Chege v Bata Shoe Company, Kenya Limited (Cause 1206 of 2017) [2022] KEELRC 1608 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1608 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1206 OF 2017

JK GAKERI, J

JULY 25, 2022

BETWEEN

ROBERT MAINA CHEGE ..... CLAIMANT

AND

BATA SHOE COMPANY, KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant initiated this claim by a memorandum of claim filed on June 27, 2017 alleging constructive termination of employment by the Respondent and prays for;

   (i) A declaration that the Respondent unfairly terminated the service of the Claimant.

   (ii) An Order for payment of the Claimant's terminal dues and compensatory damages totaling Kshs.3,360,000/=.

   (iii) Costs of this suit and interest thereon.

Claimant's case

2. The claimant avers that he was employed by the Respondent on February 20, 1993 as a delivery/wages/office clerk in the Rubber Department on contractual terms.

3. That on July 1, 1998 he was confirmed as a permanent employee and a book clerk at a monthly salary of Kshs.16,000/= at the Limuru station and was promoted to the position of accountant on July 6, 2009 and was moved to Dar es Salaam on a temporal basis and permanently in July 2015 at a monthly salary of Kshs.80,000/=.

4. It is further avered that in November 2016, the Claimant's house allowance was moved from Kshs.30,000/= to Kshs.4,000/= and no explanation was given.

5. That on February 20, 2017, the Claimant was transferred back to Kenya and proceeded on 10 days leave as no work had been allocated although he had been informed that he would be in the Costing Department.

6. It is the Claimant's case that on March 13, 2017 when he resumed duty, he was served with a notice of intention to terminate his services on the ground of redundancy within 30 days and proceeded on 20 days leave. On resumption of duty, he was directed to the Production Department by the Assistant Human Resource Officer and proceeded there.

7. It is further avered that the claimant applied for another 4 days leave to await return of the Human Resource Manager.

8. That on March 21, 2017, the Human Resource Manager informed him that the Respondent proposed to pay him a gross salary of Kshs.650,000/= which the Claimant rejected.

9. It is further the Claimant's case that he remained without any duties for 30 days after which he reported circumstance to the Labour Office at Kiambu and was given a letter addressed to the Human Resource Office but no action was taken.

10. That he was informed that he would work in the Production Department at a salary of Kshs.57,000/= per month as was the case before the transfer to Tanzania.

11. That his request for a new contract and job description was rejected.

12. That on April 26, 2017 he received a warning letter for having taken 4 days leave without authority.

13. It is the Claimant's case that he had been informed that he would take up the position occupied by one Moses Waweru who would take up the position in Tanzania.

14. That the Respondent refused to pay his salary after the 30 days' notice of redundancy had expired.

15. The claimant further avers that the termination on the ground of redundancy was not in conformity with the provisions of the law.

16. That the mistreatment prompted him to quit employment.

Respondent's case

17. The Respondent avers that the claimant was employed on 1st January, 1998 as a booking clerk at a consolidated salary of Kshs.16,000/= per month. The contract was terminable by 2 months' notice by either party.

18. That the Claimant was later transferred to Internal Audit and his duties included Stocktaking and Book Keeping for Bata Tanzania with some travelling to Tanzania.

19. That on July 1st 2015, he was offered a position by Bata Tanzania as an Audit Assistant and accepted thus terminating his employment with Bata Kenya but due to his limited educational and Professional qualifications, his immigration status was not regularised and was unable to obtain a work permit and his employment was compromised.

20. That he was transferred back to Kenya but there was no suitable position for him in Internal Audit or Accounting Department and a decision was made to retrench him and he was notified by letter dated 15th March, 2017.

21. It is further avered that meanwhile, a position became available in the Production Department as an interim position awaiting a more suitable position but the Claimant walked away before duties were allocated to him.

22. That attempts to recall the Claimant by email sent through his spouse yielded no response.

23. That after receipt of the letter from the County Labour Officer on April 28, 2017, the Respondent's Human Resource Manager, Mr. Peter Giathi attended the reconciliation meeting and the Claimant was advised to resume duty but he did not report to work and a notice to show cause was issued on May 8, 2017. The respondent gave a final chance via letter dated May 15, 2017but it was not responded to and the Claimant was removed from the pay roll.

