



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 341 OF 2016

WASHINGTON ONYANGO AWINOCLAIMANT

-VERSUS-

RELIABLE ELECTRICAL ENGINEERS (NBI) LTD.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 8.3.2016 alleging that his employment contract had been unfairly terminated by the Respondent. The suit seeks the following reliefs:

- (a) 2.25 Months salary in lieu of notice as per clause 12 of the Collective Bargaining Agreement dated 17th day of February, 2015 – Kshs. 63,434.**
- (b) Damages for wrongful dismissal and unfair termination of employment contract as per section 49 and 50 of the Employment Act, that is 169,158.00**
- (c) Severance pay at the rate of 20 days for 19 years of service as per clause 24 of the Collective Bargaining Agreement dated 17th day of February, 2015 – Kshs. 345.667.00**
- (d) Any other remedy that this Honourable Court may deem fit to grant.**
- (e) Costs of the cause.**

2. The Respondent filed defence on 13.10.2016 admitting the employment relationship but denied the alleged unfair termination. It averred that it handed over its business to another company, Reliable Fabricators Limited after which all the employments became superfluous and the employees were no longer required. It further averred that it terminated the Claimant's services in accordance with the Collective Agreement (CBA) after consultations with the Kenya Electrical Traders and Allied Union, to which the Claimant was a member. Finally it averred that it paid the Claimant his terminal dues of Kshs. 66,094.0 as discussed and agreed between it and the Claimants trade union. Therefore it prayed for the suit to be dismissed with costs.

EVIDENCE

3. The Claimant testified as CW1 and explained how he joined the Respondent in September 1996 as Welder fitter and worked until 15.12.2015 when his services were terminated verbally on grounds of redundancy. At the time of separation his salary was Kshs. 28,193 per month.

4. He further explained that the Respondent advised him to apply for the same job from the New Management of the business Reliable Fabricators Ltd, but his application was not successful.

5. He contended that the termination was done without following the procedure set out by the labour laws and the CBA. He stated that no consultations were held with the stake holders and no notice of redundancy was served on him and the labour officer. He also contended that he was never paid severance pay; a fair selection was not done considering "first in last out" principle and work experience leading him to be laid off while leaving newly employed welders; and finally the redundancy was not due to close of business but mere change of company name.

6. On cross-examination he reiterated that his dismissal was communicated to him by the management verbally. However he admitted that he was member of KETAWU and there was a CBA. He further admitted that under Clause 12 of the CBA his termination notice of 2.25.

Months. He also admitted that he received Kshs. 66,694 after the termination equalling to 2.25 months' notice. He contended that he is entitled to severance pay under clause 7(c) and 20 of the CBA because he was not in the pension scheme.

7. He admitted that payslip for December 2009 to December 2015 show that he was paid service but he contended that the same was not in accordance with the CBA and it did not cover the period worked from 1996 to 2009. Finally he admitted that the Respondent notified the union of the intended lay offs by letter dated 4.12.2015 and the union agreed by the letter dated 8.12.2015.

8. Mr. Bharesh Shah testified as RW1. He confirmed that he is a director in both the Respondent and the successor in the business, Reliable Fabricators Limited. He further confirmed that after the said company took over the business from the Respondent all its employees were laid off under the CBA since it stopped operations. However, he stated that some of the employees were employed by the new company.

9. RW1 contended that the Claimant was paid severance pay as per the payslips for December 2009 to December 2015 and as such he is not entitled to the claim for severance pay totalling to Kshs. 345,667. He further contended that the Claimant was also a member of NSSF as per the deductions in his payslips.

10. Finally RW1 contended that the terminal dues paid to the Claimant was agreed between the employer and his union and as such the instant claims were an effort by the Claimant to unjustly enrich himself.

11. On cross-examination RW1 contended that he served the Claimant with one month notice through his trade union on 7.12.2015. He further contended that he discussed the matter with the union 3-6 months before then. He admitted that the notice indicated 31.12.2015 as the last working day. He explained that he declared redundancy because the Respondent was ceasing operations and a new company was taking over the business.

