



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1788 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

CHRISPAS EGESA MWAI.....CLAIMANT

VERSUS

RADAR SECURITY (K) LIMITED.....RESPONDENT

JUDGMENT

Preamble

1. The Claimant's case is for compensation for unlawful dismissal by the Respondent. The claim is contained in the Claimant's memorandum of claim dated 30th August 2017.
2. The Respondent responded vide the memorandum of reply dated 16th October 2017.
3. The Claimant testified on his own behalf during the trial and the Respondent called its Human Resource Manager Consolata Karimi.
4. The Claimant has filed its written submissions and the Respondent.

The Claimant's Case

5. The Claimant states he was employed by the Respondent on 25th January 2013 as a security guard. He rose to the position of a Rider Supervisor over the years. His last salary was Kshs.24,310/=.
6. The Claimant state that on 22nd November 2016 he was summoned by the Controller Mr. Samuel Osebe who informed him not to report to work the following day.
7. He says that on 23rd November 2016 he was then served with at termination letter dated 22nd November 2016. The contents of that termination letter were basically that his employment was terminated due to low business.
8. The Claimant avers that he was unlawfully dismissed and is entitled to compensation as tabulated hereunder: -
 - a).. One month's salary in lieu of notice..... 24,310
 - b).. Unpaid leave for the entire period he worked... 48,620
 - c).. Service gratuity for 4 years..... 62,649
 - d).. Unpaid overtime..... 875,160
 - e).. Unpaid public holidays..... 26,741
9. He also seeks compensation for the loss suffered due to abrupt termination of service at Kshs.291,720/=.

The Respondent's Case

10. In the Respondent's memorandum of reply it admits that the Claimant was his employee from 2013 to 2016 when he terminated his services.
11. The Respondent states that Claimant's termination on redundancy was lawful as due procedure was followed. He avers that a written notice was given to the Claimant and seniority and ability were considered.
12. He also claims that Claimant had no pending leave days and all his terminal dues were paid.
13. The Respondent maintains that the Claimant was not entitled to compensation as his terminal dues were paid.
14. The Respondent's firm averments are that it carried out its duties diligently and followed the parameters of law and rules and regulations of the Respondent's guards.
15. The Respondent therefore denies that the Claimant is entitled to the reliefs sought in paragraph 11 of the Claimant's memorandum as they followed full and proper procedure in declaring the Claimant redundant.

Claimant's Submissions

16. The summary of the Claimant's submissions was that the Claimant's abrupt termination of employment was just cruel, inhuman, unfair and illegal. Claimant reported to work on 23rd November 2016 and was handed a dismissal letter.
17. The Claimant urges the Court to consider Section 40(1) of the Employment Act which lays guidelines on termination of employees.
18. Further, he points the Court to Section 43 of the Employment Act where employer is required to give reasons for termination and if no reason are given such termination is deemed to be unfair under Section 45. Section 45 provides that if an employer fails to prove that the reason for termination is valid and in accordance to fair procedures that termination is unfair.
19. The Claimant has cited several case including **Paul Ngeno v Pyrethrum Board of Kenya Ltd (2013) eKLR** among others.
20. The Claimant in his submissions says the Respondent did not challenge his prayers enumerated in the memorandum.

Respondent's Submissions

21. The Respondent on the other hand in his submissions states it terminated the Claimant's employment for a valid reason which they communicated to him. The reason they gave him was that the business was law.
22. The Respondent submits that they gave the Claimant adequate notice and was paid his dues after he cleared with the Respondent and he was even given the certificate of service.
23. The Respondent says that in accordance to Section 47(5) of Employment Act burden of proving unfair termination or dismissal rests on employee while burden of justifying the grounds for termination or dismissal rests on the employer. In quoting the case of **John Kebaso Mose v Uchumu Supermarket (2017) eKLR**, the Respondent submits they have squarely discharged their duty of proving the termination was fair.

Findings and Determination

24. The issues for determination are:-

- (a) Was the termination of the Claimant's employment lawful and fair;
- (b) Is Claimant entitled to remedies sought?