24. It is the Respondent's case that the Claimant absconded duty and is not entitled to the relief claimed and owes the Respondent two (2) months salary in lieu of notice.

25. The Respondent prays for the dismissal of the suit with costs.

Claimant's evidence

26. The Claimant adopted the witness statement and was cross-examined. The witness confirmed that he worked for Bata Shoe Kenya and later Bata Shoe Tanzania.

27. That he had a confrontation with the Branch Manager in Tanzania and requested to come back to Kenya.

28. It was his testimony that the email dated July 2, 2017allocated no duties.

29. That on his return from Tanzania, he reported to the Production Manager for work inApril 24, 2017and onApril 28, 2017. That he reported the issue to the County Labour Officer who recommended that he resumes duty but did not and upto May 8th he was not on duty and was not on leave and had not informed anyone.

30. The witness confirmed that he was issued with a 30 days' notice to be declared redundant on March 15, 2017but the formal letter was not issued.

31. On re-examination, the witness testified that the NSSF statement showed that he begun making contributions by Bata Shoe Company in 1993.

32. That his Supervisor was the Finance Director based in Nairobi, Kenya and no work was allocated to him in April 2017. That termination notice was 2 months or pay in lieu.

Respondent's evidence

33. The witness, Mr. John Ngutu adopted the written statement and was cross-examined. The witness confirmed that the claimant was first employed by the Respondent on 20th June, 1993 and the NSSF statement on record revealed as much. He confirmed that Mayank Goel was the Regional Finance Director for Africa.

34. It was his testimony that the Bata Shoe Companies in different countries were different legal entities and once an employee was transferred, they were terminated in one jurisdiction to take up the position and as such the Claimant had no contract in Kenya when he moved to Tanzania on 1st July 2016. He was transferred to Tanzania.

35. As regards the letter of redundancy, the witness stated that the 30 days' notice lapsed on April 15, 2017. That the letter of re-deployment dated 24th April was written 9 days after the notice of redundancy had expired.

36. The witness stated that when the Claimant reported back, he was taken to the factory where he previously worked though there was no document on where he was to report. That by the time the claimant was complaining to the Labour Officer, he was still an employee of the Respondent.

37. The witness testified that the letter dated April 25, 2017which purportedly reinstated the claimant was delivered to the claimant's residence.

38. That the letters dated 24th, 25 April and 8th May, 2017 had no signification of receipt by the Claimant. None of them had his signature.

39. It was his testimony that the internal memo from the Human Resource Manager to the Finance Director on removal of the claimant from the payroll was a procedural communication not a termination letter.

40. It was his testimony that the letter dated 8th May was delivered to the Claimant's residence by hand.

41. On re-examination, the witness further testified that the Production Department had an Accounting Department and Cost Accounting.

42. It was his testimony that the claimant absconded duty and thus terminated his services and summarily dismissal should have followed thereafter.

Claimant's submissions

43. According to the claimant, the issues for determination are when the claimant was employed by the respondent relationship between Bata Shoe Company Kenya and Bata Shoe Company Tanzania, whether the claimant's employment was terminated and entitlement to reliefs and costs.

44. As regards the date of employment, it is submitted that the claimant was engaged on February 20, 1993as he testified and the letter dated February 23, 1998merely confirmed his appointment. That the NSSF statement on record reveals as much.

45. As regards the Bata Kenyan and Bata Tanzania, it is urged that although the claimant worked for the Bata Shoe Kenya, he would be sent on assignment and was transferred to Bata Shoe Tanzania in 2015 and was recalled by an email from one Manyak Goel, the Financial Director for Africa and was directed "to be in office on February 20, 2017" which showed that employees could be interchanged between the two companies.

46. The letter dated March 15, 2017is relied upon to urge that the Claimant's sojourn in Tanzania was shortlived and the two companies operated as one separated by jurisdictional boundaries.

47. As regards termination, it is submitted that after his return from Tanzania, the claimant found no position and took 10 days leave returned on 13th March only to receive a notice of retrenchment on 15th March 2017 and received no other communication and thus stood dismissed by way of redundancy by April 15, 2017.

48. It is submitted that the Respondent rendered no evidence that the letters dated 24th, 25th April, 8th May and 15th May were actually received by the claimant and by May 9, 2017, the claimant had already dispatched a letter to the Respondent.

