimant on the basis that it lacked projects hence its earnings had greatly diminished. That as a result, it could not afford to maintain all its employees. The respondent further averred that it had made payments to the claimant to the tune of Kshs 99,122/= hence made good his loss. It asked the court to dismiss the claim with costs.

3. The matter proceeded for hearing on 17<sup>th</sup> November, 2021 and each side called oral evidence.

**Claimant's case**

4. At the outset, the claimant adopted his witness statement and documents filed together with the claim, to constitute part of his evidence in chief. He also produced the said documents as exhibits before court.

5. According to the claimant, he was verbally terminated sometimes in September, 2015 by one of the respondent's directors by the name, Mr. Rijenda who informed him that there was shortage of work and that his services were no longer required. That he reported to work on 9<sup>th</sup> October, 2015 but was turned away and paid the sum of Kshs 11,000/= being salary for September, 2015. He further told court that he never proceeded on leave during the years 2009, 2010, 2014 & 2015.

6. In cross examination, the claimant admitted that he only received the sum of kshs 30,000/= from the respondent.

**Respondent's case**

7. The respondent tendered its testimony through Mr. Gabriel Mambo Kyalo, who testified as RW1. He identified himself as an accountant at the respondent company. Mr. Mambo also adopted his witness statement and the respondent's bundle of documents to constitute part of his evidence in chief. He also produced the documents filed on behalf of the respondent as exhibits before court.

8. Mr. Mambo testified that on or about January, 2015, the respondent's work projects started dwindling hence in August, that year, the claimant was notified that his contract will be terminated in a months' time. That further, he was promised that he will be reengaged on a fulltime basis once the respondent's projects pick up. But before then, he would be called to work on a casual basis depending on the available tasks. That the respondent calculated the claimant's dues and paid him an initial sum of Kshs 41,028/=. Then later the sum of Kshs 32,352/= both in cash and in MPesa and thereafter Kshs 30,000/= being fees for his Advocate. Mr. Mambo further told court that the claimant was later paid the sum of Kshs 55,770/= as final settlement. He further told court that the claimant had met with the respondent's directors on several occasions with a view to settling the matter out of court.

**Submissions**

9. Both parties filed written submissions upon close of the trial. The claimant submitted that the respondent did not comply with the provisions of section 40 of the Employment Act, in terminating his employment hence the same amounted to summary dismissal. He cited the following authorities in support of his submissions; **Kenya Union of Journalists & Allied Workers vs Nation Media Group Limited (2013) eKLR and Banking Insurance and Finance Union vs CFC Stanbic Bank (2014) eKLR.**

10. On its part, the respondent submitted that the claimant had failed to prove that he had been unlawfully terminated. It further submitted that the claimant had been paid dues to the tune of Kshs 99,122/= . He invited the court to consider the case of **Eric Mukumbo vs Richard Kinuthia (2014) eKLR.**

### **Analysis and Determination**

11. Having considered the pleadings, the evidence submitted before court and the rival submissions, the court is being called to determine the following questions;

**i. Whether the claimant's termination was lawful and procedural?**

**ii. Whether the claimant is entitled to the reliefs sought?**

### **Whether the claimant's termination was lawful and procedural?**

12. From the respondent's end, the reason for the termination of the employment relationship was on the basis that its "*work projects were dwindling*" hence could not afford to maintain all its employees.

13. Accordingly, the claimant's termination was occasioned by the respondent's operational requirements hence fell within the ambit of **Section 45(2) (b) (ii) of the Employment Act**, which reads as follows;

**"A termination of employment by an employer is unfair if the employer fails to prove-**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason-**

**(i) .....**; or

**(ii) based on the operational requirements of the employer; and..."**

14. It is also apparent that the manner in which the employment relationship was terminated, fell within the realm of redundancy. Pursuant to **Section 2 of the Employment Act**, the term "**redundancy**" is defined to mean "**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**".

15. Essentially, the circumstances or reasons which leads to an employee being declared redundant must fall within the above definition and as required under the provisions of **section 45(2) (b) (ii)**, the same must be proved. In this regard, the burden of proof lies with the employer.

16. In the case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR**, the Court of Appeal found that "**for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair**".

17. In the instant case, the reason given by the respondent was "*dwindling work projects which had greatly diminished its earnings.*"

18. By dint of the provisions of **section 45(2) (b) (ii) of the Act**, the respondent was obliged to prove this assertion. This is also known as substantive justification or simply put, proof of reasons.

19. In this case, there was no evidence to support the respondent's assertion, either in the form of financial statements or through whichever manner.

20. All in all, the respondent was still bound by the provisions of **Sections 43 (1), and 45 (2) (a) & (b) of the Act** to prove that the reasons for the claimant's termination were fair, valid and related to its operational requirements. By dint of **section 47(5) of the Act**, the burden of proof fell squarely on the respondent.

