



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 451 OF 2017

ZACHARIA MAINA KIMANI.....CLAIMANT

VERSUS

MUMI FLORA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 16th November, 2017 on even date through the firm of Munene Chege and company advocates claiming wrongful and unfair termination, underpayment and failure by the respondent to pay his terminal dues. He therefore sought for the following reliefs;

- a) **A declaration that the claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal.**
- b) **Compensation for unfair termination**
- c) **An order compelling the respondent to settle the outstanding benefits as per paragraph 22 of the Memorandum of Claim**
- d) **Cost of the suit and interest thereof at court rates**
- e) **Any other relief that this court may deem fit to grant.**

2. The Claimant avers that he was employed by the respondent as a general laborer in the year 2014 till 20th May, 2017 when he received a letter titled '**Termination of Employment**' from the respondent claiming that the company was undergoing financial challenges and promised to pay his terminal dues which none has been paid as at the time of filling this suit.

3. He avers that he was paid a monthly basis salary of Kshs. 7500/- instead of the statutory minimum wage of Kshs. 9,024.15/- together with house allowance of Kshs 1,353.62 totaling up to Kshs. 10,377.77/-.

4. The claimant avers that he never went for leave during his stint as an employee at the respondent's employ, neither was he compensated for the same.

5. He alleges that the respondent failed to give him notice of the alleged redundancy as required in law neither did the respondent pay him in lieu of Notice as required.

6. He stated that he was not paid his severance pay as provided for under section 40(1)(d) of the Employment Act.

7. The claimant avers that no criterion was followed in declaring him redundant. further that the respondent failed to follow due procedure in declaring his position redundant and therefore he was unfairly and wrongfully dismissed from employment and urged this Court to hold as such.

8. The Respondent in reply filed their memorandum of Defence dated 21st February, 2018 on 22nd February, 2018 and conceded having employed the claimant herein but denied unlawfully terminating his services.

9. It was averred that in the year 2017, the respondent was faced with financial challenges occasioned by different trading environment in the flower industry forcing it to restructure its company.

10. That, the respondent informed the labour office and the affected employees of the intended redundancy on 1st April, 2017 by publishing the names of all affected employees on its Notice Board as per its annexure 1.

11. That on 20th May, 2017 the claimant was issued with the letter of termination and given his terminal benefits being; one month pay in lieu of notice, salary for May, 2017, leave earned but not utilized and severance pay at 15 days for every complete year of service all amounting to Kshs. 21, 868/- as per the payment sheet marked as respondents exhibit 2.

12. That at all times the claimant's wages were above the provided wages for a general labourer under the Regulations of wages (Agricultural industry) Amendment Order 2017 marked as its exhibit 3 in that the claimant was paid Kshs. 7500/- when the Regulation Order provides for Kshs. 6415.55/-.

13. The respondent further stated that the claimant went for leave each year as per the leave application forms marked as Exhibit-4 and the leave earned but not utilized was pro-rated and paid alongside his terminal benefits as seen in the respondent Exhibit 2.

Hearing

14. During hearing, the claimant(**CW-1**) testified and adopted his witness statement filed on 16th November, 2017 and the document filed therein and produced the termination letter marked as MF-1, The pay slip as MF-2 and the list showing employee and their designation marked as MF-3.

15. On cross examination, he testified that on termination he was given Kshs 21,000 as his terminal dues but indicated that the amount paid was low as compared to what he is entitled to. He further testified that he was not paid house allowance and that he was underpaid.

16. The respondent called one witnesses, **Penina Muthoni**(RW-1) who testified that she is the Human resource manager at the Respondent employ and adopted her witness statement dated 29th October, 2018 and filed in court on 6th November 2018. She testified that the claimant was paid all his terminal benefits and that his basic salary was computed as per the order governing agricultural workers and that the claimants pay was above what the orders requires therefore was not underpaid as pleaded.

17. On cross examination, RW-1 testifies that the respondent wrote a letter to the labour office but have not produce the same before court to affirm that it was received by the labour office. Further that they communicated the financial constraints they had to their employees both verbally and in writing but confirmed that they have not produced any financial statement to affirm the financial challenges the company was going through. That 29 employees including the claimant were declared redundant.

Submissions

18. The Claimant submitted that, the respondent failed to follow the laid down procedure under section 40 of the Employment Act with regard to laying off of employees on account of redundancy. He argues that the respondent failed to give him notice as required in law neither did they serve the Labour office with the statutory notice. Further that the computation arrived at by the respondent were made unilaterally and not with the involvement of a Labour officer as required when calculating terminal dues of an employee who is not a member of a trade union. this argument was buttress by citing the case of **Francis Maina Kamau –vs- Lee construction [2014 eklr]** where the court opined that termination of an employee on account of redundancy has to follow the laid down procedure failure to which the termination shall become unfair within the meaning of section 45 of the Employment Act.

19. Additionally, it was submitted that the conditions to be observed in declaring employees redundant is mandatory not optional as was held in the court of Appeal case of **Thomas de la rue –vs- David opondo omutelema [2013] eklr**.

20. The claimant further submitted that the respondent has failed to produce any evidence that it was experiencing financial difficulties and that RW-1 during hearing testified that it has hired new employees to fill the position of the claimant and other employee declared redundant, raising questions as to the legitimacy of the said redundancy.

21. The claimant in conclusion urged this court to find in its favour and allow his claim as prayed.

Respondent's Submissions

22. The respondent submitted that it followed due procedure required of it under section 40 of the Employment Act in declaring its 29 employees including the Claimant redundant. It was argued that the respondent informed the County Labour Office in Nakuru of the said redundancy by its letter dated 1st April, 2017 and served on 3rd April, 2017. He further submitted that the claimant was served with a notice titled termination letter on 20th May, 2017 which letter informed the claimant that his services were terminated on redundancy occasioned by financial constraints which the respondent was going through.

23. The respondent further submitted that it paid the claimant all his terminal dues required in law which the claimant acknowledged during hearing having received a sum of Kshs. 21,868/-.

24. The respondent buttressed its submissions by citing the case of **Lucas O. Ondoya & 43 others –vs- Rift Valley Railways Kenya limited, HCCC No. 33 of 2009(UR)** which court held that the employer has the right under the employment Act to terminate the service of

the employee on redundancy, which right is not subject to negotiation.

25. The respondent further submitted that an employer is justified in restructuring its business to suit its requirements of profit making as held in **Samuel Gachomo Chege –vs- Roof Top Owners [2010] eKLR**.

26. The Respondent further submitted that an employer is justified in law to restructure its business to ease the burden of operational costs as long as due procedure as to the said restructuring is followed as was held in the case of **Kavuth Ngonzi & 11 others – vs- Kapric Apparel EPZ Ltd [2017] eKLR** where the court held that;

“It was proper for the respondent to use her managerial prerogative to lay off some of her workforce. Such prerogative is permitted under section 45(2)(b) of the Employment Act which provides that, the reason for terminating the service of an employee is fair if it relates to the operational requirements of the employer.”

27. In conclusion the respondent submitted that it followed due procedure require of an employer in declaring the claimant redundant and urged this Court to dismiss the claimants claim with costs.

28. I have examined the evidence of submissions of the parties herein. The claimant indicated that he was terminated vide a notice dated 20/5/2017 which he received and signed for on 22/5/2017.

29. This termination was effective 20/5/2017. He had worked for the respondent from 20/5/2014 and so had served for 3 years at termination.

30. His salary was gross 7200/= per month and he was a member of NSSF and NHIF. His contention is that the redundancy procedure was not followed before his termination.

31. The procedure envisaged is that found at Section 40 of 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. There is no proof that the respondent issued claimant any notice before termination. They allege they gave notice to the Labour Office as per the MFI – dated 1/4/2017.

33. The letter is however not signed by the Labour Officer and therefore the requisite procedure for redundancy was not adhered to.

34. In the circumstances I find the redundancy against the claimant was unprocedural.

35. I find for claimant and award him as follows;

1. 1 month salary in lieu of notice = 7,200/=

2. 10 month salary as compensation for unfair termination

= 10 x 7,200 = 72,000/=

Total = 79,200 less statutory deduction

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

Dated and delivered in open Court this **18TH day of MAY, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Wanyoike