49. Section 107 of the *Evidence Act* is relied upon to urge that the onus lay on the respondent to prove that the claimant received the letters.

50. As regards declaration of redundancy, reliance is made on the provisions ofsection 2 and 40 of the *Employment Act*, 2007 for the definition of the term redundancy and framework on redundancy.

51. It is urged that the respondent rendered no evidence that it had notified the Labour Officer of its intention to declare the claimant redundant.

52. It is further submitted that the Respondent did not comply with the provisions of section 40 of the *Employment Act* and thus unfairly terminated the claimant's employment.

53. The Court of Appeal decision in *Thoma De La Rue (K) Ltd V. David Opondo Omutelema* (2013) eKLR is relied upon to reinforce the submission that the provisions of section 40 were not complied with.

54. On entitlement to reliefs, it is urged that the claimant was entitled to 2 months' notice as provided by the employment contract, House Allowance for 4 years as alleged that it was reduced from Kshs.30,000/= to Kshs.4,000/= a total Kshs.520,000/=.

55. As regards severance pay, it is contended that section 40 (1) (g) of the *Employment Act* provides for it. The decision in *H. Young and Co. EA Ltd V. Javan Were Mbango* (2016) eKLR is relied upon to buttress the submission on the entitlement to severance pay.

56. On damages for unfair rumination, the court is urged to award maximum compensation in view of the duration served. The decision in *Charles Kambo Wamai V. Bamburi Cement Ltd* (2013) eKLR is relied upon.

57. Finally on costs, it is urged that the claimant should be awarded costs as they follow the event.

Respondent's submissions

58. The respondent identifies four issues for determination namely, date of engagement, status of Bata Shoe Kenya and Bata Shoe Tanzania, whether the claimant was constructively dismissed and the reliefs sought.

59. As regards engagement, it is submitted that the date of engagement was 1st January, 1998 when he was employed as a Booking Clerk as per the letter of appointment. That the written agreement was the all and end all. The sentiments of the court in *Muthuuri v. National Industrial Credit Ltd* (2003) eKLR are relied upon.

60. That the NSSF statement was extrinsic evidence and thus inadmissible to vary or add the letter of Appointment.

61. It is submitted that the claimant was bound by the terms of the contract having signed the same. Further, the decision in *National Bank of Kenya Ltd v. Pipeplastic Samkolit (K) Ltd and another* (2000) EA 503 is relied upon to urge that the duty of the court was to give effect to the intention of the parties.

62. The court is urged to find that the claimant was engaged on 23rd February 1998.

63. As to the status of Bata Shoe Kenya and Bata Shoe Tanzania, it is urged that the letter heads of the letters dated 23rd February, 2017 and 5th June, 2017 bore the respective names of the two companies which demonstrates that they were distinct entities and the terms of engagement were distinct. That

in Tanzania, termination notice was 3 months but in Kenya it was 2 months and the companies are in different jurisdictions.

64. It is urged that the claimant has not proved that the entities operated as one. Reliance is made on the decision in Paulo Chacha Isack V. Manpower Guard Services and another (2020) eKLR, where the claimant sued Manpower Guard Services in lieu of Targets Guards Ltd the suit was dismissed as the two were separate entities.

65. It is submitted that the claimant's employment by Bata Tanzania was compromised when he left Tanzania and Bata Kenya retained discretion of how to redeploy him. Section 9(2) of the *Employment Act*, 2007 is relied upon.

66. As to whether the Claimant was constructively terminated on the ground of redundancy, it is urged that he was not because when he returned from Tanzania, there was no position for him in the Accounting Department and there was a delay in assigning him work and the Respondent issued a letter of intention to declare him redundant. That the letter of intended redundancy was withdrawn on April 24, 2017and alternative employment was given.

67. It is submitted that the claimant was aware of the contents of the letter dated April 24, 2017since he reported to the Production Manager's office as intimated by the letter and also attended a meeting at the Labour Office on May 2, 2017.

68. It is contended that the respondent had not clearly and unequivocally manifested its intention to terminate the claimant's services by way of redundancy and it thereafter withdrew the letter. The decision in *Edwin Beiti Kipchumba V. National Bank of Kenya Ltd* (2018) eKLR is relied up for the test applicable in determining whether the respondent intended to terminate the Claimant's contract.

69. It is the Respondent's submission that the claimant has failed to prove on a balance of probability that he was constructively dismissed on grounds of redundancy. Reliance is made on the decision in *Douglas Omunyin Otungu V. Board of Trustees Redeem Christian Church of God* (2022) eKLR.

70. It is the Respondent's submission that the claimant absconded duty and attempts to recall him fell through.

71. As regards the reliefs sought, it is submitted that the Claimant is not entitled to any of the reliefs sought because he absconded duty.

72. It is further submitted that the claimant is not entitled to severance pay because he was not constructively dismissed and is also not entitled to compensation.

73. As regards house allowance, it is the Respondent's case that it has neither been pleaded nor proved as special damages. The decision in John *Nanbokule Omukuba V. N. Mesh P. Sha Brimji* (2008) eKLR to underscore the need to plead and prove special damages.

74. The celebrated words of the Lord Chief Justice Goddard in Bohham – Carter v. Hyde Park Hotel Ltd (1948) TLR 177 at 178 cited with approval by Visram J. (as he then was) in *John Njenga V. Bata Shoe Company Ltd* (2001) eKLR emphasizing on the need to prove damages.

75. Finally, it is submitted that since the alleged loss was neither specifically pleaded nor proved, the claim fails.

Analysis and Determination

76. The issues for determination are;

(i) When the Claimant was employed by the Respondent.

(ii) Whether the Claimant's employment was terminated on account of redundancy or absconded duty.

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

77. As to when the Claimant was employed by the Respondent, while the Claimant alleges that he was engaged in February 20, 1993, the Respondent contends that he was employed on 1st January 1998 according to the contract on record dated February 23, 1998.

78. The Claimant testified that he was first engaged in 1993 on contractual basis as a delivery clerk/wages clerk/office clerk or in procurement and became a booking clerk in 1998 before the contract on record was entered into.

79. The Respondent did not contradict this evidence which appear to be supported by the NSSF statement on record.

80. More significantly, the Respondent witness Mr. John Nguru confirmed on cross-examination that the Claimant was employed in 1993 contrary to paragraph 2 of his statement dated April 19, 2022.

81. Contrary to the Respondent's submission that the contract dated February 23, 1998is the all and end all, the Claimant's case is that he had another contract previously which was unwritten a fact the Respondent did not contradict.

82. Weighing the Claimant's and the Respondent's evidence on this issue, the court is satisfied that the Claimant's evidence outweighs that of the Respondent. It is the finding of the court that the Claimant was employed on February 20, 1993.

83. As to whether the Claimant's employment was terminated on account of redundancy, or he absconded duty, the parties have adopted diametrically opposed positions.

84. While the claimant insists that his employment was terminated on account of redundancy, the Respondent maintains that the Claimant absconded duty and attempts to contact him failed.

85. Section 2 of the *Employment 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 addition of office, job or occupation and loss of employment."

86. Section 40 of the *Employment Act* provides the framework for redundancy.

87. As observed in *Charles Kambo Wamai V. Bamburi Cement Ltd* (Supra)

> " Redundancy is a special mode of terminating employment and that is why the law provides for special reasons for it including involvement of a Government Officer to validate the process. Any default by the employer to comply with the set rules of procedure, the redundancy process become invalid and therefore unfair termination."

88. In *Freight In time Ltd v Rosebell Wambui Munene* (2018) eKLR the Court of Appeal stated as follows;

In addition, section 40 (1) of the *Employment Act* prohibits in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions namely: . . ."

89. The court enumerated the conditions set out in section 40 (1) of the Act. Legions of decisions of this court and the Court of Appeal have held that for a redundancy to pass muster, all the conditions prescribed by section 40(1) of the *Employment Act* must be complied with.

90. These conditions are;

    i. Notice to the union, if the employee is a member of a trade union, or the employee, if not a member and the Labour Officer in-charge of the area of employment, not less than a month prior to the date of the intended date of termination on account of redundancy. The notice must set out the reasons for and the extent of the intended redundancy. (See *Thomas De La Rue (K) Ltd V. David Opondo Omutelema (*supra).

    ii. In determining the employee to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employee.

    iii. Where the terminable benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee or not being a member of a trade union

    iv. The employer must pay the employee any leave due in cash.

    v. The employer must pay the employee at least on months' notice or one month's wage in lieu of notice.

    vi. The employer must pay the employee severance pay at the rate of not less that 15 days for each completed year of service. (See Kenya Plantation and Agricultural Workers Union V. Harvest Limited Case No. 77 of 2014).

