



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

CAUSE NO 49 OF 2018

JOSEPH IRUNGU KIMANI.....CLAIMANT

VERSUS

KENSALT LIMITED.....RESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 17th May 2018 and amended on 14th October 2019, the Claimant seeks damages for unfair termination plus terminal dues. The Respondent's defence to the Claimant's claim is by way of a Response dated 4th June 2018 and amended on 28th October 2019. The Claimant filed a reply to the Respondent's Response on 23rd April 2019.

2. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Human Resource Development Manager, Caleb Kamote and Administrator, David Momanyi Gekanana. The parties also filed written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 4th January 1994, in the position of Excavator Operator, Job Group E. The Claimant further states that he was paid an initial monthly pay of Kshs. 8,333.30 plus a house allowance of Kshs. 2,000 making a monthly gross salary of Kshs. 10,333.30. The Claimant's salary was progressively increased over the years.

4. The Claimant avers that from 19th November 1996, he was paid travelling allowance as a separate item on the payslip. He adds that in July 2005, he was issued with a payslip containing only a basic pay with no house allowance or travelling allowance. He claims that this was in contravention of his appointment letter and subsequent salary review letters issued to him.

5. The Claimant therefore claims house allowance for the period running from July 2005 to July 2018 as well as travelling allowance for the period running from 2005 to February 2018.

6. The Claimant accuses the Respondent of terminating his employment on 19th February 2018, without good reason and in violation of due procedure.

7. The Claimant denies the allegation that he declined to occupy company houses, which he claims were ready for occupation in the year 2017. He further claims that he was never allocated a house.

8. The Claimant adds that the company houses were single rooms without toilets, which could not accommodate him and his family.

9. The Claimant avers that at the time of termination he was paid the following:

- a) Salary for days worked up to and including 19th February 2018;
- b) 4 days' leave pay for the year 2018;
- c) Travelling allowance for the month of January 2018;
- d) One month's salary in lieu of notice;
- e) Staff retirement benefit.

10. The Claimant however claims that at the time of termination of his employment, there were balances in unutilised leave plus public holidays and Sundays worked without compensation running from 2010 to 2017. He gave the cumulative number as 37 days.

11. Regarding leave, the Claimant contends that as per his letter of appointment, he was entitled to 30 working days' leave on completion of each year of service. However, in the year 2010, the employer changed the provision on leave arbitrarily and started counting leave days based on consecutive rather than working days.

12. The Claimant claims to have lodged a complaint with his employer, on this change of employment terms, and adds that he thereafter started keeping a record of Sundays and public holidays, as leave balances.

13. The Claimant avers that he worked overtime from the year 2003 up to the date of termination but was only paid a flat rate of Kshs. 500 for Sundays and holidays for a full day and Kshs. 250 for half day.

14. The Claimant further avers that when he was employed, he was working for 8 hours and any extra hours were compensated either in cash or time off.

15. The Claimant states that in March 2003, he submitted his overtime claim but was not paid nor was he given time off. He now seeks payment for the extra hours worked from 2003 to 10th February 2018.

16. The Claimant's claim against the Respondent is as follows:

- a) Unpaid leave, Sundays and public holidays
- b) Unpaid house allowance at 15% of gross pay
- c) Travelling allowance
- d) Overtime underpayments
- e) Severance pay
- f) Damages for unfair termination

The Respondent's Case

17. In its Response as amended on 28th October 2019, the Respondent states that the Claimant's salary as at the time of termination being Kshs. 92,400 was inclusive of house allowance, as agreed in the letter of employment dated 4th January 1994.

18. Regarding the termination, the Respondent states that it followed the provisions of the Employment Act, after the Claimant had intentionally committed acts of gross misconduct.

19. The Respondent states that on 15th February 2018, the Claimant unlawfully, wilfully and maliciously drove a D6 Dozzer machine from its designated place of work, inside the salt works, on a public road to the office area, allegedly to go for lunch. The Respondent adds that the D6 Dozzer machine falls within the category of heavy machinery and was not supposed to be removed from its designated area of operation, without the authority of the Respondent.

20. The Respondent avers that the Claimant's unauthorised removal of the D6 Dozzer machine was an act of gross misconduct, which entitled the Respondent to summarily dismiss the Claimant.

21. The Respondent further avers that prior to the termination, the Claimant was given a chance to be heard and was served with a notice to show cause to which the Claimant responded but his explanation was not acceptable.

22. The Respondent states that the Claimant was paid all his terminal dues on 17th February 2018, pursuant to a mutual agreement between the parties.

Findings and Determination

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

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

24. The Claimant's employment was terminated by letter dated 16th February 2018 stating:

“RE: TERMINATION OF SERVICES

Please refer to Management's letter to you dated 15/02/18 and your reply to the same dated 16/02/18 and the discussion held with the undersigned and Salt Works Manager. The Explanation you have given is not acceptable and the Management has decided to terminate your services with immediate effect.

In this respect you will be paid your final dues as follows:

- 1) Salary for the days worked up to and including 19/02/18.*
- 2) Salary in lieu of any leave due to you but not taken as at 19/02/18.*
- 3) Pro-rata LTA for one month (January 2018).*
- 4) One month salary being your notice in lieu.*
- 5) You will be advised of your entitlement under the staff Retirement Benefit Scheme once the same has been received from ICEA Lion Assurance Company.*

I now take this opportunity on behalf of the Management to thank you for the services you have rendered to this Company and wish you all the best of luck in your future endeavors.

