



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 52 OF 2017

FRANCIS MURIMI KIGORO.....CLAIMANT

VS

READY CONSULTANCY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated and filed in court on 18th January 2017, the Claimant sued the Respondent for unlawful termination of employment and payment of terminal dues. The Respondent filed a Response to Claim on 9th March 2017.
2. On 11th February 2021, the Court heard the Claimant and the Respondent’s witness, Ibrahim Bocha. Thereafter, the parties filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a security guard, from September 2009 until 10th October 2016, when he was issued with a letter terminating his employment on account redundancy. At the time of leaving employment, the Claimant was earning a monthly salary of Kshs. 20,020.
4. The Claimant’s case is that the termination of his employment was in contravention of Section 40 of the Employment Act. He therefore claims the following:

- a) Salary in lieu of notice.....Kshs. 20,020
- b) Pay in lieu of leave for 2015-2016.....20,020
- c) Severance pay.....60,060
- d) 12 months’ salary in compensation.....240,240
- e) Certificate of service
- f) Costs plus interest

The Respondent’s Case

5. In its Response to Claim filed in court on 9th March 2017, the Respondent states that the Claimant was erroneously issued with a redundancy letter, which was later recalled. The Claimant was then offered another job on similar terms and conditions, which the Claimant declined.
6. The Respondent denies the Claimant’s entire claim and puts him to strict proof.

Findings and Determination

7. There are two (2) issues for determination in this case:

a) Whether the Claimant has made out a case of unlawful termination of employment;

b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

8. On 10th October 2016, the Respondent wrote to the Claimant as follows:

“Dear Murimi,

Termination of employment on account of redundancy

*The purpose of this letter is confirm the outcome of recent review by our clients **Mombasa Maize Millers Ltd** of its operational requirements, and what this means for you.*

*As a result of the security department having been earlier outsourced to **Texas Alarms Security**, this regrettably means your employment will terminate. Therefore your employment will end on the 11/10/2016.*

Due to your employment ending on account of redundancy, you will be paid as per the employment ACT 2007 as the law of Kenya and any outstanding pay.

We thank you for your valuable contribution during your employment with us. Please contact the office incase of any queries.

Sincerely,

(signed)

Director.”

9. The Respondent produced another letter of the same day addressed to the Claimant as follows:

“Dear Sir,

Re: Transfer Letter.

Refer to the above.

Following our letter dated the 10/10/2016 in respect to redundancy after further consultations with the directors, they have decided to cancel the redundancy and have decided to transfer and deploy you as follows.

You shall be transferred to Mombasa Maize Millers Ltd (Kisumu) as from the 14/10/16 and shall report to Kisumu-Mombasa maize millers ltd on the 30th OCT, 2016 and report to Mr. Festus Omollo the manager on the ground, to allocate you duties on that particular day.

We shall Endeavour to cater for your transport to Kisumu.

This is with immediate effect.

We ask that you cooperate.

Please note that all your salaries and benefits remain unchanged.

Please note the redundancy stands revoked.

Yours faithfully

(signed)

Director”

10. The Claimant denied receipt of the second letter. On the face of this letter, there is a hand written note indicating that the Claimant refused to sign and accept the transfer letter. The Respondent did not however present any person in whose presence the Claimant declined to accept the letter.

11. The Respondent also produced a show cause letter dated 15th November 2016, also addressed to the Claimant. This letter accuses the Claimant of failure to take up a transfer to Kisumu. The Claimant denied having received the letter and on its face, there is a handwritten note indicating that the Claimant was called and texted but he refused to collect the letter. Again, no testimony was called to back this averment.

12. In this case the Respondent makes serious allegations against the Claimant without calling any supportive evidence. The said allegations were therefore unverified and unproved.

13. This leaves the redundancy letter issued to the Claimant on 10th October 2016, as the only solid evidence before the Court. According to this letter, the Claimant's employment came to an end on account of redundancy.

14. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define 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 services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

15. By definition, redundancy bears two significant factors; first, it is undertaken at the instance of the employer and second, the conduct of the employee is not in question (see *Jane I Khalechi v Oxford University Press E.A. Ltd [2013] eKLR*).

16. While allowing employers to invoke redundancy as a legitimate mode of ending employment, the Employment Act at Section 40(1) sets out stringent conditions to be met. These conditions are 7 in number but may be placed in 3 broad categories namely; redundancy and termination notices, objective selection criteria and payment of statutory dues.

17. The Respondent made no attempt to observe any of the aforesaid conditions and as held by this Court in *Fatma Ali Dabaso v First Community Bank Limited [2018] eKLR* such failure amounts to unfair termination of employment. The Court therefore finds and holds that the Claimant has established a case of unlawful termination of employment and he is entitled to compensation.

Remedies

18. I therefore award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's failure to observe the law in bringing the employment relationship to an end.

19. I further award the Claimant one (1) month's salary in lieu of notice.

20. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

21. Having been declared redundant, the Claimant is entitled to severance pay.

22. In the end, I enter judgment in favour of the Claimant as follows:

a) 8 months' salary in compensation.....	Kshs. 160,160
b) 1 month's salary in lieu of notice.....	20,020
c) Leave pay for 1 year (20,020/30*21).....	14,014
d) Severance pay for 6 years (20,020/30*15*6).....	<u>60,060</u>

Total.....254,254

23. This amount will attract interest at court rates from the date of judgment until payment in full.

24. The Claimant is also entitled to a certificate of service plus costs of the case.

25. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft

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

LINNET NDOLO

JUDGE

Appearance:

Mrs. Kariuki for the Claimant

Miss Omido h/b for Mr. Birir for the Respondent