

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1970 OF 2016

BONIFACE MUTUNGA WAMBUA.....CLAIMANT

VERSUS

ALKASH LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant vide a Statement of Claim dated 22nd September 2016 sued the Respondent for the alleged unfair termination of his employment and refusal to pay his terminal dues. He averred that he worked as a Salesman/Shop Assistant at the Respondent's shop from around November 2007, at a basic salary of Kshs. 13,000/- per month and transport allowance of Kshs. 3,000/- and that he was not given house allowance. The Claimant averred that on or about 21st June 2016, the Respondent terminated his employment on account of redundancy after he had worked for nine years and that he was not given any notice or letter to show cause prior to the termination. He further averred that he sought the services of his advocates when the Respondent refused to pay his dues which include one month's salary in lieu of notice, one month's redundancy notice, days worked in June 2016, leave, public holidays worked, overtime, salary underpayments, service gratuity, severance pay and a Certificate of Service. He prays for an award and/or judgment against the Respondent for a declaration that the Claimant's termination from his employment was unlawful and wrongful and for payment of his terminal benefits totalling to Kshs. 3,088,656/-. He further prays for costs of the claim and interest on the payments at court rates.

2. The Respondent filed its Defence dated 24th November 2016 wherein it admits that the Claimant worked for it and was promptly paid his monthly salary inclusive of house allowance and overtime. It further averred that the Claimant deserted his duties from 20th June 2016 without giving notice to it contrary to Section 36 of the Employment Act. The Respondent denied that demand has been issued to it and prays the Claimant's suit be dismissed with costs. The Respondent also filed a Witness Statement made by Alkarim Abji who states that the Claimant was not dismissed from his employment as claimed but that he chose to remain at the Diamond Plaza area from where the Respondent had relocated its business when it moved to Sky Mall. That he tried in vain to call the Claimant to the new premises but he declined and that the suit papers in the claim were given to the Respondent having been collected from a shop owned by someone known to the Respondent. He further states that the Claimant never demanded from the Respondent for payment or dues at any given time.

3. The Claimant relied on the Statement of Claim, his Witness Statement and the documents filed in court in support of his case. He submitted that the Respondent contravened the principles of natural justice and the provisions of Section 41 of the Employment Act, 2007 when it failed to issue him with a letter to show cause and notice of termination. The Claimant submitted that the law on termination on account of redundancy under Section 40(1)(b) of the Employment Act is that where an employee is not a member of a trade union, the employer notifies the employee in person, in writing and also notifies the labour officer of the intended termination and gives at least a month's notice prior to the termination. The Claimant submitted that there is no evidence by the Respondent of any notice in the instant case and that there is therefore no reason for the Respondent to terminate his employment. He relied on the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR** where the Court held that the conditions for redundancies as outlined in the law are mandatory and not left to the choice of the employer because redundancies affect workers livelihood. He submitted that the termination of his employment on account of redundancy became unfair within the meaning of Section 45 of the Employment Act because the mandatory conditions as per the law were not adhered to by the Respondent. The Claimant submitted that as under Section 49 as read with Section 50 of the Employment Act, he is therefore entitled to 12 months' salary as compensation for the unfair termination of his employment on account of redundancy and considering the difficulty he has faced in securing alternative employment. The Claimant submitted that he is entitled to notice pay as under Section 35 of the Employment Act since the Respondent did not issue any notice to him and further entitled to a redundancy notice pursuant to Section 40(1)(f) of the Employment Act. The Claimant submitted that he is also entitled to the days he worked in the month of June 2016, pro rata leave, overtime and salary underpayments because the Respondent has failed to produce documents of his employment records, which it is mandated to keep as under Section 74 of the Employment Act, and has therefore not controverted the said claims. The Claimant submitted that since he was not registered under any statutory body for the entire time he worked for the Respondent and neither did it remit for him NHIF or NSSF, the claim for service gratuity ought to be paid and that no evidence has been produced to prove the contrary.

4. He further submitted that Section 40(1)(g) of the Employment Act provides that prior to termination of employment on account of redundancy, an employer has to pay the employee declared redundant severance pay at the rate of not less than fifteen days for each completed year of service. The Claimant submitted that he should be granted the claim for severance pay since there was no such payment by the Respondent. He submitted that he is entitled to a Certificate of Service in accordance with Section 51 of the Employment Act and that he is also entitled to costs and interest because the Respondent refused to act so that this suit would not have been necessary. The Respondent did not file any submissions.

5. The Claimant asserts unlawful dismissal and the Respondent asserts there was desertion by the Claimant. The Claimant asserts he was rendered unemployed by the Respondent's unlawful redundancy. To declare a redundancy, Section 40 places a burden on the employer to notify the Labour Officer, the trade union and where the employee is not a trade union member – directly to the employee and ensure that leave is paid in cash. There must be notice also paid. The Claimant also sought the one month's redundancy notice, days worked in June

2016, leave, public holidays worked, overtime, salary underpayments, service gratuity, severance pay. He asserts that he was not a member of the NSSF and therefore entitled to service pay. The Claimant was required to mount a claim for the overtime, public holidays worked, salary underpayments within 12 months of the alleged dismissal. The Claimant was allegedly terminated on 21st June 2016 and his claim was filed on 22nd September 2016 within the limitation period. He did not however tabulate the number of hours he worked for purposes of computation of the overtime, the alleged salary underpayments, the public holidays worked and the leave days earned but not taken for which he was entitled to recompense. The Respondent was required to be a keeper of records but though the Respondent is required to keep the records, it was not duty bound to prove the Claimant's claim. He was required to adduce some evidence on this even if it meant issuing interrogatories or notices to produce in order for the Respondent to be bound to produce the documents he required. He did not seek any such relief and therefore it is a matter of conjecture as to whether he indeed was entitled to leave dues, the public holidays claim or the underpayments alleged. He was unable to prove the alleged dismissal as he did not avail any evidence to this end and all there was were mere allegations. In the premises the Claimant's suit is only fit or dismissal and since the Respondent declined to participate in the matter despite directions issuing, the Respondent is not entitled to an order for costs. Suit dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2021

Nzioki wa Makau

JUDGE