12. He admitted that he is a director of both the Respondent and the new company but contended that the two were different entities. He also admitted being unaware whether the Respondent served redundancy notice over the labour officer but stated that the company followed the advice from the union. He further admitted being unaware whether Mr. Odiek who was retained by the new company as a welder had worked for the Respondents for a shorter period than the Claimant. He reiterated that the Respondent paid severance pay in accordance with the labour laws. Finally he contended that he only produced some payslip because the rest were lost in a fire in the office.

SUBMISSIONS

13. The Claimant submitted that the Respondent has not proved the reason for terminating his services contending that the termination notice did not state the reason. He further submitted that in the defence the Respondent pleaded that the reason for termination was redundancy after a new company took over the business which RW1 testified that the reason was that the Respondent had closed down business. In his view the Respondent has given contradictory reason for the dismissal.

14. As regards the procedure followed, the Claimant submitted that the termination did not comply with section 40 of the Employment Act. First, he contended that the notice in the letter dated 4.12.2015 was shorter than one month; second the notice was not served on the area Labour Officer; third the selection process for the redundant employer was not fair since he was laid off and newer staff retained; and finally severance pay was not paid as per the clause 24 of the CBA which provides for 20 days pay for each completed year of service.

15. He relied on **Walter Ogal Aruero v Teachers Service Commission [2013] eKLR** where Ndolo J held that for a termination to pass the fairness test, there must be both substantive justification and procedural fairness. In the Claimants view, there was no justification and procedural fairness in his layoff and consequently, he is entitled to the reliefs sought including damages for notice, unfair termination, severance pay plus costs.

16. On the other hand, the Respondent submitted that the redundancy of the Claimant was in accordance with CBA and it was approved by the Claimants union. It contended that discussion on the redundancy started 3 months before his termination and also served the notice dated 4.12.2015 and the union agreed to procedure adopted by the letter dated 8.12.2015. Therefore it contended that the agreement between the Respondent and the Claimant's union constituted a binding contract on him.

17. For emphasis, he relied on **Transport Workers Union v. Console base Ltd [2015] eKLR** in which it was held that until an employee resign from a trade union the employer is entitled and is obliged to regard the union as the representative of the employee and to deal with the union on that basis.

18. He further relied on **Coast Bottlers Ltd v. Kimathi Mithika [2018] eKLR** where the Court of Appeal held that a settlement agreement constitutes a binding contract between the parties therein and all what is required is for the ELRC to give effect to the contract. Finally it contended that selection process was immaterial because all staff members were laid off.

19. As regards the reason from the redundancy the Respondent submitted that it closed the business and that brought it within the meaning of redundancy under section 2 of the Act which includes take overs of business. It contended that the fact that the Claimant applied for a job in the new company is evidence of the said taking over of its business by a new company.

20. On the issue of reliefs sought, the Respondent submitted that the Claimant is not entitled to any. First it contended that the Claimant was paid service pay at the end of every year and by letter dated 8.12.2015, the union agreed that severance pay had been paid at the end of every year. The justification for the payment of the service pay at the end of every year was that the Respondent did not want to face a heavy burden at the time of separation.

21. Second, the Respondent contended that the Claimant admitted payment of 2.25 months salary in lieu of notice and as such that Claim

should be declined. Thirdly, it submitted that the claim for damages for unlawful termination must fail because in its view the termination was fair.

ISSUES FOR DETERMINATION

22. There is no dispute that the Claimant was employed by the Respondent in September 1996 till 31.12.2015 when he was laid off. The contested issues are:

- (a) Whether redundancy was justified.
- (b) Whether the procedure for redundancy under section 40 of the Employment Act was complied with.
- (c) Whether the Claimant is entitled to the reliefs sought.

