



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 482 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

STEPHEN ANEKEYA MUMANYI..... CLAIMANT

VERSUS

TRAVEL ASSOCIATES LIMITED.....RESPONDENT

JUDGEMENT

INTRODUCTION

1 The Claimant has filed a Statement of Claim dated 13th March 2017 suing the Respondent for redundancy, non-payment of terminal benefits and damages for unlawful and or wrongful termination of employment. He avers that the Respondent employed him as Tours Manager in October 2004 and that he diligently worked for it in a clean service record spanning 12 years, until 10th January, 2017 when it unprocedurally declared him redundant. At the time of termination of his employment, the Claimant avers that he was earning a gross salary of Kshs.68,890/=.

CLAIMANTS'S CASE

2 The Claimant further avers that the Respondent never allowed him to resume work despite requesting him on several occasions to allow him to resume duty. He is categorical that his termination of employment was without any justifiable cause and without notice. That he was not heard nor served with a month notice and a letter to the Labour Officer and neither was he paid lieu of notice and that the Respondents did not also pay him his terminal dues and severance pay.

3. He avers that the Respondent's illegal conduct of declaring him redundant without following the due process of the law has caused him to suffer great loss and hardship. The Claimant prays for judgment to be entered against the Respondent for orders:

(i) that the reasons and procedure for declaring him redundant were wrongful, unfair and unprocedural;

(ii) that the Respondent's continued withholding of his terminal benefits and other unpaid dues as unlawful and untenable; and

(iii) that the Court orders the Respondent to pay him all his terminal benefits and other unpaid dues as computed in the Statement of Claim.

RESPONDENT'S CASE

4. On 04/08/2017, the Respondent filed a Memorandum of Response dated 10th July 2017 averring that it severally cited the Claimant for misconduct in the course of his employment and issued him with warning letters in that regard and that the Claimant was further issued with a notice to show cause on his misconduct.

5. The respondent says that the Claimant refused to respond to the issues it raised and also refused to attend the meeting it convened for him on 23/11/2016 and that his stubbornness led to the final decision that he be relieved from duty on the grounds of low performance and gross negligence at work.

7. The Respondent states that the Claimant was earning a net salary of Kshs. 52,900/= at the time of his termination. He says it would have been risky to allow the Claimant continue with his duties having proved he was numerously culpable of misconduct including engaging in activities detrimental to the Respondent such as the deliberate deletion of company emails and crucial data from the company's servers.

8. The Respondent further avers that it never declared the Claimant redundant as claimed and that he is thus not entitled to any relief under Section 40 of the Employment Act. That the Claimant received and acknowledged receipt of the full and final settlement of his dues of Kshs. 70,533/- by voluntarily signing for the same on 20/01/2017 and that the same included payment for one month notice pay and salary for 10 days worked in January 2017. The Respondent prays that the Claimant's suit is dismissed with costs to it.

CLAIMANT'S SUBMISSIONS

9. The Claimant submits that the Respondent's sole reason for terminating his employment as per the termination of service letter dated 10/01/2017 was on account of redundancy due to dramatic fall of sales. That significantly, the said letter was never served upon the Labour Officer as required under **Section 40(1) (b) of the Employment Act** and that generally the Respondent did not follow the provisions of section 40(1) of the Act which are couched in a mandatory form.

10. He substantively relies on the analysis and decision of the Court in the case of *Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR*; and in the case of *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR* wherein the Court of Appeal agreed that redundancy notices are not mechanical so as to satisfy the motions of the law and that fair labour practice requires the employer to act in good faith.

11. He further submits that his redundancy thus amounted to unfair termination as the Respondent failed to adhere to the provisions of **section 40(1) of the Act**. That **section 45(1) and (2) of the Employment Act**. Section 45 of the employment act further provides that no employer shall terminate the employment of an employee unfairly and which termination shall be deemed unfair if the employer fails to prove that the same was in accordance with fair procedure. It is the Claimant's submission that termination of his employment was thus wrongful and unprocedural and that he is entitled to the relief sought and prayed for in his Statement of Claim.

12. The Respondent did not file submissions and he did not appear in court during the hearing.

ISSUES FOR DETERMINATION:-

(i) Whether the Respondent terminated the

Claimant's employment on account of redundancy.

(ii) Whether the Respondent adhered to procedure under

Section 40(1) of the Employment Act before terminating the services of the Claimant on account of redundancy.

(iii) Whether the Claimant is entitled to the reliefs sought.

DECISION

13. The Claimant says he was served with a termination notice dated 10th January, 2017. He says he started working for the Respondent in 2004.

He says he inquired why he was terminated and was told his services were redundant.

Indeed his letter of termination addressed him on redundancy citing current economic climate and cutting down on operational costs.

14. Section 40 of the Employment Act provides the conditions precedent in terminating the employee on account of redundancy. The same are as hereunder:-

(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 or employees affected by the redundancy;

(d) where there is in existence a collective agreement between the 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 a 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 had 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 for each completed year of service.

15. The court has no evidence to demonstrate that the Respondent complied with the provisions of Section 40 of the Employment Act.

There is no notice to the employee on redundancy one month prior to the date of the said termination or to the labour officer in charge of the area or even to the Claimant's union if he belonged to one.

There is no evidence that the Claimant had a discussion with the Respondent to justify the criteria used to declare his post redundant.

16. Indeed there is no evidence before this court to demonstrate that the Respondent complied with the seven provisions in Section 40 of the Employment Act.

With the support of case of **JANE I. KHALECHI VS OXFORD UNIVERSITY PRESS E. A. LIMITED (2013) eKLR** held that "Section 40 of the Employment Act gives conditions precedent before one is declared redundant.

These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies effects workers livelihood and where this must be done by an employer, the same must be put into consideration."

17. Clearly the Respondent in its termination letter cited redundancy as the reason due to need to cut costs. He then had no choice but to follow the law and the procedure set down in Section 40 of the Employment Act.

18. The Respondent in his Reply to Memorandum says he had to release the Claimant as he had disciplinary issues and had received several warning letters. Even if that was the case still it was not cited in the termination letter, no notice was issued to disclose the wrongdoing and to invite the Claimant to a disciplinary hearing in accordance to Section 41 of the Employment Act.

19. The court finds the claims of indiscipline by the Respondent were never raised in the process of terminating his employment and so is found to hold no grounds.

The letter of recommendation by the Respondent to the Claimant is very positive and presents him as honest and hard working person. It is dated 10th January, 2017. This contradicts the claims of indiscipline cited by the Respondent.

20. In conclusion there was no fair procedure followed in terminating the Claimant's employment as articulated in Section 40 of the Employment Act.

21. The court having declared the termination of the Claimant as unlawful, I now proceed to award the following remedies:-

(1) I will not award him compensation for unlawful termination as he is well compensated with service pay provided in Section 40 of the Employment Act.

(2) He is also awarded one month salary in lieu of notice Kshs.68,980/= because the Respondent did not present evidence that he paid the same though in his reply he purports to have paid the same.

(3) 12 years' service pay at Kshs.68,980 x 5.5 years Kshs.379,390/=.

(4) Costs of the suit are awarded to the Claimant and interest at court rates from this date of Judgement till full payment.

The total award amounts to Kshs.448,370/=.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF MARCH, 2022.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 **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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE