



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

CAUSE NO. 567 OF 2015

(Before Hon. Justice Dr. Jacob Gakeri)

**KENYA GAME CONSERVANCY TOURS AND SAFARIS
WORKERS UNION.....CLAIMANT**

VERSUS

DAVID SHELDRIK WILDLIFE TRUST...RESPONDENT

JUDGMENT

1. The Claimant's statement of claim dated 8th April 2015 was filed on 10th April 2015. The grievants sought reinstatement without loss of payment for the duration they were out of employment owing to wrongful redundancy. Although the statement of claim alluded to redundancy as one of the issues in dispute, the factual background was not adverted to. The grievants filed an amended statement of claim dated 7th June 2019. The statement set out the circumstances in which the grievants left employment on 18th August 2013 and the prayers.

2. Efforts by a Conciliator appointed by the Ministry of Labour, Social Security and Services failed and the grievants sued for the following reliefs –

1. Dismas Ondiek Getate claims:

Compensation (12,000 x 12)----- Kshs.144,000

Payment in lieu of notice (12,000 x 1)--- Kshs.12,000

Severance pay (12,000 x x 3)----- Kshs.18,000

Days worked in August 2013----- Kshs.48,810

Total----- Kshs.222,810

2. Kevin Nyaunga Gesairo claims:

Compensation (11,000 x 12)----- Kshs.132,000

Payment in lieu of notice (11,000 x 1)--- Kshs.11,000

Severance pay (11,000 x x 6)----- Kshs.33,000

Days worked in August 2013----- Kshs.23,938

Total----- Kshs.189,938

3. Certificate of service

4. Costs of this suit.

3. Despite service of summons, mention and hearing date, the Respondent neither responded nor participated in the case. The case was heard on 22nd September 2021 and the two Grievants testified.

4. CW1 MR. KELVIN NYAANGA GESAIRO testified that he had not recorded any witness statement. He told the Court that he was engaged by the Respondent sometime in May 2008 as an Elephant Keeper at Kshs.11,000 per month and was housed at the Respondent's premises. That although he signed a letter of appointment, he had no copy. That he left employment in August 2013 by which time his net salary Kshs.23,938 per month. The extra earnings were overtime payments and that he had not been paid the August 2013 salary. He testified that although the dispute was referred to a Conciliator, the Respondent did not appear for the hearings and the Conciliator filed a certificate to that effect dated 14th January 2014 which was copied to both parties.

5. It was the Grievant's testimony that sometime in August 2013, the Respondent introduced a new contract but when the Grievants sought explanation, the Respondent insisted that they sign the contract or leave. The Grievants refused to sign the new contract and subsequently contacted the Union on the issue.

6. CW2 MR. DISMAS ONDIEK GETATE testified that he had recorded a witness statement and filed other documents which he adopted as evidence in the case. It was his testimony that he was engaged on 14th January 2011 as an Elephant and Rhino keeper at Kshs.12,000 per month and was terminated in August 2013 by which time his salary had risen to Kshs.46,810 per month. That his salary for August was not paid. He testified that he was aware that some Kshs.65,389 had been sent to the Labour Officer, Nairobi by the Respondent but they declined the same pending the outcome of the reconciliation proceedings which fell through. He further testified that he was dismissed when he declined to sign the new contract introduced by the Respondent as advised by the Union. That he had neither a record of blemish nor show cause letter. That he was a member of the Union and finally he was informed that his job did not exist and was thus declared redundant.

7. He testified that four employees were terminated effective 1st September 2013 without any prior warning or reasons for termination.

8. From the documents on record, it would appear that the dispute was reported to the Ministry of Labour and Social Services sometime in late 2013 and registered as trade dispute ML/DL/IR/25/8/2013 or early 2014 and a Conciliator was appointed. By a letter dated 9th January 2014, the Conciliator invited the parties for a meeting on 27th January 2014. Parties were required to submit written proposals before the date of the meeting. The meeting did not take off because the Respondent did not appear.

9. A further meeting scheduled for 25th March 2014 did not proceed for a similar reasons.

10. The Conciliator submitted the certificate dated 14th January 2015 reporting that the parties had failed to settle the dispute owing to the refusal of the Respondent to attend meetings. The Union submitted the proposals and attended all the meetings.

11. In sum, attempts for reconciliation fell through. The Grievants submitted that the Respondent was the author of the misfortunes in this case.

Submissions

12. The Claimant submitted that the case raised three issues for determination namely: -

- i. Whether the Grievants' services were unfairly terminated;
- ii. Whether the Respondent's action was a dismissal or redundancy;
- iii. Remedies.

13. The Claimant contended that the Respondent's action violated the provisions of the Employment Act, 2007 that the Respondent disregarded the Constitution and ILO Convention No. 158. Further it was submitted that the dispute was referred to a Conciliator but the Respondent refused to attend the meetings, that the new terms of employment amounted to declaration of redundancy but the prescribed procedure was not complied with. That the action by the Respondent was not a dismissal since the Grievants were not taken through a disciplinary process

14. It was further submitted that the Respondent could not introduce a fixed term contract yet the Grievants had served for a period of time without first declaring them redundant and pay for the duration served before engaging them under a new contract. That since the Grievants were engaged on permanent terms, they could only be terminated if there was a valid reason to do so and the process followed and this had been complied with. The Grievants submit that the Court should quantify damages occasioned by the unlawful termination of employment alongside compensation prayed for in the memorandum of claim.

15. It was further submitted that the Grievants were not aware that they would be required to sign new contracts with the employer. That although the Respondent forwarded Kshs.441,472 to the District Labour Officer, Nairobi as terminal dues for the Grievants and their two colleagues, the Respondent did not demonstrate how the amount due to each grievant was arrived at.

16. On the issue of redundancy and termination procedure, the Grievants relied on Section 2 of the Employment Act, 2007 and the decisions in **Kenya Union of Commercial Food and Allied Workers v Kisii Bottlers Ltd (2017) eKLR** where Marete J. awarded the equivalent of 3

months' salary as compensation to the five (5) grievants in a case for wrongful, unfair and unlawful termination. The grievants in this case did not demonstrate the relevance of the case.

17. Reliance was also made in the Court of Appeal decision in **Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited [2021] eKLR** where the grievant had been terminated allegedly for drunkenness while on duty and the trial court held that the termination was lawful but on appeal the decision of the Trial Court was set aside on the premise that the grievant's termination was unlawful for noncompliance with the provisions of Sections 41, 43, 45 and 46 of the Employment Act.

18. The decision is relevant to this case to the extent that it demonstrates that for a termination to be fair and lawful it must be compliant with the provisions of Section 41, 43 and 45 of the Act as well as the remedies set out in Section 49 of the Act in cases of unfair and unlawful loss of employment.

19. Another relevant decision relied upon is **Kenya Union of Commercial, Food and Allied Workers v Kenya Credit Traders Limited [2020] eKLR** where a redundancy by the Respondent was not carried out in consonance with the provisions of Section 40 of the Employment Act, 2007. The Court found that the grievants were unfairly terminated and awarded one month's pay in lieu of notice and the equivalent of two months' salary compensation.

20. Contrary to the submissions by the grievants that their termination was a consequence of redundancy, it is unclear on what this submission is founded. There is no concrete evidence on record that the Respondent contemplated a redundancy. The pith and substance is that the Respondent unilaterally changed the terms of the contract and demanded that the Grievants execute the new contract but they justifiably declined. They were not privy to the variations and had not consented to them. As employees serving under a contract of service, the employees had to be consulted in any attempt to alter or vary the terms of the contract of service. Emerging jurisprudence on alteration of terms of an existing contract of service is that it behoves the employer who seeks to vary the terms of a contract to consult employees and seek their suggestions or proposals or view and obtain their concurrence or disagreement and proceed accordingly.

21. See **James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR**, **Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosochi & 2 others [2014] eKLR** and **Kenya Plantation And Agricultural Workers Union v James Finlay (K) Limited [2013] eKLR** where the Respondents had unilaterally varied the terms of the contract without engaging the employees. In **Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosochi (supra)** it was held that the unilateral move by the Respondent was tantamount to termination of the existing contract and constituted an unfair and unjustified termination.