21. It is not lost to the court that under Section 40(1) of the Employment Act, an employer is granted the right to declare redundancy. Be that as it may, it is not a through pass for laying off employees without basis. It is for this very reason that the provisions of **sections 43(1) and 45(2) (a) and (b) of the Act** come into play.

22. In the premises of the foregoing, I find and hold that the respondent has not proved that the claimant's termination by way of redundancy,

was justified.

23. As regards procedural fairness in case of redundancy, the same is provided for in an elaborate manner under section 40(1) of the Act. Under the said provision, the following conditions must precede a redundancy;

**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.**

24. It is noteworthy that all the conditions stipulated above are mandatory and it is not open to the employer to apply the same selectively.

25. From the evidence of RW1, the respondent issued a verbal notice to the claimant hence there was no evidence to back up this assertion. However, the court notes that as part of the respondent's exhibits, there is a pay slip which contains an item described as "payment in lieu of notice" from 15<sup>th</sup> August, 2015 to 15<sup>th</sup> September, 2015". The court thus presumes that this was in compliance with the provisions of clause (f) of section 40(1) of the Act. Similarly, in the same pay slip, is an item described as "leave balance" hence the court also presumes that the same was made in fulfillment of the provisions of clause (e) of the said section 40(1).

26. Although RW1 told court that the claimant was not the only employee affected by the redundancy, it did not adduce evidence to that end nor provide the selection criteria as regards which employees were declared redundant. RW1 further admitted that there were no consultations prior to the claimant being terminated and neither was the Ministry of Labour notified of the intended redundancy. The only consultations RW1 alluded to, were in regard to an out of court settlement, which evidently, were fruitless.

27. RW1 produced the claimant's pay slip which indicate that he had been paid severance pay for the period between July, 2013-July, 2014 and July, 2014 to July, 2015. This was in apparent compliance with clause (g) of section 40(1) of the Act.

28. As stated herein, compliance with the provisions of section 40 (1) of the Act are mandatory and in absence of proof of such compliance, any resultant termination by way of redundancy is unlawful and unprocedural.

29. The court in the case of **Hesbon Ngaruiya Waigi vs Equitorial Commercial Bank Limited (2013) eKLR** held that;

**"Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the Employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair."**

30. Similarly, and having found that the respondent did not fully comply with mandatory requirements stipulated under sections 40(1) of the Employment Act, I find that the claimant's termination on account of redundancy was unlawful and procedural.

31. The upshot of the foregoing is that the Court finds and hold that the termination of the claimant was unfair and unlawful.

### **Reliefs**

32. Having found that his termination was both unfair and unlawful, I will award the claimant compensatory damages equivalent to 5 months gross salary. This award has taken into account the length of the employment relationship.

33. The court also awards the claimant severance pay for one year, that is July, 2012 to July, 2013 as it notes that he was only paid for 2 years instead of 3. It is evident from the claimant's contract of employment, that the employment relationship came into effect from 1<sup>st</sup> July, 2012.

34. The reliefs in regards to notice pay, unpaid salary, untaken leave days, and off days are denied as it is discernible from the claimant's pay slips which were produced as part of the respondent's exhibits, that the same were paid as part of his terminal dues.

35. The court takes note of the claimant's admission to the effect that he received the sum of kshs 30,000/= from the respondent. Subsequently, this amount will be reduced from his total award.

36. As regards the other payments made to the claimant by the respondent, through cash and MPesa, I note that the same are described as being payments in respect of notice pay, August salary, payment of dues and balance of notice. The court therefore presumes that the same were part of the claimant's terminal dues and unpaid salary.

### **Orders**

37. In conclusion, I enter Judgment in favour of the claimant against the respondent as follows;

- a. A declaration that the claimant's termination was unfair and unlawful.**
- b. The claimant is awarded compensatory damages in the sum of Kshs 85,000/= which sum is equivalent to 5 months gross salary.**
- c. The claimant is also awarded the sum of Kshs 8,500/= being severance pay for 1 year (between July, 2012 to July, 2013).**
- d. The total award is Kshs 93,500/= less Kshs 30,000/= hence the final award is Kshs 65,500/=.**
- e. Interest on the amount in (d) at court rates from the date of Judgement till payment in full.**

38. The respondent is also directed to remit all the unremitted dues in respect of National Social Security Funds (NSSF) on account of the claimant.

39. Costs follow the event, hence the respondent shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2022**

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**STELLA RUTTO**

**JUDGE**

#### **Appearance:**

For the Claimant Ms. Omamo

For the Respondent Mr. Otieno

Court Assistant Barille Sora

### **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**