



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1567 OF 2014

PADDY CHRIS ADHOLA.....CLAIMANT

VERSUS

ORPOWER 4 INC. LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein instituted this suit in vide a Statement of Claim dated 6th August 2014 against the Respondent seeking various relief for his alleged wrongful termination of employment. He averred that he was employed by the Respondent on 1st July 2009 and that he had prior to being employed by the Respondent had a stable permanent and pensionable job with M/s Kengen Co. Ltd where he had projected to work until retirement at 65 years were it not for the Respondent enticing him with permanent terms. That he diligently worked for the Respondent in Naivasha with zeal and without default of any of the terms and conditions of his employment at all material times and steadily got promoted with salary increments as a reward. He averred that he was wrongly terminated from his employment by the Respondent vide a redundancy letter dated 8th April 2014 and without facing any disciplinary hearing or action or being issued with a warning letter. The Claimant averred that the Respondent's reasons of redundancy are false and misleading since it has retained the said post and further recruited for the same despite its change of name and that the alleged redundancy was meant to send away the Claimant. He averred that the Respondent's actions disrupted his means of livelihood and career as getting a permanent and pensionable job at his current age of 54 years is difficult, not to mention the mental anguish for losing his previous job. The Claimant averred that the Respondent broke the cardinal principles of labour law by failing to follow due process and not awarding him redundancy package to cover for the remainder of his useful employment years. He averred that the Respondent's conduct of sacking him is mischievous, bad in law and malicious further because it failed to give him notice or adequate time to plan for alternative earning and purported to trick him to sign a vague/fake contract document. The Claimant averred that he has suffered loss and damage as a result of the breach and malicious conduct by the Respondent as particularised in his Claim, including subjecting him to ridicule and creating a bad image of his reputation. The Claimant thus prays for judgment against the Respondent for punitive damages for unlawful termination, general damages plus any other earning benefits and costs of the suit. The Claimant states in his Witness Statement that he was employed by the Respondent as a Storekeeper and later had his salary adjusted vide a letter dated 24th September 2012. He stated that he has suffered psychologically and financially from the time he was illegally terminated from employment and that his family is also suffering as he was the sole breadwinner and cannot get employment at his age.

2. The Respondent filed a Memorandum of Defence dated 22nd October 2014 averring that termination of the Claimant's employment on the grounds of redundancy was lawful and justified and that the Claimant and the Labour office were notified of the redundancy. The Respondent averred that the Claimant's position was abolished and his employment terminated with effect from 9th April 2014 and that the Claimant was fully paid his terminal dues which he accepted as full and final while confirming he held nothing against the Respondent. It further produces in its bundle of documents, the Claimant's appointment letter marked **Appendix 1** to confirm that it had employed him as a Storekeeper II together with the Organogram marked **Appendix 3** showing the new generating units in the organisation. The Respondent contends that when it abolished one storekeeper position, the Claimant was not retained as his colleague had served the Respondent for a longer period and was more experienced. The Respondent averred that the Claimant's claim for payment to the date of his retirement has no legal or factual basis, is misguided and misadvised and that the Claimant was given adequate notice and further involved in discussions regarding the structural changes. It thus denies the alleged particulars of mischief, illegality, malice and damage as pleaded against it by the Claimant and averred that the Claimant is not entitled to the reliefs sought. The Respondent prays that the claim is dismissed with costs.

3. The matter was disposed of by Written Submissions in compliance with Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Claimant submitted that he has proved his employment at the Respondent Company by supplying an appointment letter dated Thursday 25th June 2009, his contract of employment signed by him on 29th June 2009 and a letter dated 26th January 2010 confirming his employment. The Claimant submitted that he has supplied a copy of his pay slip for the month of March 2014 to prove his gross monthly earning. He submitted that the alleged redundancy did not take due regard of seniority in time and to skill, ability and reliability as set out at Section 40 of the Employment Act 2007 and further denies that he was copied on the redundancy notice letter addressed to the district labour officer. That there is no evidence whatsoever that the said letter was ever given to him and which letter in fact does not refer personally to him and that he only saw the letter on 9th April 2014 when it was served together with another letter terminating his employment. The Claimant cites the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR** where the

Court held that any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and that the same becomes unfair if the grounds used to identify the affected employees are not as per the law. The Claimant submitted that Section 40 of the Employment Act 2007 provides that:

“(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.”

4. The Claimant submitted that it is apparent from Section 40(1)(b) of the Employment Act that an employee should be notified of a redundancy situation personally in writing but which evidence of service the Respondent has failed to produce. The Claimant submitted that the Respondent has further not pleaded or otherwise demonstrated that it informed the Claimant about the criteria used in the selection of employees declared redundant in relation to Section 40(1)(c). He submitted that the Respondent has also not demonstrated that the Claimant was of lesser skill, ability and reliability than the Store keeper III who was his immediate junior who got promoted and that the Respondent has therefore not justified terminating the Claimant by redundancy. He thus prays that the Court finds there was no valid reason for termination of his employment and the alleged termination on account of redundancy which did not follow the conditions of Section 40(1)(b) and (c) of the Employment Act 2007 is as such unfair and unprocedural. The Claimant submitted that he seeks an award of damages for the unlawful termination equivalent to 12 months’ salary and relies on the case of **Faiza Mayabi v First Community Bank Limited [2019] eKLR** where the Court concluded that the respondents had failed to consult with the affected employees affected and found the termination unfair and unjustified before awarding the claimant 12 months’ salary as compensation for unlawful redundancy. He submitted that he is also entitled to general damages resulting from the Respondent’s breach of his right to Fair Labour Practices which is protected at Article 41(1) of the Constitution of Kenya and that the particulars of the unfair labour practices by the Respondent are set out at Paragraphs 12 and 14 in his Statement of Claim. He prays the Court awards him general damages at Kshs. 1 Million and relies on the case of **Alice Ndaani & 5 Others v Mwalimu National Savings and Credit Co-Operative Society Limited [2021] eKLR** where the Court found that the claimants’ right to fair labour practices and freedom from discrimination was violated by the respondent when they were laid off because they were over 50 years and the Court awarded the claimants general damages over and above compensation for unlawful and unfair termination. The Claimant further submitted that he ought to be awarded costs and interest since his former advocate on record served the Respondent with a demand letter on 19th May 2014 before filing the claim in court and which service the Respondent has not denied. He stated that he had abandoned prayers (i) and (ii) in his Claim which related to his claim for payment in lieu of notice and expected income for at least 11 years.

5. The Respondent submitted that both the Labour Office and the Claimant were issued with a redundancy notice in line with the provisions of Section 40 of the Employment Act and that the Claimant’s tabulation of terminal dues is consistent with termination of employment on account of redundancy. It further submitted that the Claimant has not established any factual, legal and/or contractual basis for an award of punitive damages and general damages plus any other earning benefits and which prayers must thus fail. The Respondent relied on the case of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR**, where Radido J. held as follows:

“General damages for wrongful and unlawful termination

49. The Claimant sought general damages for wrongful and unlawful termination to be assessed by the Court. It is trite law that general damages are not awardable for wrongful termination.

50. Wrongful termination is a concept of the common law and the authorities which I need not recite here limited any damages to the notice or reasonable notice period.

51. What the Employment Act has provided for is an award equivalent to a number of months wages not exceeding twelve months based on the gross monthly wages. Indeed, this is one of the primary remedies for unfair or wrongful termination.

52. This award though is discretionary and the statute has set out some thirteen factors which the Court ought to consider. The Court could take into account any, some or all of the factors.

53. *The Claimant had the benefit of legal representation. He did not plead for an award under this head. If he were a layman, I would have considered exercising my discretion to grant an award under this head. In the present case, I decline to exercise my discretion in favour of the Claimant.*”

6. The Respondent further cited the case of **Dorcas Kemunto Wainaina v IPAS [2018] eKLR** where the Court held that nearly all unfair terminations of employment would lead to some embarrassment and/or torture to an employee, but the statute has provided the primary remedies which do not include general damages. The Respondent relied on the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR**, where the Court of Appeal held that:

“The arguments advanced by Mr. Khagram were aptly explained by this Court in Walter Musi Anyanje v Hilton International Kenya Ltd & Another, Civil Appeal No. 269 of 2003 thus:

“Is an employee whose services have been terminated entitled to general damages? This Court in Kenya Ports Authority v Edward Otieno, Civil Appeal No. 120 of 1997 drawing support from the case of Addis v Gramophone Company (1909) AC 488 emphatically stated that there can be no general damages in respect of suits based on termination of employment contract since the relation of the parties to such contract is contractual and thus terminable only under the terms of the same contract. See also Rift Valley Textiles Ltd v Edward Onyango Oganda Civil Appeal No. 2 of 1992 and Ombanya v Gailey & Roberts (1974) EALR 522 where in the latter case it was stated by Muli, J. (as he then was) that:

‘I think it is established that where a person is employed and one of his terms of employment include a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current’ ”.

The Respondent thus urged the dismissal of the Claimant’s claim.

7. The Claimant was declared redundant in a process he states was unlawful as he was not notified of the same until he received a notification that he was facing termination on account of redundancy. He asserts that the Respondent retained his position and therefore had no basis to declare a redundancy. The Respondent countered by asserting that the Claimant was terminated in accordance with the law and that his letter of termination was subsequent to the process the Claimant participated in of notification, counselling and ultimately receiving the final dues which he signed off committing not to sue the Respondent in a waiver he signed. The Claimant was right that the declaration of a redundancy has to be in accordance with Section 40 of the Employment Act. An employer must notify the employee of the intent, it must have a criterion in place for the identification of the staff to be declared redundant. The Act bars an employer from terminating the services of an employee on account of redundancy until the employer dispenses with the duties of notifying the employee’s union; or in the event where the employee is not a member of a union, then the employee is notified personally in writing. In both instances, the local labour officer must be informed. The Claimant having received his notification of redundancy proceeded to accept in payment, the final dues calculated by the Respondent. He signed a discharge whose import was, as held by the Court of Appeal (Visram, Karanja, JJA and Koome JA (as she then was) in the case of **Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR** to be final. In the case, the learned Judges of Appeal held:-

21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent’s termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties.

8. The Claimant in his discharge intended to fully indemnify and discharge the Respondent and the Respondent anticipated the discharge to be absolute as indicated in the agreement the Claimant and the Respondent signed. It is not within the province of this Court to rewrite the contract the Claimant and the Respondent entered into. As such, the Claimant’s claim is misplaced for seeking to overturn an agreement between him and the Respondent which is not within the parameters of vitiation of a contract. Suit is dismissed and each party is to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2021

Nzioki wa Makau

JUDGE