Termination

25. The Claimant produced a letter dated 22nd November 2016 addressed to the Claimant. In paragraph 1 of the said letter the Claimant was informed that his employment with the Respondent had been terminated with effect from 22nd November 2016. He was informed the same was informed by low business.
26. The letter went further to inform him that the Respondent had valued his services and would consider him in future where need arises. He was also promised that his final dues would be settled and meanwhile he should return the company properties. The letter was signed by the Manager James Mwanzia.
27. The Claimant acknowledged the letter on 23rd November 2016.
28. The Respondent admits the Claimant's employment was terminated through redundancy.

29. Redundancy is defined in Section 2 of the Employment Act as a loss of employment, occupation, job or carrier 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 practices commonly known as abolition of office, job as occupation and loss of employment.

30. Employment is a contract of personal nature according to the common law. The law allows an employer to declare redundancy **BUT** subject to following conditions set out in Section 40 of the Employment Act.

31. The provisions of the Employment Act are broadly that the employer must inform the trade union if employee is a member of union one month prior to the notice of the redundancy.

32. If employee is not a member of union than the employer should notify the employee personally in writing and the Labour Officer. There is also the issue of selection criteria based on seniority, pay pending leave days and severance pay among others.

33. I can classify the conditions for redundancy as giving requisite notices, using objective selection criteria and paying the dues owing to the employees.

34. There is no evidence on record that the Respondent issued a statutory notice to the Labour Officer setting out the reasons for and extent of intended redundancy.

35. The Claimant's evidence is that on reporting to work on 23rd November he was given the termination letter. The same is dated the previous day.

36. The instant case the Respondent did not comply with the conditions set out in Section 40(1) of the Employment Act in terminating an employee's employment under redundancy. The **Industrial Case No. 1661 of 2012, Aviation Allied Workers Union Kenya & 3 Others v Kenya Airways Limited**, 400 employees were declared redundant. The Court found in favour of the union which had filed a case on behalf of the employees.

37. The Court found there was no valid reasons to terminate the employees and further the procedure followed was flawed. All were reinstated and awarded salary for the period they were out of employment. The Respondent appealed and succeeded in that reinstatement was reversed but employees were awarded damages rather than reinstatement. From this decision among others for termination of employment under redundancy to be lawful it must be both substantially justified and procedurally fair.

38. Apart from the Respondent failing to report the redundancy to the Labour Officer, he also did not give the Claimant notice.

39. The Court has carefully considered the submissions presented by both the Claimant and the Respondent. In the case of **Paul Ngeno v Pyrethrum Board of Kenya Limited, Cause No. 26 of 2016**, Ongaya J. found termination of the Claimant's employment by way of redundancy was unfair as Claimant was not given any notice or prepared for redundancy and the selection criteria was not disclosed to the Claimant.

40. Similarly in this case even though the Respondent insists they gave the Claimant adequate notice, a termination letter given the same day, the employee is given marching orders to exit his place of employment cannot be called a valid notice. The Court finds the Respondent failed dismally in following lawful procedure provided in Section 40 of the Employment Act. Section 40(1)(a) provides a notice should be given of one month either to the employee or the Union the reason or nature of redundancy.

41. The Court finds the termination of the Claimant was not valid for the foregoing reasons.

Remedies

42. The Court therefore enters judgment in favour of the Claimant and awards him the following: -

(i).. One month's salary in lieu of notice..... Kshs.24,310

(ii).. Unpaid leave for 2 years is not proved and so is not awarded.

(iii). Service gratuity as provided in Section 40(1)(g) of the Employment Act that is 15 days equivalent for each year worked same is awarded for 4 years..... Kshs.48,620

(iv). He claimed overtime days and public holidays which are not proved and I find no grounds to award the same and so are declined.

(v).. The Court finds the prayers for general damages suffered as a result of the abrupt dismissal is reasonable prayers and in view of the fact that the Claimant's salary was quite low but noting he had worked for about 4 years for the Respondent, I will award him 4 months Kshs.97,240

Conclusion

43. The Court is satisfied that the Claimant's termination from employment was unlawful and procedurally flawed and so grants him the

total compensation of Kshs.170,170/=. This amount excludes the dues paid the claimant and statutory deductions.

44. Costs and interest are awarded at Court rates till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF SEPTEMBER 2021

ANNA NGIBUINI MWAURE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

ANNA NGIBUINI MWAURE

JUDGE