JUSTIFICATION

23. The reason for the redundancy was that the Respondent's business was taken over by a new company and that rendered all its employees including the Claimant superfluous and not required. The takeover of the Respondent's business by Reliable Fabricators Ltd has not been denied by the Claimants who admitted that he even sought employment in the new establishment but he did not succeed.

24. Redundancy has been defined under section 2 of the Employment Act 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 the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment”.

25. Considering the foregoing definition and the finding that indeed the Respondent's business was taken over by a new company, it is clear that the Claimants' position became redundant. Consequently, I agree with the Respondent that the takeover of its business was a valid reason for terminating the Claimant's services on account of redundancy.

PROCEDURE

26. Section 40(1) of the Act provides a procedure for redundancy in mandatory terms. First it provides for at least one month prior notice in writing to the employees' trade union and the area Labour Officer. Secondly, it provides for a fair selection process of the person to be laid off including a consideration of seniority in time and skill. Third, there should be no unequal treatment on the basis of union membership. Fourth, employer must pay accrued leave. Fifth, employer must pay at least one month salary in lieu of notice and severance pay of not less than 15 days pay for each completed year of service.

27. In this case the Respondent has not produced any written notice of the said redundancy served on the Claimant's trade union and the area Labour Office at least one month before the 31.12.2015 which was the effective date of the redundancy. The only letter produced was the one dated 4.12.2015, which in my view was not sufficient notice under section 40(1) (a) of the Act because it was even served on 7.12.2015.

28. Again, although the selection process may not be relevant herein since all the staff were laid off, I find that the Claimant was not paid his severance pay in accordance with the CBA and the law. Under Clause 24 of the CBA the Claimant was entitled to severance pay of 20 days for every completed year of service.

29. The Respondent admitted the said entitlement but averred that it had already paid severance pay at the end of every year and produced payslips for December 2009 to December 2015. No evidence of payment of the same was produced for the rest of the years of service. Therefore I find that the Claimant was entitled to severance pay for all the 19 years served but the Respondent did not pay him

30. Having failed to prove compliance with the requirement of service of not less than one month and payment of severance pay before termination, I proceed to hold that the Claimant was laid off in not accordance with the mandatory procedure laid down in section 40 of Employment Act and therefore it amounted to wrongful and unlawful termination within the meaning of section 45 of the Act.

RELIEFS

31. In view of the foregoing holding, the Claimant is entitled to compensation for the unlawful termination by dint of section 49(1) read with section 50 of the Employment Act. Considering the long service of 19 years and that the Claimant did not contribute to the termination through any fault on his part, I awarded him 10 months salary equalling to Kshs. 281,930 as compensation for the unlawful termination.

32. The said award settles also the claim for severance pay because I have treated the faulty redundancy as unlawful and wrongful termination. The claim for notice is also declined because the Claimant admitted that it was paid.

33. In awarding the said compensation I have dismissed the allegation by the Respondent that there was a settlement agreement between it and Claimant's union. My reading of the letter dated 4.12.2015 and the response dated 8.12.2015 does not reveal any settlement agreement between the Respondent and the union which is capable of being enforced by the court in favour of the Respondent. In my view, parties cannot enter into a consent to circumvent an express provision of the law.

34. Again, the facts of this case are distinguishable from the **Coastal Bottlers Case** in that in the said case, there was a clear settlement agreement signed by the parties to the suit in which the employee accepted the sum paid as full and final settlement and discharged the employer from any further claim concerning both the employment contract and the termination. In this case the agreement contained in the said correspondences fall short of the attributes of a binding settlement agreement, capable of denying the Claimant remedy before the court.

35. In conclusion and based on all the foregoing observation, findings and determination, I now enter judgment for the Claimant in the sum of Kshs. 281,930.00 plus costs and interest at court rate from the date of this judgment. The award shall be paid subject to statutory deductions.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 18TH DAY OF AUGUST, 2021.

ONESMUS N. MAKAU`

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this Judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE