



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

AT NAIROBI

CAUSE NO 788 OF 2017

FREDRICK MWANIA MUSAVA.....CLAIMANT

VERSUS

ALPHARAMA LTD.....RESPONDENT

JUDGMENT

1. This claim is presented by the Claimant against the Respondent seeking compensation for alleged wrongful termination. The Respondent disputes the Claim.
2. The Claimant filed a Statement of Claim dated 24th April 2017 in which he asserts that he was employed by the Respondent on 20th July 2006 as a machine operator. That over time he rose through the ranks to the position of a selector and ultimately a supervisor.
3. The Claimant further asserts that he was initially engaged on long term basis. However, in 2009 the Respondent changed the mode of engagement with him by converting the employment contract to a one year fixed term contract renewable by the parties.
4. About his dismissal, the Claimant asserts that he reported on duty on 2nd November 2016 when he worked the full day. That as he prepared to leave for his home, he was summoned by one Ruth, the Respondent's human resource manager and asked to see her at her office the following morning.
5. That when he went to the office the next day as instructed, he was handed a termination letter. This was after he was made to wait at the reception for quite some time.
6. The Claimant asserts that the letter intimated that the termination was on account of redundancy. He asserts that prior to this decision the Respondent had not engaged him regarding the issue of redundancy. And neither was he informed the reasons for the purported redundancy.
7. Based on the foregoing, the Claimant prays for the following reliefs:-
 - a. A declaration that the dismissal was unlawful and unfair.
 - b. Severance pay of Ksh. 94,576.95.
 - c. Underpayments aggregated at Ksh 55,785.40.
 - d. Payment in lieu of public holidays worked Ksh. 62,433.15.
 - e. Compensation for wrongful termination of Ksh. 192,864.00.
 - f. A compliant Certificate of Service.
 - g. Costs of the cause.
8. The Respondent filed a statement of reply to the claim. Through its witness, the Respondent asserts that the Claimant was lawfully relieved of his work. That he was paid his dues in accordance with the law. As a result, the Respondent prays that the claim be dismissed.

9. During the trial, the parties produced their respective witness statements and relied on them as their evidence in chief. They also produced the documents attached to their respective lists of documents as exhibits.
10. In his evidence, the Claimant reiterated his averments in the Statement of Claim. On the part of the Respondent RW1 indicated that the Respondent faced economic challenges around the time it terminated the Claimant because of the sudden slump in its international market. As a result, it had to reduce its workforce in order to remain a float. This resulted in the retrenchment of several employees including the Claimant.
11. The Respondent asserts that it handled the Redundancy process in accordance with the law. That the Claimant was engaged before he was handed his termination letter.
12. During cross examination, RW1 stated that the Claimant was engaged on the very day he was given his termination letter. That he was paid all his terminal dues. As a consequence, it is the Respondent's position that the claim ought to be dismissed with costs.
13. After tendering their evidence and closing their respective cases, the parties filed their written submissions. The following are the issues for determination:-
- a. Whether the Claimant was lawfully declared redundant. This can also be reframed to simply ask whether the Claimant's termination was lawful.
 - b. Whether the Claimant is entitled to the remedies set out in the Statement of Claim.
14. The law on redundancy in Kenya is now fairly settled. It is founded on the provisions for section 40 of the Employment Act as read with sections 43 and 45 of the Act. It is also informed by the wider constitutional dictate for fair labour practices.
15. An employer has discretion to reorganize his/her business in order to ensure optimum operations and profitability. This may require taking measures which may render the positions of some employees superfluous or obsolete.
16. However, in undertaking this exercise the employer must observe the guidelines provided for in law. First, he/she must issue a notice of the intended redundancy to the employee(s) and the local labour office. Where employees are represented by a trade union, this notice must issue to the union.
17. The notice, which is mandatory, must be for a minimum period of one month. It is this notice that communicates to the employees the reasons and extent of the proposed redundancy.
18. The employer must then undertake selection of the employees to be terminated while observing the general principles set out under section 40 of the Employment Act. In general, the employer should be guided by the first in last out principle. By this, it is meant that employees who were last to be hired in the affected pool of employees should, all factors remaining constant, be the first to exit.
19. However, in order to temper the effects of this principle and allow for the proper exercise of the employer's discretion to take management decisions in the enterprise, the law permits a departure from the first in last out principle to the extent that the employer may consider other factors such as the skill, ability and reliability of every of the employees in the affected pool while determining which employees will exit and which ones will be retained.
20. To demonstrate the fact of having taken these factors into consideration, the employer must proceed on the basis of some objective parameters capable of being interrogated by an independent third party. The process must not be opaque (see Maraga J's views in ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR***).
21. The employer must then release the employees identified for termination by issuing them with a termination notice. In the alternate, the employer can pay the employees an amount equivalent to one month salary in lieu of notice. However, where the parties have negotiated better notice duration, the pay in lieu of notice must be measured against these improved terms.
22. The employer must then pay the affected employees salary for the days worked but not paid and severance pay equivalent to salary for 15 days of every year worked. In addition, employees who were due for leave will have their leave days commuted into cash which is then paid to them.
23. Adherence by the employer to this strict procedure must be self-evident in the event of a dispute arising as to the validity of a redundancy. This means that the employer must be able to prove that he/she complied with these statutory edicts.
24. In the current case, RW1 says that the Claimant was informed about the redundancy the same day he was handed the termination letter. No prior notice of the intended redundancy had been given to him. Although the Respondent asserts that it served the local labour office with the notice, no evidence of this was supplied to the court.
25. Similarly and as submitted by the Claimant's counsel, no evidence was given on how the Respondent settled on the Claimant for termination on account of redundancy. Apart from stating that the Claimant and some 72 other employees were terminated, RW1 did not indicate the selection criterion for those who were finally declared redundant.
26. As to whether there were valid grounds for declaring a redundancy, the Respondent only mentions in its Reply to the Memorandum of

