



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 851 OF 2017

ALBANUS MBITHI MUTISO CLAIMANT

VERSUS

FRESH SQUEEZE LIMITED RESPONDENT

JUDGMENT

The claimant initiated his claim by a memorandum of claim dated 22nd May 2017 filed in Court on 22nd May 2017 alleging unfair or unlawful dismissal from employment and non payment of terminal dues and compensatory damages. The claimant prays for: -

- a) One month's salary in lieu of notice = Kshs.13,662.
 - b) Severance pay for 6^{1/2} years ($15/30 \times 13,662 \times 6\frac{1}{2}$) = Kshs. 44,401.
 - c) Compensatory damages at 12 months' salary = Kshs. 160,032.
- Total Kshs. 218,095.
- d) Costs of the suit and interest.

The respondent filed its statement of defence on 6th March 2018 together with a witness statement of one Lilian Kinyua, the head of human resources. The law firm of C. W. Kinuthia filed the two documents. Subsequent hearing notices were served upon the respondents advocates on record but the firm did not participate nor formally withdraw from the proceedings. The last hearing notice dated 6th August 2021 was served upon the respondents advocates on record on 9th August 2021 but the law firm did not appear for the hearing on 13th August 2021. Previously, the law firm did not appear for the mentions on 20th May 2019, 16th July 2021 and hearing on 6th August 2021 when hearing was adjourned due to technical challenges experienced by the claimant's counsel.

The respondent prayed for dismissal of the claim in its entirety.

Claimant's case

The claimant avers that he was employed by the respondent in July 2010 as a sales person at the respondent's shop, until 26th March 2016 when he was terminated. His monthly salary was Kshs.13,662.

The claimant further avers that he proceeded on annual leave on 1st March 2016 and on his return for deployment as earlier advised the respondent's director, Mr. Paresh informed him that the respondent was making losses and was as a consequence reducing the number of its employees and that the claimant's services were no longer required, that he was ordered to leave the premises. He avers that the impromptu decision by the respondent and the termination was contrary to the provisions of the Employment Act, 2007, Constitution of Kenya, 2010, precepts of natural justice and fair labour practices and was thus entitled to reliefs sought.

Respondent's case

The respondent denied having terminated the claimant, that he was redeployed to a different work station, a normal occurrence, but the claimant did not show up at the new work station. That no notice of termination was issued to the claimant. The respondent further averred that since the claimant was a member of the NSSF and the respondent had religiously paid his contribution, he was not entitled to severance

pay and leave days since the respondent had been paying for the days as and when due.

Evidence

The claimant adopted his written statement dated 22nd May 2017 as evidence in chief and testified that he was employed by the respondent in July 2010, a fact confirmed by the respondent in its statement of defence dated 23rd February 2018. He told the Court that his monthly salary was Kshs. 13,662, that when he reported from leave on 26th March 2016, Mr. Paresh, his employer informed him that because business was low, the claimant's services were no longer needed. He alleges that when he returned two days later, he could not access his former place of work. He confirmed that he was making contributions to the NSSF and the respondent confirmed this fact. He testified that he was claiming severance pay because he was declared redundant. He refuted the allegation by the respondent that he had absconded duty. He was categorical that he had no record of blemish for the duration he served the respondent. He told the Court that he was unfairly terminated and prayed for the reliefs set out in the memorandum of claim inclusive of costs of the suit.

Although the respondent led no evidence, documents on record show that its defence was that the claimant absconded duty after he was redeployed to another work station which is normal at the work place and denied having terminated the claimant.

Submissions

According to the claimant, the issues for determination are whether a fair procedure was applied before terminating the claimant and whether the claimant is entitled to the reliefs sought.

On the first issue, counsel submitted that it was clear that the respondent provided no explanation for the termination contrary to the provisions of section 41 of the Employment Act, 2007. That section 45 required the employer to prove not only the validity of the reason for termination but also that it was fair and a fair procedure was applied in the termination. It was the claimant's testimony that the respondent gave no reason for his termination. Reliance was made on the decision in *Donald Odeke vs= Fidelity Security Limited [2017] eKLR* on disciplinary proceedings. Counsel submitted that the manner in which claimant was terminated could not pass the procedural fairness test in section 41 of the Employment Act, 2007. Since the respondent did not provide any reason(s) for termination, the termination was unlawful/unfair as pleaded by the claimant.

Counsel relied on the decision in *Stanley Mwangi Gachungu & another vs= Barclays Bank of Kenya Limited [2021] eKLR* for the proposition that where the respondent fails to appear in Court to prosecute its defence, and no witness(s) is called to lead evidence, the evidence tendered on behalf of the claimant remains uncontroverted.

On the reliefs sought, counsel submitted that the claimant is entitled to: -

a) Payment in lieu of notice –

Counsel relies on section 36 of the Employment Act, 2007.

b) Severance pay –

Counsel relies on section 40 (1) (g) of the Employment Act to reinforce the contention that since Mr. Paresh had intimated to the claimant that business was making losses and the claimant's services would be no longer required, this amounted to a redundancy by the respondent.

c) Damages

It is submitted that since the claimant was the sole bread winner of his family and served the respondent diligently for 5 years without blemish, and was dismissed in an inhumane way, the equivalent of 12 months gross salary would be sufficient.

The respondent did not file its submissions.

Analysis and determination

After due consideration of the pleadings, evidence, submissions and the authorities relied upon by the claimant, the issues for determination are as formulated by the claimant's submissions namely;

a) Whether the claimant's termination was unfair and unlawful.

b) Whether the claimant was declared redundant.

c) Whether the claimant is entitled to the reliefs set out in the memorandum of claim.

On termination, sections 35, 40, 41, 43 and 44 of the Employment Act 2007 are clear on the substantive and procedural requirements to be adhered to by the employer for a termination to be legally compliant. Courts have in innumerable decisions underscored the need to ensure that a termination is substantively and procedurally fair as emphasized in *Walter Ogal Anuro vs= Teachers Service Commission [2013] eKLR*.

A similar holding was made in *Stanslaus Onchari vs Creative Consolidated Systems Limited [2020] eKLR* as well as in *Fredrick Saundu Amolo vs Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR*. The duty of the employer to prove valid and fair reason(s) for termination coupled with a fair procedure was also underscored in *Beatrice Nyambune Mosiria vs Judicial Service Commission [2019] eKLR* as follows: -

“In employment matters, the employer has to prove both valid reason and fair procedure.”

In *Alphonse Maghanga Mwachanya vs Operation 68 Limited* Radido J. states on procedural fairness: -

“... in order for an employer to meet the legal requirements of procedural fairness, section 41 of the Employment Act, it should meet or show as a matter of factual evidence that it did the following: -

(i) Explain to the employee in a language the employee understood the reason why it was considering the termination.

(ii) Allow a representative of the employee, being either a fellow employee or shop floor representative to be present during the information/explanation of the reason.

(iii) Heard and considered any explanation by employee or his representative”

The respondent alleges that the claimant refused to show up at his place of work after a redeployment from Nakumatt Mega to Tuskys T-Mall. That the claimant absconded duty but provided no evidence to support the allegation.

The emerging jurisprudence on allegations of desertion or absconding duty is that, the employer must establish that it took reasonable steps to contact the claimant to understand the reasons for the desertion. The employer must take the initiative and the notice to show cause should follow establishment of contact with the claimant. This is consistent with the holding in *Boniface Mwangi V.B.O.M. Iyego Secondary School [2019] eKLR*, *Simon Mbithi Mbane vs Inter Security Services [2018] eKLR* as well as *Nzioka vs Smart Coatings Limited [2017] eKLR*.

Applying the foregoing provisions and propositions of law to the instant case, it is clear to the Court that the claimant's termination on 26th March, 2016 did not attain the tenets of substantive and procedural fairness provided by the law.

In this case, the respondent has not shown that it took any reasonable steps to contact the claimant to appreciate the circumstances of the desertion, and having failed to do so, it has no sustainable defence to the claimant's assertion that his termination was unlawful and unfair.

On redundancy, the claimant alleges that he was declared redundant. The allegation is based on the testimony that when he returned from leave and reported to work on 26th March, 2016, Mr. Paresh, the proprietor of the business informed him that since the business was making losses, he was reducing its staff and consequently, the claimant's services were no longer required. According to the claimant, the above communication sealed his fate and amounted to being declared redundant.

The claimant's counsel submitted that the statements made by Mr. Paresh amounted to declaring the claimant redundant and justifies the prayer for severance pay under section 40 (1) (g) of the Employment Act, 2007.

It is the considered view of this Court that section 40 of the Employment Act is a self-contained provision which an employer is required to invoke in cases of redundancy. It prescribes the parameters to be complied and the nature of payments to be made to the person(s) declared redundant. The provision does not anticipate any other payments.

If the provisions of section 40 of the Employment Act are not complied with religiously, the termination qualifies as an unfair termination and triggers section 49 of the Act. It would appear to follow that an employee cannot seek payments under section 40 and invoke the reliefs in section 49 as well. This court is of the view that the two sections apply to different circumstances.

Finally, consistent with the principle that he who alleges must prove, the claimant has not placed any material before the court to establish that he was declared redundant. The court is satisfied that section 40 of the Employment Act is inapplicable to this case.

The Court finds and holds that the claimant's termination on 26th March, 2016 was substantively and procedurally unfair.

On reliefs, the claimant prays for;

One month's salary in lieu of notice since the respondent gave the claimant no notice of termination, the claim for pay in lieu of notice is merited.

Severance pay for the entire working period.

Having found that there was no evidence of redundancy, the prayer for severance pay under section 40 (1) (g) is not merited and is rejected.

Compensatory damages for the unfair dismissal

Having found that the claimant was unfairly terminated, section 49 of the Employment Act provides the appropriate remedies.

Considering that the claimant served for about 6 years and did so diligently, the equivalent of three (3) months' salary is sufficient compensation.

In sum, judgment is entered for the claimant as follows:-

- (i) Payment in lieu of notice Kshs. 13,662.
- (ii) Compensation for unfair termination Kshs. 40,986.
- (iii) Total Kshs. 54,648.
- (iv) Interest at Court rates from the date of judgment till payment in full.
- (v) Costs of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF OCTOBER, 2021

DR. JACOB GAKERI

JUDGE

Delivered in the presence of

Omamo for the claimant.

No appearance for the respondent.