Yours faithfully

KENSALT LIMITED

(signed)

C.M. KAMOTE

Human Resource Development Manager”

25. This letter does not disclose the reason for termination of the Claimant's employment. However, a reading of the show cause memo issued to the Claimant on 15th February 2018, and his response of the same date, reveal that the termination was on account of unauthorised removal of a D6 Dozzer machine coupled with indiscipline.

26. In his response to the show cause memo as well as in his testimony before the Court, the Claimant admitted using the machine as a means of transport from the field to the office. The Claimant's explanation for this was that the Respondent had failed to provide him with transport.

27. The Respondent's Human Resource Development Manager, Caleb Kamote testified that the D6 Dozzer machine was heavy machinery that could not be removed from its designated place without authority. During the trial, the Claimant did not adduce any evidence that he was authorised to move the machine in the manner in which he did.

28. In his written submissions however, the Claimant states that he had been authorised to use the machine as a form of transport by a Mr. Mishra. This statement was not backed by either the Claimant's pleadings nor his testimony before the Court. The only conclusion to make therefore is that the statement was an afterthought and an attempt to introduce new facts in final submissions.

29. Furthermore, in making this statement, the Claimant appears to suggest that it was the Respondent's responsibility to call the said Mr. Mishra as a witness. With much respect, this is a misunderstanding of the concept of the burden of proof.

30. If it is indeed true that the Claimant had been authorised to remove the machine from its designated place, he ought to have first, pleaded this in his Memorandum of Claim and second, adduced evidence to support his assertion in this regard. As it is, there is no evidence that the Claimant was authorised to remove the machine and the only conclusion to draw is that his using the machine as a means of transport from the field to the office was unauthorised.

31. Section 43 of the Employment Act requires an employer to establish a valid reason for terminating the employment of an employee. In its written submissions, the Respondent made reference to the decision in *Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 others [2019] eKLR* where the Court of Appeal defined the employer's burden under Section 43 in the following terms:

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it genuinely believed to exist, causing it to terminate the employee's services.”

32. From the evidence on record, the Claimant removed the machine from its designated place without authority and because this was not a

normal means of transport, it seems to me that the Claimant breached the terms of his employment and the Respondent had a valid reason for terminating his employment.

33. The next question to ask is whether in terminating the employment, the Respondent observed due procedure. The procedural fairness edicts are set out in Section 41 of the Employment Act in the following terms:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee, being either a fellow employee or a shop floor representative, to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative.

34. The Claimant in this case was issued with a notice to show cause on 15th February 2018 to which he responded on the same day. There was no evidence of any hearing at which the Claimant's response was considered nor was there a chance for him to bring a representative to back his case. To this extent, the Court finds and holds that the threshold of Section 41 of the Employment Act was not met and the resultant termination was consequently procedurally unfair. On this ground, the Claimant is entitled to some compensation.

Remedies

35. I therefore award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service with the Respondent tinkered with the finding that there was a valid reason for the termination.

36. The Claimant's claim for unpaid leave is based on a change of policy effected by the Respondent from 1st June 2010, whose effect was to change leave entitlement for management employees from 30 working days as provided in the letter of appointment, to 30 consecutive days, including Sundays and public holidays. The actual impact of this policy shift was a reduction in the number of working days available to management employees as annual leave.

37. This was a major change in the terms of employment and the Respondent's Human Resource Development Manager, Caleb Kamote told the Court that there was no prior consultation with the affected employees. The question is whether the policy shift was lawful.

38. Sections 10(5) and 13(1) of the Employment Act, require the employer to first, consult the employee on any changes to the terms of employment and second, to notify the employee of those changes in writing. This is more so where the change amounts to a downgrade of terms, as happened in this case.

39. Apart from a general circular to the Respondent's management employees dated 11th May 2010, there was no evidence of any specific communication to the Claimant on the adverse change of his terms of employment. Even worse, as confirmed by Caleb Kamote in his testimony before the Court, the Claimant was not consulted before the decision to downgrade his leave entitlement was effected.

40. In *James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR Radido J* termed a unilateral variation of terms of employment by an employer as an unfair labour practice, as contemplated under Article 41(1) of the Constitution of Kenya, 2010.

41. In similar fashion, this Court, in its decision in *Daniel Njuguna Mwangi v De La Rue Currency Security Print Limited [2017] eKLR* held that an employer's unilateral decision to downgrade the employment terms of an employee is unlawful.

42. In light of the foregoing, the Respondent's decision to downgrade the Claimant's leave entitlement was unlawful and the claim on this account is allowed.

43. The Claimant's claims for house allowance and travelling allowance is based on the Respondent's decision to consolidate the two allowances as part of basic pay. The Claimant however confirmed that there was no reduction in his overall emoluments and the claims for separate house allowance and travelling allowance are thus without basis and are dismissed.

44. The claim for overtime underpayments was not proved and no basis was laid for the claim for severance pay. These claims therefore fail and are disallowed.

45. In the end I enter judgment in favour of the Claimant in the following terms:

- a) Kshs. 554,400 being 6 months' salary in compensation;
- b) Kshs. 6,160 being 2 days' salary (Sunday, 23rd June 2017 & Monday, 24th June 2017 which was a public holiday) recovered as part of unpaid leave;
- c) Leave pay for all Sundays and public holidays counted as part of the Claimant's annual leave to be tabulated by the Respondent and paid to the Claimant within thirty (30) days from the date of this judgment.

46. The liquidated amount will attract interest at court rates from the date of judgment until payment in full.

47. The award pending tabulation will attract interest at court rates effective 30 days after judgment until payment in full.

48. The Claimant will have the costs of the case.

49. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY JULY 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:

Joseph Irungu Kimani (the Claimant in person)

Mr. Omwenga for the Respondent