91. As stated by the Court of Appeal in *Barclays Bank of Kenya Ltd and another v. Gladys Muthoni and 20 others* (2018) eKLR,

> " There is a heavy burden of proof placed upon the employer to justify any termination of employment"

92. I will now proceed to apply the provisions and propositions of law stated above, to the facts of this case.

93. It is common ground that after the Claimant returned from Tanzania as documents on record reveal, he was not assigned any particular role by the Respondent despite compliance with the contents of the email from the Regional Financial Director, Mr. Mayank Goel dated February 7, 2017and the Claimant's response, and the claimant took 10 days leave.

94. It is also not in dispute that when the Claimant reported back to the office, on or around March 13, 2017, he was issued with a 30 days' notice of intention to be retrenched and request for 20 days leave.

95. Contrary to the Respondent's submission that the Respondent had not clearly and unequivocally intended to terminate the Claimant's employment, there is no evidence of any communication by the Respondent to the Claimant even after the 30 days' notice expired until on 25th April when the

discussion on transfer to the Production Department arose and the letter dated April 24, 2017 was handed over. The Respondent's conduct was sufficient.

96. Prior to the letter of April 24, 2017, the Claimant had reported the dispute to the Labour Officer on April 20, 2017and the Labour Officer did a letter of even date requesting the Respondent to pay the Claimant redundancy dues as particularised therein.

97. There is no evidence on record that the Respondent responded to the request by the Labour Officer dated April 20, 2017which forced the Claimant to consult the Labour Officer again on April 28, 2017and the Respondent was invited for a meeting on May 3, 2017at 2.30 p.m and the meeting took place.

98. Although RW1 testified that the Claimant was advised to report to work, he provided no evidence of a consensus on the way forward.

99. It is unclear what directions the Labour Officer gave or what the parties agreed as far as the Claimant's issues were concerned and the Respondent did not reduce the same into writing as evidence of the deliberations.

100. Whereas the Claimant acknowledge receipt of the letter dated April 24, 2017, on 'Transfer and Redeployment' on April 25, 2015, the Respondent tendered no evidence that he received the letters dated 25th April 2017, May 8, 2015 and May 15, 2015.

101. RW1 confirmed on cross-examination that the letters dated April 25, 2017 and May 8, 2015were delivered to the Claimant's residence.

102. It is unclear who delivered the letters and why the Claimant did not acknowledge receipt. RW1 did not allege that the Claimant declined to acknowledge receipt of the letters.

103. From the evidence on record, it is discernible that after the Claimant's return from Bata Shoe Company Tanzania, there was no indication by the Respondent on where he would be redeployed until the letter of April 24, 2015. RW1 testified that the Claimant was to return to the Department he previously worked which is not supported by the evidence on record.

104. Relatedly, the parties did not reach an agreement at the Labour office, as regards the proposed redeployment.

105. In the courts view, the Respondent initiated a concatenation of events by its letter of March 15, 2015which it appears to have lost control over and was left scrambling for a landing ground after the Claimant raised the issue with the Labour Officer on or before April 20, 2014, five days after expiration of the notice the Respondent had given.

106. The Respondent neither communicated with the Claimant during the intended redundancy nor after, until on April 24, 2017when it purported to transfer and redeploy the claimant and withdrawal the notice of intention to retrench on April 25, 2017 after the notice had run its full course.

107. The absence of communication from the Respondent for almost 40 days after giving notice of intention to retrench the Claimant for non-availability of a vacant position for him and the Claimant's prompt reporting to the local Labour Officer may be construed as constructive dismissal on account of redundancy.

108. Relatedly and more significantly, the Respondent did not comply with any of the provisions of section 40 (1) of the *Employment Act*, 2007 which is a mandatory requirement.

109. For the above stated reasons, it is the finding of the court that the Claimant's employment was unlawfully terminated by the Respondent disguised as a redundancy.

110. As regards the alleged desertion or absconding of duty by the Claimant, the court is in agreement with the Claimant's submission that he who alleges must prove as provided by sections 107 and 108 of the *Evidence Act*.

111. As mentioned elsewhere in this Judgement, the Respondent led no evidence to prove that the Claimant actually received or was served with the letter datedApril 25, 2017as well as those dated 8th and May 15, 2017 and declined to acknowledge receipt.