Analysis and Determination

22. From the evidence on record, pleadings and submissions the following issues commend themselves for determination: -

- i. Whether the grievants were employees of the Respondent and for how long;
- ii. Whether the Grievants were declared redundant;
- iii. Whether the grievants are entitled to the reliefs sought;
- iv. Costs of this suit.

23. Whereas CW1, Mr. Kelvin Nyaunga Gesairo testified that he was employed by the Respondent in May 2008, CW2, Mr. Dismas Ondiek Getate told the Court that he was engaged on 14th January 2011. None however provided documentary evidence of their relationship with the Respondent. It is unclear when the grievants were employed by the Respondent.

24. Similarly the Grievants provided copies of the payslips for the month of August 2013 which show that the Grievants were employees of the Respondent in August 2013. In addition, the Grievants provided "To Whom It May Concern" letters by the Respondent indicating that both had worked for the Respondent for half a year to 18th September 2013. Although the letters are neither signed nor dated, they allude to the alleged redundancy and how the Respondent dealt with it. This explains the Kshs.441,472 sent to the District Labour Office by a letter dated 25th September 2013 and received on 30th September 2013. A deposit receipt no. 103853 dated 30th September 2013 was issued. The Grievants did contradict these letters on the duration of service.

25. It is important to mention that the documentation on membership of the Union is largely unhelpful in this case. The letter on deductions dated 23rd October 2010 has no particulars on the members of the Union on that date and the list of members identified in another undated document identifies the two grievants but the date on the document is tampered with. The year is changed to reflect 2010 from the original year and it is not counter-signed for authentication. In the circumstances the Court is of the view that the document is unreliable as evidence in this case. From the evidence on record provided by the Claimant, the grievants served the Respondent for half a year only.

26. On whether the Respondent's actions in September 2015 amounted to an unfair dismissal or redundancy, the Grievants submitted that it was a redundancy in that the new terms of engagement presupposed that the previous positions had been abolished. Further, it was submitted that the Respondent did not comply with the procedure set out in Section 40 of the Employment Act, 2007. That it was not a dismissal because the grievants were not taken through a disciplinary process. That whether it was termination or redundancy, the Respondent did not comply with the provisions of the Employment Act. The grievants relied on Section 2 of the Employment Act, 2007 which defines redundancy 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 practices commonly known as abolition of office, job or occupation and loss of employment;***"

27. In addition, Section 40 of the Employment Act provides a comprehensive list of the parameters to be observed in a termination on account of redundancy. The principles and procedures applicable in a redundancy were also explained in detail in **Jane Khalechi v Oxford University Press E.A Ltd (2013) eKLR** as follows: -

- a. Give notice to the Union or labour officer a month before the process commences;
- b. For those not unionised, personal letters copied to the Labour Officer;
- c. Use a criteria of seniority, abilities and reliability of each employee (though not mentioned by the Court, skill is one of the parameters);
- d. Where there is a CBA the same should not disadvantage any employee;
- e. Leave days due should be paid in cash;
- f. One month notice or one month pay in lieu of notice; and
- g. Severance pay not less than 15 days for each year of service.

28. And elaborated further by the Court of Appeal in **Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**. More significantly termination of employment through redundancy must be substantively and procedurally fair.

29. Other than the grievants' submission that the Court should find that the separation in this case amounted to a redundancy and reliance on the definition in Section 2 of the Employment Act and Court decisions, there is no other material relied upon to sustain the case of redundancy. There is no indication from the Respondent that it contemplated a redundancy. It was the grievants' evidence that the Respondent's fault was the proposal that they sign a new contract of employment. In the circumstances, the Court finds that this was not a case of redundancy.

30. Having found that the grievants were not declared redundant, the character of their termination must be sought elsewhere.

31. From the evidence on record as furnished by the grievants, the Respondent unilaterally varied the terms of the employment contract with the grievants. A copy of the new contract was provided. According to the grievants, they were term employees and the new contract was a fixed term contract.

32. At common law, since a contract is a consensual relationship, variation must be mutual and any unilateral variation by either party amounts to a repudiation of the contract. The Employment Act provides that a variation of the terms of a contract of service must be effected in consultation with the employee and where the variation involves an essential of the contract such as duration and remuneration and the employee is adversely affected, the variation violates the right to fair labour practice guaranteed by Article 41 of the Constitution of Kenya 2010. It was so held in **James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR** where the Respondent had unilaterally varied its contract of service with the claimants.

33. Applying the above principles to this case, the Court is satisfied that the unilateral action by the Respondent was a fundamental repudiation of the existing contract which was an unfair labour practice since the employer is taking advantage of its superior bargaining power to the detriment of the employee in violation of the provisions of the Employment Act, 2007.

34. The Court finds and holds that the unilateral variation of the terms of the original contract violated the Grievants' right to fair labour practice which entitles them to compensation.

35. With respect to remedies, the grievants pray for compensation, one month's pay in lieu of notice, redundancy severance pay and days worked in August.

36. Section 49 of the Employment Act catalogues the reliefs available to an employee(s) who is unfairly terminated.

I. Compensation

Dismas Ondiek Getate Kshs.(12,000 x 12) = 144,000

Kevin Nyaunga Gesairo Kshs.(11,000 x 12) = 132,000

37. Although the grievants claimed maximum compensation for unfair termination, and testified that they were engaged in 2008 and 2011 respectively, none produced any evidence on the date of appointment. They, however provided copies of letters from the Respondent indicating that they had served for only half a year up to 18th September 2013.

38. Having found that the grievants were unfairly terminated and in view of the duration served, a two months' salary equivalent is fair compensation. This is comparable to the decision in **Kenya Union of Commercial, Food and Allied Workers v Kenya Credit Traders Limited [2020] eKLR** where the Claimants had served for 6 months. The Court awarded the equivalent of two months' salary as compensation.

Dismas Ondiek Getate Kshs.(12,000 x 2) = 24,000

Kevin Nyaunga Gesairo Kshs.(11,000 x 2) = 22,000

39. In **Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited [2021] eKLR** the Court of Appeal awarded the equivalent of three months' salary as compensation for unlawful termination.

II. One month's pay in lieu of notice

Dismas Ondiek Getate – Kshs.12,000

Kevin Nyaunga Gesairo – Kshs.11,000

40. Having found that the grievants were terminated without compliance with the provisions of the Employment Act, 2007, the Court holds that they are entitled to one month's pay in lieu of notice, **Kshs.12,000** and **Kshs.11,000** respectively.

III. Redundancy/Severance Pay

Dismas Ondiek Getate – Kshs.18,000

Kevin Nyaunga Gesairo – Kshs.33,000

41. Having found that this was not a case of redundancy, the severance pay provided by Section 40(1)(g) of the Employment Act is not due and the same is rejected.

IV. Days worked in August 2013

Dismas Ondiek Getate – Kshs.48,810

Kevin Nyaunga Gesairo – Kshs.23,938

42. For unexplained reason, Mr. Dismas Ondiek Getate had two payslips for August 2013 with different basic salaries. It is unclear which of the two is authentic. The grievant testified that his basic salary was Kshs.12,000. The Court will rely on the pay slip that reflect the sum of Kshs.12,000 excluding overtime. In the absence of evidence to the contrary, the grievants' claim for the days worked in August 2013, remains uncontroverted and the Court awards the same as prayed as follows:-

Dismas Ondiek Getate – Kshs.48,810

Kevin Nyaunga Gesairo – Kshs.23,938

43. In the final analysis judgment is entered for the grievants as follows: -

a. Dismas Ondiek Getate

2 months' salary equivalent----- Kshs.24,000

One month's pay in lieu of notice----- Kshs.12,000

Days worked in August 2013----- Kshs.48,810

Total----- Kshs.84,810

b. Kevin Nyaunga Gesairo

2 months' salary equivalent----- Kshs.22,000

One month's pay in lieu of notice----- Kshs.11,000

Days worked in August 2013----- Kshs.23,938

Total----- Kshs.56,938

c. Costs of this suit

Since the Claimant is not covered by the Advocates Remuneration Order but incurred expenses and disbursements on the suit, it is entitled to

reasonable costs which the Court assesses at **Kshs.50,000/=**.

d. Interest at Court rates from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2021

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE