



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

AT NAIROBI

CAUSE NO.1328 OF 2014

KENNEDY NYAMWAYA BUNDICLAIMANT

VERSUS

INSTRA PRODUCTS (EPZ) LIMITED.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as a Logistics Manager in the year 2013 until 10th June, 2014 when his position was declared redundant. The claim is that the redundancy was unlawful, unprocedural, unfair and without justification. That the termination of employment on account of redundancy was in contravention of section 40(1) of the Employment Act.

The claimant was last earning ksh.82, 000 per month.

He is seeking the following dues;

- a. Notice pay ksh.82,000;
- b. House allowance for 10 years ksh.1,476,000;
- c. Salary arrears from 1st June, 2013 to 10th June, 2014 Ksh.984,000;
- d. Severance pay for 10 years Ksh.410,000;
- e. General damages for unlawful termination Ksh.984,000; and
- f. Costs.

The claimant testified in support of his case that upon employment by the respondent he worked until 16th January, 2013 he went on leave and then Mr Mustafa through the administration manager instructed him to report to work on 15th February, 2013 which was then changed to 18th February, 2013 and when he was given further leave until 21st February, 2013 and then was informed not to report to work until further instructions.

On 22nd February, 2013 the claimant reported on duty seeking clarification on his leave status and was then sent on indefinite leave. His salary was paid until June, 2013. The claimant made demand for payment of his salary on 19th March, 2013 and the respondent replied noting he had been declared redundant and was ready to pay severance.

The claimant testified that his employment was terminated without due process as required under section 40(1) of the Employment Act. his terminal dues were not paid. The house allowance due during employment was not paid.

Response

In response, the respondent's case is that the claimant was summarily dismissed from his employment on 25th March, 2013. He was invited to a meeting where his conduct was discussed and was informed of the decision taken by the respondent.

The claimant had been issued several warnings with regard to his conduct to which he replied. Employment terminated due to gross

misconduct and the details given to the claimant and the claims made are without merit and should be dismissed.

The claimant was paid in lieu of notice at ksh.82, 000. The claimant was paid all his salaries until May, 2013 which was all inclusive. Employment terminated lawfully and in accordance with due process. The claimant was never sent on leave through phone message as alleged as the practice is to apply for leave and the same is approved. The claimant had been sent on leave to facilitate investigations into his misconduct and misappropriation of respondent's time and resources for personal gain which justified summary dismissal.

In evidence, Mustafa Mohammed the executive director testified that the claimant was paid all his due, 3 months' notice pay until May, 2013. The claim for house allowance is not due since he had a consolidated salary. The claim for salary arrears is not due since the claimant was paid for time worked. severance pay and damages are not due as there was no redundancy his case was summary dismissal for gross misconduct.

Mr Mustafa also testified that by letter dated 15th March and 25th March, 2013 the claimant was dismissed and given reasons. He was found doing work outside the respondent for a competitor where he signed as the chief finance officer and the claim should be dismissed with costs.

The gross misconduct committed by the claimant related to poor work, negligence of duty because he was moonlighting with a competitor. When questioned, the claimant did not deny it.

The response to the claimant with regard to redundancy was done on a without prejudice basis. Summary dismissal was for gross misconduct on 25th March, 2013.

At the close of the hearing, both parties agreed and filed written submissions.

Determination

The court has analysed the pleadings, the evidence and written submissions and the issues which emerge for determination are that;

Whether employment terminated due to redundancy or gross misconduct;

Whether the remedies sought should issue.

The claimant filed his Memorandum of Claim and attached various records and including letters dated 5th June, 2014 and 30th May, 2014. Both are by the respondent and marked without prejudice.

The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. See **Mumias Sugar Co. Ltd & another v Beatrice Akinyi Omondi [2016] eKLR** that;

... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.

Such evidence on documents and records marked 'without prejudice' are therefore inadmissible.

The respondent filed work records and letter dated 15th March, 2015 being notice of termination of the claimant's employment and on the grounds that following various warnings in respect to gross misconduct and negligence and his failure to take heed, he was invited to a meeting to be issued with termination notice.

By letter dated 25th March, 2013 the claimant's employment was terminated following a meeting where the parties *discussed in the termination meeting, following the decision by management subject to scrutiny of the acts of commissions brought against you are per letters addressed and provided to you n 31st October 2012, 4th December 2012 and 28th February 2013*. The claimant was found to have neglected his duties and also;

- your possession of files with documentation for processing for a known competitor (Nutro Manufacturers (EPZ) Limited), possession of documentation for private logistics company (Airzen Logistics K Ltd) registration in which you sign off on is evidence that you were undertaking business that was of conflict of interest. ...

The claimant was thus dismissed from his employment following notice, a meeting was held with him and the reasons leading to such sanction were outlined in the above referenced letter dated 25th March, 2013.

Section 41 of the Employment Act, 2007 requires the employer to issue notice to the employee so as to attend and defend himself. Section 43 of the Act requires that where there is a valid reason(s) leading to termination of employment, once invited to a hearing, the employer to justify the same.

Under section 44 of the Employment Act, 2007 the employer is allowed to issue summary dismissal against an employee who has committed gross misconduct. The safeguard to the employee is section 41 (2) of the Act and which requires that;

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

In this case, the claimant was issued with notice, he was invited for a hearing in accordance with section 41(2) of the Employment Act, 2007 and the matters he faced with regard to negligence of duty, working for competitors and being in conflict of interest were addressed with him. there is no defence that these matters are not true.

There existed a genuine and valid reason leading to termination of employment.

summary dismissal of the claimant was justified.

The claimant was paid salaries up to May, 2013. Such was a generous pay on the face of gross misconduct.

There is no case of redundancy as alleged to justify the claimant for notice pay, severance pay, salary arrears or general damages for unlawful termination of employment. such remedies do not exist.

On the claim for house allowance, the claimant was paid above the minimum wage. to claim a house allowance over the salary of ksh.82, 000 per month is to seek unjust enrichment.

The claim is found without foundation and is hereby dismissed. costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 10TH DAY OF JUNE, 2021

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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