112. RW1 merely told the court that the letters were delivered to his house with no record of delivery by who or evidence of receipt or refusal to acknowledge receipt. To his credit RW1 confirmed on cross-examination that he had no evidence to show that the Claimant received the letters.

113. It is not unreasonable to assume that the Respondent had the Claimant's cell phone number. Relatedly, RW1 led no evidence on how his office tried to contact the Claimant. Attempts to do so through the spouse were unsubstantiated.

114. As explained in the South African case in *Seabolo V Belgravia Hotel (1997) 6 BLLR 829* (CCMA)

> " .....desertion as distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or having left his or her post, subsequently formulates the intention not to return."

115. As regards the defence of desertion Onyango J. had this to say in *Felistas Acheha Ikatwa v. Charles Peter Otieno* (2018) eKLR.

> " The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered."

116. A similar holding was made in S*imon Mbithi Mbane V. Inter Security Services Ltd (2018) eKLR and Nzioka V. Smart Coatings Ltd* (2017) eKLR.

117. In the instant case, the Respondent led no evidence to show that attempts were made to contact the Claimant through his Cell phone number or the letters on record reached him.

118. Be that as it may, from the evidence on record, it is clear that the Claimant did not resume duty as such until he was constructively terminated on account of redundancy.

119. For the foregoing reasons, it is the finding of the court that the Respondent has on a balance of Probability failed to prove that the Claimant absconded duty or deserted the place of work.

120. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

i. Salary for April 2017 Kshs.84,000/=.

121. The Claimant testified that one of the complaints made to the Labour Officer was the salary for April 2017 which the Respondent had not paid by 2nd May 2017.

122. Granted that the Claimant's case is that he was declared redundant and the court has held that it was constructive, and notice expired on 15th April 2017, the Claimant cannot claim to have

been in employment thereafter and rendered no services to the employer. The claimant is awarded Kshs.42,000/= being the salary for 15 days worked in April 2017.

ii. 3 months salary in lieu of notice

123. The Claimant led no evidence as to why he should be paid 3 months in lieu of notice having been advised to report to the office in Kenya after the sojourn in Tanzania. The contract concluded with Bata Shoe Tanzania had no application. The contract dated February 23, 1998 was applicable. The Claimant is awarded two months salary in lieu of notice Kshs.168,000/=.

iii. Severance pay Kshs. 1,008,000/=

124. Severance pay is only payable where a redundancy is conducted in consonance with the provisions of the section 40 (1) of the *Employment Act*. In the instant case, the Respondent did not comply with the provisions of the Act. As observed by Makau J. in *Charles Kambo Wamai V. Bamburi Cement Ltd* (Supra),

> "Any default by the employer to comply with the set rules of procedure, the redundancy process becomes invalid and therefore unfair termination."

125. The Court of Appeal adopted a similar approach in *Freight in Time V. Rosebell Wambui Munene* (Supra).

The claim is disallowed.

iv. Unfair termination of grounds of redundancy Kshs.1,008,000/=

126. Having found that the Claimant was constructively dismissed on account of redundancy, the Claimant is eligible for the discretionary relief under section 49 (1) (c) of the *Employment Act*.

127. In determining the quantum of compensation, the court has considered the fact that;

i. The claimant was employee of the Respondent from 1998 until April 2015 a period of 19 years and 2 months which is along period of time and wished to continue.

ii. The Claimant had no record of misconduct or disciplinary hearing.

iii. The Claimant did not appeal redundancy notice.

In the circumstances the court is satisfied that the equivalent of 8 months salary is fair, Kshs.504,000/=.

v. Damages for unfair termination generally Kshs.1,008,000/=.

128. The claimant led no evidence to establish this claim and it is declined.

129. In the upshot, judgement is entered for the Claimant against the Respondent as follows;

(a) Salary for 15 days worked in April 2017, Kshs.42,000/=

(b) Two months salary in lieu of notice Kshs.168,000/=

(c) Equivalent of 8 months salary compensation Kshs.504,000/=

(d) Costs of this suit.

(e) Interest at court rates from the date of Judgment till payment in full.

130. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JULY 2022

DR. JACOB GAKERI

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 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.

DR. JACOB GAKERI

JUDGE