Claim that it lawfully terminated the Claimant. However, there is no mention of the actual reasons for declaring the redundancy. The Respondent only states that the reasons for termination were explained to the Claimant alongside other affected employees as they were given their release letters.

27. The reason for the decision to terminate the Claimant is given for the first time in the witness statement by RW1 on 2nd August 2021 just in time for the trial on 4th August 2021. This is when RW1 elaborated that the reason for declaring the redundancy was that the Respondent had run into economic headwinds following low international exports. As a result, it could not sustain the large volume of employees on its payroll.

28. It is difficult to fathom how the Respondent expected the Claimant to respond to the apparent justification for redundancy when supplied this late in the day. That notwithstanding, to the extent that the Respondent did not provide the reason for the redundancy in terms of section 40 of the Employment Act, the court finds that the Respondent did not justify the redundancy termination on substantive grounds.

29. Therefore and to the extent of the failure to observe the dictates of section 40 of the Employment Act, the Respondent's decision to terminate the services of the Claimant was flawed. In terms of section 45 of the Employment Act, the purported declaration of redundancy in effect constituted a wrongful termination of the Claimant.

30. Having found that the Claimant's termination was flawed, the next issue for determination relates to whether the Claimant is entitled to the remedies sought in the Statement of Claim. As indicated above, the Claimant prayers are mainly compensatory in nature.

31. The Claimant has prayed for severance pay. However, as the purported declaration of redundancy against him has been found to have been irregular, I do not think that the Claimant is entitled to this remedy. This payment is made under section 40 of the Employment Act on the assumption that there has been a valid declaration of redundancy. Where the declaration is found to be irregular, the resultant termination becomes unlawful. Thus, the affected employee can only pursue awards under section 49 of the Employment Act and perhaps as well sections 35 and 36 of the Act.

32. In any event, the Respondent was able to demonstrate that it paid the Claimant Ksh. 69,081/= as his terminal dues. From the evidence tendered, part of this amount comprised severance pay. For this reason, I decline to award the Claimant severance pay.

33. The Claimant has also claimed underpayments of Ksh. 55,785.40. However, during his testimony, he did not lay a basis for this claim. And neither was there sufficient evidence tendered in support of it.

34. The only stage at which an attempt is made to explain what these under payments comprise of is during the Claimant's submissions. But it must be clear to the Claimant that evidence cannot be tendered through submission.

35. In any event, counsel's view that the statutory deductions applied to reduce the amount which was paid to the Claimant from Ksh. 119,126/= to 69,081/= resulted in the Claimant being underpaid by approximately Ksh. 55,785.40 has no legal basis. The law requires that such payments be subjected to statutory deductions. I will accordingly decline to grant it.

36. There was also no satisfactory evidence tendered by the Claimant to support the claim for pay in lieu of public holidays. The Claimant gave no particulars of the public holidays during which he was required to work to enable the court determine the validity of the claim.

37. In his submissions, the Claimant insinuates that the burden of proof lay on the Respondent to produce employment records to resolve this issue. This is partially correct. However, the evidential burden only shifts onto the Respondent once the Claimant establishes a prima facie case that he was denied enjoyment of his public holidays.

38. This in my view requires the Claimant to provide at least particulars of the holidays he was made to report on duty. It is only then that the Respondent will be required to provide evidence to explain the occurrences.

39. On this, I rely on the decision in **Reuben Wamukota Sikulu v Director of Human Resource Management, Ministry of Devolution & Planning & 2 others; Public Service Commission(Interested Party) [2020] eKLR**, where the Court of Appeal explains that in employment discrimination cases where the law places the burden of proof on the employer to disprove allegations of discrimination against an employee, the employee shoulders the burden of laying a prima facie case suggesting discriminatory treatment against such employer before the burden can shift to the employer to justify that his/her action was not discriminatory. This reasoning applies to this cause as well.

40. I have looked at the decision in **Lawi Wekesa Wasike v Mattan Contractors Limited [2016] eKLR** relied on by the Claimant regarding the need for employers to maintain records of employees and avail them whenever required. This is correct. However, it does not disturb the reasoning aforesaid regarding the reverse burden of proof. It may also be helpful to point out that the excerpts referred to by counsel were actually part of the obiter dicta in the matter. Accordingly, the claim for unpaid holidays worked is not proved and fails.

41. The Claimant has also prayed that the Respondent be compelled to re-issue him with a new Certificate of Service. There is evidence that the Respondent had issued him with a Certificate of Service showing that the Claimant worked with the Respondent as a selector. However, the Claimant wants this amended to include his alleged roles as a mechanic and supervisor.

42. The Respondent stated in evidence that the last role the Claimant played in the company was that of a selector. Although the Claimant asserts that he worked as a mechanic and supervisor, there was regrettably insufficient evidence to prove this. Therefore, it will be undesirable to compel the Respondent to re-issue this Certificate to include items which were not in the Claimant's job description and which the Respondent cannot guarantee. This prayer is therefore declined.

43. On the claim for compensation for wrongful termination the Respondent takes the position that it paid the Claimant Ksh. 69,081/= towards his terminal dues and the Claimant accepted the payment and signed a voucher in this respect. Therefore, no further amounts ought to be awarded to him as the Claimant, by signing the payment voucher, released the Respondent from any further claims under the contract.

44. I have looked at the document in issue. It does not contain any clause indicating that the payments made to the Claimant were in full and final settlement of his terminal dues and that he released the Respondent from further claims. His signature on the document could as well have been intended as an acknowledgement of the payments; not a release of the Respondent from settling further obligations following the unfair termination.

45. If I properly understood the reasoning by the Court of Appeal in *Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR*, a discharge voucher could, depending on how it is framed, release the employer from further claims. However, it must be evident that it was executed voluntarily and the content of the voucher must suggest a release. In effect, whether a payment voucher constitutes a contract settling the matter fully is a matter of fact to be decided on a case by case basis having regard to the content of the document and circumstances under which it was executed.

46. In the current case and properly constructing the payment voucher in issue, I see no suggestion that the Claimant, by appending his signature on it, intended to release the Respondent from future claims arising from the impugned contract of service. I am hesitant to read this clause into the instrument for this would amount to imposing on the parties, terms that they may never have intended.

47. Therefore, as compensation for wrongful termination, I am minded to award the Claimant an amount equivalent to seven months' salary. The September 2016 pay slip of the Claimant shows that his gross salary was Ksh. 16,072/=. Therefore, the total award to the Claimant under this head is Ksh. 112,504/=.

48. In arriving at this figure, I have taken into account the fact that the Respondent had made earlier payments to the Claimant. I have also considered the fact that the Claimant had in fact mitigated his loss by securing another job.

49. The Claimant has, in his submissions, also prayed for service pay of Ksh. 133,520.65. This claim is unsupported by the Claimant's pleadings. There was no prayer for service pay in the Statement of Claim. I will accordingly decline to award it.

50. I award the Claimant interest on the sum of Ksh. 112,504/= awarded. I also award him costs of the claim as well.

51. The amount shall be subject to the applicable statutory deductions if any.

52. Summary of the Award

- a. The Respondent's termination of the Claimant is declared unfair and unlawful.**
- b. The Claimant is awarded compensatory damages equivalent to his gross salary for 7 months totaling Ksh. 112,504/=.**
- c. The Claimant is awarded interest on (b) above.**
- d. The Claimant is awarded costs.**
- e. The award is subject to the applicable statutory deductions under section 49 of the Employment Act.**

DATED, SIGNED AND DELIVERED ON THE 10TH DAY OF SEPTEMBER 2021

B O M MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

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.

B O M MANANI

JUDGE