



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 556 OF 2016

MOHAMED BONAYA HARO.....CLAIMANT

VERSUS

CHARLES FRASER.....RESPONDENT

JUDGEMENT

1. The claimant avers that he was employed by the respondent as a security guard with effect from 14th September, 2011 until 30th July, 2015, when he was summarily dismissed for no reason whatsoever. As a result, he prays against the respondent, the sum of Kshs 241,769/=, being notice pay, annual leave accrued, compensatory damages and service gratuity.

2. In his defence, the respondent has averred that he did not terminate the claimant unjustifiably or unlawfully. That he had engaged the services of the claimant at his Karen home as he was often away at his other residence in Kilifi. That upon his return to the Karen residence, he terminated the claimant's employment as he did not require his services anymore. That the termination was therefore not ill motivated and consequently, he prays that the suit be dismissed with costs.

3. The claimant rendered oral testimony before court, while the respondent opted to tender a sworn Affidavit in support of his case.

Claimant's case

4. The claimant adopted his witness statement and bundle of documents to constitute part of his evidence in chief. He also produced the said documents as exhibits before court.

5. The claimant's case is that he was employed by the respondent with effect from 14th September, 2011 to guard his residence at Kilifi. That in 2012, he was transferred to the respondent's residence in Karen. That while at the respondent's Karen residence, his employment was unlawfully terminated. That he was not issued with any notice or paid terminal benefits. That he was only paid the sum of Kshs 9,350/= as salary for the month of July, 2015. He further alleged that the claimant did not remit his NSSF benefits between 2011 and 2014, despite deducting the same from his salary.

Respondent's case

6. It is the respondent's case that he employed the claimant to guard his residence at Kilifi and thereafter, Karen as he was often away. That upon his return to Karen, he installed an electric gate, hence he did not require the services of a security guard anymore. That as such, the termination of the claimant was not on any other ground, save that he did not require his services anymore. That he therefore issued the claimant with a certificate of service and wished him well. That further, he had on several occasions issued the claimant with verbal warnings on account of breach of his employment contract.

Submissions

7. Both parties filed written submissions in support of their respective cases. The claimant submitted that his termination was not substantively or procedurally fair. That he was not informed of the reasons for his termination hence the respondent did not comply with the provisions of section 45 of the Employment Act. To buttress his submissions, he placed reliance on the following authorities; **Walter Ogal Anuro vs Teachers Service Commissions (2013) eKLR**, **Moses Daniel Kyalo vs Treadsetters Tyres Limited (2019) eKLR**, **Kenfreight (E.A) Ltd. vs Benson K. Nguti (2016) eKLR**.

8. On his part, the respondent submitted that the claimant was declared redundant as his services became superfluous upon installation of an electric gate. He buttressed his submissions on the case of **Kenya Airways vs Aviation & Allied Workers Union Kenya & 3 others (2014)**

eKLR. He further urged that he had complied with the provisions of section 40 (1) of the Employment Act as he had paid the claimant one months salary in lieu of notice, and which amount was set off against a loan which he had fully settled.

Analysis and Determination

9. From the pleadings and the evidence on record, as well as the parties' submissions, the issues falling for the court's determination can be distilled as follows:

- i. Whether the claimant's termination was unfair and unlawful?**
- ii. Whether the claimant is entitled to the reliefs sought?**

Whether the claimant's termination was unfair and unlawful?

10. The respondent has stated that he terminated the employment of the claimant when he moved back to his Karen residence and installed an electric gate. As such, he did not require the services of the claimant, who was a security guard. He was categorical that the claimant was not terminated on account of any misconduct on his part. In short, the services of the claimant had been rendered superfluous. It is notable that the claimant did not rebut these assertions hence the same remained uncontroverted.

11. It is therefore apparent that the main reason for the claimant's termination was on account of redundancy. **Section 2 of the Employment Act**, defines the term "**redundancy**" 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**".

12. 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**".

13. The reason advanced by the respondent for effecting the redundancy was that the claimant's services were no longer required as he had adapted new technology by way of an electric gate and that he had moved back to this Karen residence.

14. The Court of Appeal in the case **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others (supra)** noted that redundancy could arise as a result of adaptation of modern technology and not just economic downturn. **Githinji, JA (as he then was)** stated thus:

"Besides economic distress, redundancy can also arise where the employer finds that he can employ modern technology to run his business more efficiently and/or profitably. This is the crisp of the International Labour Organization's Recommendation No. 166--Termination of Employment of 1982 and the decision in the case of G.N. Hale & Son Ltd v. Wellington Caretakers IUW.4"

15. In this case, and there being no rebuttal to the respondent's assertions that the cause for the claimant's redundancy was the fact that his services had become superfluous, the court presumes the same as factual. As such, there was substantive justification for the claimant's redundancy.

16. It is not in doubt that redundancy is permitted under the Employment Act, save that the employer ought to comply with the following requirements stipulated under section 40(1):

- 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.**

17. The foregoing procedure is what constitutes procedural fairness in cases of redundancy. The respondent has stated that he complied with the provisions of the said section 40(1) in terminating the claimant. This does not seem to be the case for the reason that:

i. There was no proof that the claimant was issued with any notice or paid salary in lieu of notice. The averment that the claimant's salary in lieu of notice was set off against an outstanding loan he had with the respondent was not backed by evidence to prove the existence of the said loan. The pay slips attached do not indicate as much, for instance an advancement. Indeed, during cross examination, the claimant denied having any outstanding loan and maintained that he had fully paid off a loan he had taken from the respondent.

ii. Despite the respondent stating that the claimant had no outstanding leave days, and that he had taken 28 leave days during 2015, there was no evidence in the form of leave records to back up the assertion.

iii. There was no evidence of payment of severance pay despite to respondent conceding that the claimant had worked for him since September, 2011 till July, 2015.

18. In as much as the respondent was entitled to declare the claimant redundant, he was bound to comply with the procedure set out under section 40(1) of the Act and more specifically, in regards to payment of his dues, but evidently he did not.

19. In light of the foregoing, the court finds that the claimant's termination by way of redundancy, was unprocedural hence unlawful.

Reliefs

20. The claimant is awarded compensatory damages equivalent to 3 months of his gross salary on the basis that his termination on grounds of redundancy was unprocedural and unlawful. The award has taken into account the length of the employment relationship.

21. The court also awards the claimant severance pay for four years as it was common ground that the employment relationship commenced sometimes in September, 2011 and terminated sometimes in July, 2015. In as much as the employment relationship was based on a renewable contract, the same was continuous and there was no break, hence the entire employment period ought to be considered in the computation of severance pay.

22. The claimant is also awarded one month's salary in lieu of notice.

23. The claim for accrued leave is denied as the claimant failed to particularize this relief by stating the specific number of days accruing and for which he was seeking compensation for. As it is, the sum of Kshs 51,692/= appears to have been plucked from the air.

24. The claim for service gratuity is also denied by virtue of the provisions of section 35(6) (d) of the Employment Act as it is evident that the claimant was contributing towards the National Social Security Fund (NSSF).

Orders

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

(a) The claimant is awarded compensatory damages in the sum of Kshs 42,000/= which sum is equivalent to 3 months gross salary.

(b) The claimant is also awarded the sum of Kshs 28,000/= being severance pay for 4 years (between July, 2011 to July, 2015).

(c) The claimant is also awarded one month salary in lieu of notice being the sum of Kshs 14,000/=.

(d) The total award is Kshs 84,000/=.

(e) Interest on the amount in (d) at court rates from the date of Judgement till payment in full.

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

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant

Ms. Mideva

For the Respondent Ms.Waweru

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 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 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