



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 4 OF 2017

EZRA KIBET BIEGON.....CLAIMANT

VERSUS

BIOJOULE KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Memorandum of Claim dated 13th January, 2017 on even date, claiming the following remedies: -

a) A declaration that his termination was unlawful hence payment of damages of Kshs. 18,944,000 as per paragraph 7 of the claim.

b) Costs of the suit and interest from the date the amount fell due until payment in full.

2. The summary of the facts of this case is that the Claimant was employed by the Respondent as a plant operator commencing on 1st March, 2015 on probation terms earning a gross salary of Kshs.40,000. That his employment was confirmed on the 1st June, 2015 which job he performed till his termination on 15.7.2016.

3. The cause of termination according to the Claimant was that the Respondent was allegedly undergoing re-organization which got rid of his positions. Later on, the Respondent rescinded their decision to get rid of the Claimant position vide a letter dated 27th July, 2016, requiring and asked him to report back to work on the 7th August, 2016 however the letter was send to his rural home address which letter he got held of on 28th September, 2016 after the date requiring him to report to work.

4. It is stated that since he did not report to work on time the Respondent send him a termination notice dated 1st September, 2016 which he received on the 5th October, 2016 directing him to report to the Respondent for clearance.

5. That he was not paid his terminal dues as provided for under the law and therefore urged this Court to allow the claim as prayed.

6. The Respondent entered appearance on the 29th March 2017 and filed a response to claim on the 22nd August, 2017. The Respondent avers that the Claimant was erroneously terminated from employment by his supervisor without the authority of the Respondent and that when the Respondent head management heard the mishap, it immediately tried to remedy the situation by sending a letter asking the Claimant to report back to work and promising to pay his full salary during the said period till 30th September, 2017.

7. The Respondent indicated that it used the address of services provided by the Claimant to reach out to him and that the letter recalling his services was send via postal address.

8. It is stated that the Claimant failed to report on 7th August, 2016 as indicated in the letter of 27th July, 2016 and the Respondent wrote a follow up letter dated 1st September, 2016 which did not elicit any response either.

9. It is the Respondent's case that the Claimant failed to report back to work despite being served with recall letters therefore that the Claimant left on his volition and the termination was justified in the circumstances.

Hearing.

10. The Claimant appeared as CW-1 and adopted his witness statement dated 10th October, 2016 which reiterated the claim and in addition

testified that when he visited his rural home he received two later one reinstating him back to employment and another one dismissing him from employment for failing to report to work as per the letter of reinstatement. The Claimant avers that the reinstatement letter was not genuine for the reason that if the Respondent indeed wanted him back to employment he could have called him through his mobile phone. The Claimant further testified that on 5th October he received a call from the management requiring him to clear with the company and upon clearance he was paid his July salary, half month salary for each year worked and leave days then issued with certificate of service.

11. Upon cross examination the witness testified that upon being terminated on 15 July, 2016 he exited the Respondents employment without appealing the decision. He maintained that he received the recalling letter after it had been overtaken by events. He also testified that he received July salary and leave pay which was paid to him after the termination.

12. On re-examination the witness testified that he was termination without following due process and prayed that he be compensated for the unfair termination.

13. Respondent called one witness, **John Matanyi**, the Respondent's senior human resource manager who also adopted his witness statement dated 21.8.2017 and produced the list of documents filed on even date and a further list of documents dated 18.8.2018. He then testified that the Claimant after the erroneous termination was asked to report back to work but failed and therefore that he left employment on his volition.

14. Upon re-examination, the witness testified that the Claimant was initially terminated for poor performance but since that was error noted the Respondent recalled him to employment and continued paying his dues and since the Claimant failed to report back to work he was notified by the letter dated 1st September, 2016 that his salary would be stopped if he failed to report to work therefore that the letter of 1.9.2016 was a notification letter and not a termination letter. The witness testified further that they tried getting in touch with the Claimant through his mobile phone but could not get through him but did not produce any evidence. He also testified that he did not send him email though they had the Claimants email address. He then admitted that the Claimant was not subjected to any disciplinary hearing for the alleged desertion of duty.

15. On re-examination, RW-1 testified that they paid the Claimant up to September, 2016.

Claimant's Submissions.

16. The Claimant submitted that the termination of his employment was vide the letter of 15th July, 2016 which termination was based on allegation of restructuring therefore that the termination process was as a result of redundancy which ought to have adhered to the procedure of termination provided for under section 40 of the employment Act. It was argued however that the Respondent failed to follow due procedure of issuing notices and paying severance pay as required under Section 40 of the Employment Act, therefore the termination was unfair and the Respondent ought to be compelled to pay the Claimant 12 months' salary compensation in addition to the other prayers sought therein. In this he cited the case of **Kenfreight E.A Limited V Benson K Nguti [2019] eKlr.**

17. With regard to the recalling letter and the subsequent termination, it was submitted that the re-engagement letter was not genuine for the reason that the Respondent in their letter indicated that the Claimant would be paid salary till 30th September, 2016 but when the Claimant reported to work on 5th October, 2016 about 5 days later he was turned away for failing to report on time therefore the termination was the Respondent's end game.

Respondent' Submissions.

18. The Respondent on the other hand maintains that the initial termination of 15th July, 2016 was rescinded and the Claimant recalled back to employment through his official postal address given to the Respondent therefore that the failure by the Claimant to report back to work as indicated in the recalling letter cannot be blamed on the employer.

19. It was then submitted that when the Claimant failed to report to work as at 30th September, 2016, his termination was proper and in accordance with section 44 of the employment Act for failing without leave or other lawful cause to report to his place of work.

20. The Respondent further submitted that the Claimant was accorded adequate time to resume his duties which he failed. It was further argued that he Respondent took a further step and notified the labour officer of the Claimant's absence, therefore that his failure to report to work was on his volition and not a termination initiated by the Respondent as alleged since the Respondent adhered to the requirements of section 41 of the employment Act. In this the Respondent cited the case of **Anthony Mkala Chitayi V Malindi Waters & sewage co. limited [2013] eKlr.**

21. On whether the Claimant is entitled to the reliefs sought, it was submitted that the Claimant has failed to prove that the termination was unfair to warrant the payment of compensation. In support of its argument, the Respondent cited the case of **Kenfreight E.A Limited V Benson K Nguti (Supra).**

22. On the claim for loss of earnings, it was submitted that the same was not payable since the Claimant was not guaranteed to work for the Respondent till retirement, further that the contract of employment provided for termination clause at clause 11 of the employment contract. In support of its argument the Respondent relied on the case of **John Benson Githinji V Attorney General & 4 others [2014] eKlr.** Further that section 49 of the Employment Act caps compensation for unfair termination to 12 months' salary therefore the compensation till retirement is without any justification.

23. The Respondent then concluded that the Claimant has failed to prove his case and urged this Court to dismiss the same with costs.

24. I have examined the evidence and submissions of the parties herein. The fact of the Claimants employment to the Respondent is not in dispute.
25. It is also not in dispute that on 15th July 2016, the Respondents terminated the Claimant's services on account of reorganization of the company.
26. On 27th July 2016, the Respondents wrote to the Claimant reviewing the termination and asked him to report back to work 7th August 2016 at 9.00am.
27. According to the Claimant the letter recalling him to work was received on 5th October, 2016.
28. The Claimant of course didn't report back to work on 7th August 2016 and thereafter on 1st September, 2016 the Respondent wrote to the Claimant informing him that they were now going to stop his salary having not reported to work after the recall.
29. That notwithstanding the issue for this Court's determination is whether the Respondent having terminated the Claimant on 15th July 2016, could reverse the termination as if nothing had happened as assumed in their letter of 7th August 2016 and received on 5th October, 2016.
30. As stated above, the Respondent through their HR Manager terminated the services of the Claimant on account of redundancy. Redundancy is defined under Section 2 of the Employment Act 2007 as follows;

“redundancy” means 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;

31. In the circumstances of this case the Respondent terminated the Claimant without any notice and without following procedure under Section 40 of the Employment Act 2007 which states as follows;

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.**

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Cabinet Secretary may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Cabinet Secretary.

32. The moment the Claimant received the termination, the contract between the Claimant and Respondent came to an end.

33. If the Respondent needed to re-employ the Claimant there was need for a fresh contract which should have been accepted by the parties.
34. The fact that the Claimant didn't report back to work when recalled was of no effect as at the time there was no binding contract between the Claimant and Respondent.
35. In the circumstances it is my finding that the Claimant's services were terminated on 1st July 2016 and this was done without due process.
36. In the circumstances, I find for Claimant and I award him as follows;

1. 12 months salary as compensation for the unlawful termination

= 12 x 40,000/=

= 480,000/=

2. Payment of house allowance not paid for 1 year

15% x 40,000 x 12 months

= 72,000/=

TOTAL = 552,000/=

Less statutory deductions

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Fred