



**REPUBLIC OF KENYA**

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

**AT MOMBASA**

**CAUSE NO. 832 OF 2017**

**JAPHETH KOOME INYINGI.....CLAIMANT**

**- VERSUS -**

**BARAKA FM.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> April, 2021)

**JUDGMENT**

The claimant filed the memorandum of claim on 02.11.2017 through Oyugi Kitoo & Company Advocates. The claimant's case is that he was engaged by the respondent as a reporter effective 01.12.2004. He was given a letter of appointment and his last monthly pay was Kshs.70, 000.00. Further, on 25.02.2016 the respondent served him a redundancy notice instructing the claimant to proceed on his outstanding leave days as from 26.02.2016 to 31.03.2016. The letter required the claimant to handover the respondent's property in his possession (on 25.02.2016) before proceeding for leave on the following day. The claimant went on leave and expected further communication from the respondent by 31.03.2016 but he received no such communication. The claimant's case is that the procedure in section 40 of the Employment Act, 2007 was not followed and the respondent had no justifiable cause to terminate the contract of service. The claimant prayed for judgment against the respondent for:

- a. A declaration the termination by the respondent was unfair.
- b. One-month salary in lieu of notice Kshs. 70,000.00.
- c. Unlawful (NSSF) deductions for 18 months Kshs.7, 200.00.
- d. Compensation for unlawful termination Kshs. 840, 000.00.
- e. Total claim Kshs. 917, 200.00.
- f. Costs of the claim plus interest thereon at court rates.
- g. Any other relief that the Honourable Court may deem fit to grant.

The respondent filed on 07.12.2017 the response to memorandum of claim and counterclaim through M/S Muturi Gakuo & Kibara Advocates. The respondent admitted employing the claimant as pleaded for the claimant. The respondent stated that the claimant underperformed in his duties which occasioned poor media rating of the respondent on various dates in 2013 and 2014. To enhance capacity of programing department, the respondent initiated and held several discussions with the claimant who informed the respondent that there was no room for improvement as he had done all he could do in the programing department. Further, the respondent's case is that as time ran, the respondent's media rating became poorer leading to great financial loss to the respondent's broadcast due to poor programing and which task was handled by the claimant. Further, due to the poor rating and claimant's poor performance, it was mutually agreed between the parties herein that the claimant be deployed as an External Relations Manager. Further, the respondent engaged consultants to rebrand and restructure the respondent company and some roles were thereby rendered redundant including but not limited to the position and role of External Relations Manager. Further, once the restructuring and rebranding report was released, the claimant was served with a redundancy letter. By the letter dated 01.04.2016 the respondent informed the claimant that the total severance payment amounting to Kshs.330, 000.00 was due. The respondent's case was that the redundancy procedure per the Employment Act was followed. Further the claimant was given a one-month redundancy notice and he was not entitled as prayed for.

The respondent counterclaimed that upon conducting an internal audit, it discovered that the claimant had consistently drawn full salary even

in months when he did not attend all working days on diverse dates between 2014 and 2015 amounting to an overpayment of Kshs. 714, 000.00. The claimant was notified the overpayment by letter dated 30.06.2016 and the respondent claimed for a set-off or counterclaim. The respondent prayed for judgment against the claimant for:

- a. The sum of Kshs.174, 000.00.
- b. Costs of the suit.
- c. Interest on (a) and (b) above at Court rates.

The claimant filed on 18.01.2018 the reply to response to the memorandum of claim and set off or counterclaim. The claimant denied the underperformance as was alleged for the respondent. The claimant stated that the redundancy had not been in accordance with the Employment Act, 2007. The claimant denied that the respondent had delivered to him the alleged notice to refund overpayment dated 30.06.2016. The claimant denied owing the respondent money as counterclaimed.

The claimant testified to support his case. The respondent's witness (RW) was Joseph Akwiri, the respondent's Operations Manager. The Court has considered the pleadings, the evidence and the final submissions filed for the parties.

To answer the 1<sup>st</sup> issue for determination the Court returns that the parties were in a contract of service per the letter of offer of employment dated 31.12.2004.

To answer the 2<sup>nd</sup> issue for determination, the Court returns that the contract of service was terminated by the redundancy notice dated 25.02.2016. The letter conveyed to the claimant that in view of the new company structure where some roles or positions had been affected, the claimant's position had been rendered redundant and the respondent would not need the claimant's services effective 01.04.2016. The letter further stated thus, **"The record shows you still have some outstanding leave days. Therefore, you proceed on leave as from 26<sup>th</sup> February 2016 until 31<sup>st</sup> March 2016. Please ensure you hand over any company property in your possession today the 25<sup>th</sup> February 2016 before you proceed on leave as from the 26<sup>th</sup> February 2016. At the completion of your leave, the Company shall vanish you with details of your severance pay...."**

The 3<sup>rd</sup> issue for determination is whether the termination was unfair. The claimant's case is that the termination was not in accordance with the redundancy procedure in section 40 of the Employment Act, 2007. The respondent's case is that the statutory procedure was complied with. The redundancy notice of 25.02.2016 was copied to Labour Officer Coast Region and Labour Officer Mombasa County and the copy exhibited for the claimant appears to show that the Labour Officer received the notice on 26.02.2016 or thereabouts. The Court finds that the respondent complied with section 40 (1) on giving not less than one-month notice to the claimant and the area labour officer of the reasons for and the extent of the intended redundancy. The claimant testified that he was not a member of a trade union and the Court finds that the respondent correctly served the notice upon the claimant. It was submitted for the claimant that the redundancy notice per letter dated 26.02.2016 failed to give reasons but the Court finds that the letter clearly stated the purported reasons as restructuring and rationalization of staff rendering the position redundant. In Kenya Plantation and Agricultural Workers Union –Versus- Harvest Limited [2014] eKLR the Court held that the criteria for selecting candidates for redundancy as provided for in section 40 of the Act must be shown to have been complied with and failing which, the redundancy would be unfair. In the instant case it is submitted for the claimant that the respondent did not produce any document to show that the statutory criteria was followed in selecting the claimant for redundancy. However, the Court finds that it was not the claimant's case that he held such position similar to one held by other respondent's employees so that in the Court's opinion, the issue of selection for redundancy did not arise. As urged for the respondent, the claimant last held the position of External Relations Manager which in absence of any other evidence, was one post in the respondent's establishment. Thus, the Court holds that where only one post is affected in a redundancy process and no other material facts are urged and proved to justify compliance with the statutory or contractual selection criteria for affected employee, the issue for compliance with statutory or contractual selection criteria would not arise. It was further submitted for the claimant that the redundancy notice promised payment of severance pay but which did not come to fruition despite multiple attempts on the part of the claimant to follow up on his severance pay and the claimant was terminated prior to payment of terminal dues. The Court finds that indeed, as per the evidence, the respondent terminated the claimant's employment effective 01.04.2016 and without paying the separation dues. Under section 40 (1) of the Act, as a precondition for redundancy, the employer is required to pay the employee any pending leave in cash; not less than one month's wage in lieu of notice; and severance pay at the rate of not less than 15 days' pay for each completed year of service. The payments having not been effected as mandatorily provided, the Court finds that the termination was to that extent procedurally unfair.

Section 43 of the Act required the respondent to show that as at termination the reason for termination existed as genuine. The Court finds that the respondent has not exhibited the material on the alleged restructuring and staff rationalization. The respondent has not also exhibited the documentation on the alleged losses leading to the alleged restructuring and staff rationalization. The redundancy notice by the letter 25.02.2016 stated that the claimant's position had been rendered redundant. Section 77 of the Employment Act provides, **"When a post, which has been notified to the Director as vacant, has been filled or has been abolished before being filled, the employer shall notify the employment service office of this in writing within two weeks of the filing of the post or of its abolition, as the case may be."** The respondent has not shown that it notified the employment service office about the alleged abolition of the post held by the claimant. The Court therefore returns that, on a balance of probability, the reason for termination, namely redundancy of the post of External Relations Manager which the claimant last held, was not genuine as at the time of the redundancy decision.

For the stated reasons the Court returns that the termination of the contract of service between the parties amounted to unfair termination.

The 4<sup>th</sup> issue for determination is whether the claimant was entitled to the remedies as prayed for. The Court makes findings as follows:

- a. The Court has found that the termination was unfair and the claimant is entitled to the declaration as prayed for.

b. The Court finds that the claimant is entitled to one-month salary in lieu of notice **Kshs. 70,000.00** and as prescribed in section 40(1) (f) of the Act.

c. The claimant prays for unlawful (NSSF) deductions for 18 months **Kshs.7, 200.00**. The claimant has exhibited his pay slips to show he was deducted but the money was not remitted to NSSF per exhibited NSSF statements. The Court will therefore allow the claim and prayer. While allowing the refund, the Court has considered section 19 (6) of the Employment Act, 2007 which allows the Court to make such orders for refund of deducted wage but which deduction is not remitted by the employer to the intended beneficiary.

d. The claimant prays for compensation for unlawful termination Kshs. 840, 000.00. The Court has considered the factors to be considered in awarding compensation under section 49 of the Employment Act, 2007. The claimant desired to continue in employment. While alleging that the claimant contributed to the termination due to poor performance leading to claimant's losses, the Court finds that the respondent failed to establish the poor performance (while the claimant was still in service) and by way of a notice and a hearing as envisaged in section 41 of the Act. Further, the Court has found that the respondent has failed to prove the alleged losses said to be attributable to the alleged claimant's poor performance. The Court finds that the claimant did not therefore contribute to his termination. The claimant had served the respondent for a long time from 01.12.2004 to 01.04.2016. The aggravating factor was that the respondent, in breach of section 40 of the Act, failed to promptly pay the redundancy dues which are said to have been computed at Kshs.330, 000.00 in severance pay. The respondent did not pay the claimant any money consequential to the termination. RW testified that the respondent had not refused to pay the claimant's redundancy dues but was facing economic hardship hence the inability to pay. RW further testified, "**Claimant was given letter of 01.04.2016 showing terminal dues of 330,000. The letter of 01.04.2016 referred to in my witness statement is not filed. The 330,000/= has never been paid to claimant.**" The Court has specifically considered that the due severance pay was not paid at all. In the circumstances, the claimant is awarded 12 months' salaries in compensation making **Kshs. 840, 000.00** as prayed for.

The **5th issue** for determination is whether the respondent is entitled as prayed for in the counterclaim. The counterclaim is for Kshs. 174, 000.00 alleged to be salary drawn by claimant when he did not attend work on some days. It is alleged that the respondent notified the claimant about the claim by the letter dated 30.06.2016. The letter, which the claimant has denied receiving, states thus, "**The initial report indicates you were overpaid Kshs.387, 333 in the year 2014 and Kshs.326, 667 total Kshs. 714, 000.**" RW testified that audit was conducted and it was discovered that the claimant had been overpaid per the counterclaim and he had already left the respondent's service. RW confirmed that the audit report had not been filed in Court. RW further testified that the letter dated 30.06.2016 had been delivered by email but the relevant email communication had not been filed. The Court has considered the evidence. The Court finds that the letter dated 30.06.2016 had not been shown to have been delivered and there is no reason to doubt the claimant's evidence that he never received the demand. The Court further finds that in absence of the audit report referred to by RW and in absence of a disciplinary hearing as envisaged in section 41 of the Act, the respondent's claim and prayer has not been established on a balance of probability. The Court observes that the prayer in the counterclaim is Kshs. 174, 000.00 whereas the alleged demand letter referred to Kshs.714, 000.00 and such discrepancies serve as an impetus to the collapsing of the counterclaim. Further, section 90 of the Act provides, "**Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after cessation thereof.**" The Court considers that the alleged overpayment was a continuing injury from 2014 and 2015 when it allegedly took place and the respondent allegedly demanded for it on 30.06.2016. The Court further finds that the continuing injury being overpayment due to absence from duty lapsed at most on 31.12.2015, the conceivable date the claimant may have been absent. 12 months from 31.12.2015 lapsed on 31.12.2016. Thus the Court considers that for that continuing injury whose occurrence lapsed sometimes in 2015, the counterclaim was time barred when it was filed on 07.12.2017. Further, section 19 (1) of the Employment Act, 2007 allows an employer to deduct from an employee's pay a maximum of a daily wage with respect to any day the employee is absent from work without leave or other lawful cause or is absent from work. In the instant case, the Court finds that the respondent has not established that the claimant was absent from work without leave or lawful cause and, the evidence is that there were no disciplinary proceedings to establish the same. The Court further finds that the respondent has not shown that the claimed sum was calculated proportionate to due amounts deductible for each day of unjustified absence. In the circumstances, the respondent is found to have failed to strictly prove the alleged counterclaim and prayer.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the termination of the contract of service was unfair.
2. The respondent to pay the claimant a sum of **Kshs.917, 200.00** (less PAYE) by 01.07.2021 failing, interest at Court rates to be payable thereon from the date of this judgment till full payment.
3. The counterclaim is dismissed with costs.
4. The respondent to pay costs of the claimant's suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 30<sup>TH</sup> APRIL, 2021**

**BYRAM ONGAYA**

**JUDGE**