



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 21 OF 2020

DANIEL MBURU MURIU.....CLAIMANT

VERSUS

HYGROTECH EAST AFRICA LTD.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a statement of Claim dated 24th June, 2020 filed in court on 8th July, 2020 the Claimant prays for:-

“(a) An order of declaration declaring that the decision by the Respondent to terminate the Claimant’s services on 12th May, 2020 on account of redundancy was unlawful and unfair.

(b) An order/award for Claimant’s terminal dues being severance pay, house allowance arrears, accrued and outstanding leave days as particularized in paragraph 14 at KES.2,449,115/-.

(c) Interest on (b) above at court rates until payment in full.

(d) Compensation for unfair and unlawful termination of employment on account of redundancy (KES 92,500/ month X 12 months) at KES. 1,110,000/=.

(e) An order for issuance of a certificate of service.

(f) Costs of the suit.

(g) Any other and/or further relief that this court may deem just and fit to grant in the circumstances.”

2. Along with the statement of claim the Claimant filed a verifying affidavit, witness statement, and a list of documents and copies thereof.

3. The Respondent entered appearance dated 4th August, 2020 and filed in court on 6th August, 2020 and along with it a memorandum of response dated and filed on the same dates as the memorandum of appearance, and prayed that the Claimant’s cause be dismissed with costs for lack of merits.

4. Along with the memorandum of response the Respondent filed a bundle of documents.

5. The Claimant’s Advocates further filed “Reply to Respondent’s memorandum of claim” dated 1st September, 2020 reiterating the contents of the memorandum of claim and joining issues with the response filed by the Respondent.

6. The cause came up in court for hearing on 22nd September, 2021 when the Claimant (CW1) testified orally and produced exhibits filed with the memorandum of claim. The Claimant was cross-examined and re-examined and he closed his case.

7. The Respondent did not call any witness and it was agreed and directed by the court that written submissions be filed and served. Counsel for both parties obliged and filed their respective written submissions and the matter was reserved for judgment.

III. CLAIMANT'S CASE

8. The Claimant's case as advanced through his memorandum of claim, oral and documentary evidence, and in the written submissions is that he was engaged by the Respondent as an assistant accountant vide a letter of appointment dated 1st July, 2012 and that he served the Respondent for eight (8) years until 12th May, 2020 when he was, by his own testimony, unfairly and unlawfully terminated on account of redundancy by way of a letter of termination dated 12th May, 2020. That letter of termination was produced as an exhibit by the Claimant, along with the letter of appointment.

9. The Claimant further stated that as at the time of termination he was earning a basic monthly salary of Kshs.92,500/=. He alleges that he did not take annual leave for the entire period that he worked for the Respondent and that he was not compensated for the same. He also alleges that he was not paid house allowance or given housing accommodation during the entire period.

10. The Claimant further stated in his evidence that on 12th May, 2020 he received a letter terminating him on account of redundancy yet, according to him, his position had not been rendered redundant by any factors or circumstances, including those stated in the said letter of bad weather, political instability, heavy rains, and Covid-19 pandemic.

To buttress his testimony, the Claimant alleged that immediately after he was shown the door, his assistant was promoted to occupy his position, demonstrating that he was the target of unfair and unlawful termination disguised as redundancy.

11. It is on the basis of the foregoing that the Claimant pleaded with the court that he be granted the prayers sought in his pleadings.

III. RESPONDENTS' CASE

12. Although the Respondent filed a response to the claim in which it denied liability and prayed for dismissal of the claim, the Respondent did not call evidence in support of their position. It is therefore correct for the court to presume that the pleadings and documents filed in court by the Respondent are unsupported in evidence and as such they are of no evidential value. It is not enough for a party to file pleadings and other materials before the court and leave it to the court to sift through the same to determine what is admissible in evidence and what is not. The materials must be tendered in court through a witness (es) or by consent from the other party. Failure to do so leaves such materials in the realm of mere allegations – See **Edward Mariga VS. Nathaniel David Shulter and Another (1997) eKLR**, among other decisions.

13. In the circumstances, the evidence tendered by the Claimant, subject to evaluation by court and credibility as tested in cross-examination, remain unchallenged.

IV. ISSUES FOR DETERMINATION

14. Arising from the pleadings, the oral and documentary evidence by the Claimant, and the written submissions filed by counsel for both parties, the court identifies the following issues for determination-

- (i) was the termination of the Claimant by the Respondent on account of redundancy fair and lawful?
- (ii) If the answer to (i) above is in negative, is the Claimant entitled to the prayers in the Claim?
- (iii) Who meets the costs of this cause?

This court shall now look into each of the above items.

V. TERMINATION

15. There is no dispute that the Claimant was engaged by the Respondent on 1st April, 2012 as an assistant accountant. That engagement was reduced into writing via a letter of appointment dated 1st July 2013. It is also not in dispute that the relationship between the employer and the employee came to an abrupt end on 12th May, 2020 when the Claimant was terminated on account of redundancy as expressed in a letter dated 12th May, 2020. It is also not disputed that as at the time of termination the Claimant was earning a basic salary of Kshs.92,500/= per month.

16. The Claimant produced the letter of appointment and the letter of termination as **exhibits 1 and 3** respectively. He also produced a bundle of payslips as **exhibit 2**. In his testimony the Claimant confirmed that the basic salary was also the gross.

17. The Claimant in his testimony stated that on 12th May, 2020 he was asked by the newly appointed manager of the Respondent to see him before he left office for home. In compliance, the Claimant went to see the manager at about 6.00pm. when he was informed that he was one of the unfortunate ones and that he was to be terminated on redundancy. The Claimant stated that he was there and then handed a letter of termination but the same was later withdrawn and redrafted by the finance manager in the format of exhibit 3 produced in court.

18. The Claimant testified that prior to 12th May, 2020 he had not been informed or issued with a notice to the effect that he was to be terminated on redundancy.

19. It is against the above background that this court has been invited to determine whether the termination of the Claimant by the Respondent on account of redundancy was fair and lawful. The Claimant alleges that his termination was a dismissal disguised as redundancy.

20. A variety of decisions have emphasized on the importance of both substantial and procedural fairness in all forms of terminations – See **Mary Chemweno VS. Kenya Pipeline Company Limited (2014) eKLR**, **Walter Ogal Amiro VS. Teachers Service Commission (2013) eKLR**; and **Janet Nyandiko VS. Kenya Commercial Bank Limited (2017) eKLR**.

21. Further, courts have made decisions specifically on fairness in redundancy in a variety of decisions including **Kenya Airways Limited VS. Aviation and Allied Workers Union & 3 Others (2014) eKLR**; **Geoffrey Andabwa Ashino VS. Coconut (K) LTD (2019) eKLR**; and **Paul Ng'eno VS. Pyrethrum Board of Kenya (2013) eKLR**.

22. **Section 2 of the Employment Act No 11 of 2007** (the Act) 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 practice commonly known as abolition of office, job or occupational loss of employment.”

23. Essentially, the Act allows an employer to terminate an employee. However, the said right on the part of an employer is regulated by **Sections 40, 43, and 45 of the Act**. **Section 40** specifically places obligations and conditions that an employer ought to meet before declaring an employee(s) redundant. Those conditions include the following:-

(i) An employer, where an employee(s) is a member of a trade union, shall issue at least one (1) month's prior notice of the intended redundancy to the union and the area labour officer.

(ii) Where the employee(s) is not a member of a union, the notice shall issue to the employee(s) and the labour officer.

(iii) In arriving at the decision on the employee(s) to be affected by redundancy the employer has to consider seniority in time and skill, ability and reliability especially of the employees(s) to be affected.

(iv) An employer must ensure that even an employee(s) who is not a member of a trade union does not lose benefits under any subsisting collective bargaining agreement.

(v) Any pending leave shall be paid for in cash before the employee is let go on redundancy (*This part of the law needs reform as payment in cash is a rather outdated mode of payment. The provision should be to the effect that the pending leave shall be paid for promptly before the employee is released. And in any event, there is nothing that should prevent such payment to be made along with the other dues). But as it stands for now, the law is that the leave pending shall be paid in cash before the employee is let go.

(vi) The employer shall pay the employee(s) affected severance pay at the rate of not less than 15 days for each completed year of service.

24. Clearly, declaration of redundancy is a process and not an event. Further, even when an employee is to be terminated on redundancy such an employee should still be afforded a hearing on whatever it is that they would wish to say about the termination on redundancy. Further, **Section 43** of the Act on proof of reason for termination by the employer, and **Section 45** on unfair termination apply to termination on redundancy just as they apply on other terminations. Hence both substantive and procedural fairness apply on redundancy and an employer who fails either test stands to be held liable for unfair, or wrongful, and unlawful termination.

VI. SUBSTANTIVE FAIRNESS

25. For avoidance of doubts, redundancy is a form of termination and therefore **Sections 43, 45, 47 and 49** of the Act apply in cases of redundancy just like in other forms of termination. Therefore, Section 40 provides for an ideal situation where the reason for termination on redundancy is based on a valid and lawful reason. Once an employer has a valid and lawful reason(s) for termination on redundancy, such an employer must apply and comply with **Section 40 of the Act**.

26. It is therefore upon this court to now apply the above provisions of the Act to the facts, evidence, and circumstances of this cause in order to determine whether the Respondent had a lawful reason for terminating the Claimant on account of redundancy.

27. In the notice of redundancy dated 12th May, 2020 the Respondent cited financial difficulties due to bad weather, political instability, heavy rains, and covid-19 pandemic as the reason for declaring the Claimant redundant. In his testimony in court, the Claimant disputed this position and stated that the Respondent was in good financial standing, notwithstanding that the Respondent was making bad financial decisions including purchase of luxury vehicles for the top management.

28. There is no evidence from the Respondent to confirm that it was experiencing financial difficulties. The Respondent would have done this by way of producing audited financial statements to dislodge the allegation by the Claimant. In the circumstances, this court is

satisfied and holds that there was no good, lawful, or reasonable basis for the Respondent to declare the Claimant redundant.

29. Under **Section 43 of the Act** the Respondent as the employer is under obligation to prove the reason(s) for termination and that the same was lawful under Section 45 of the Act. As stated above, the Respondent did not adduce evidence to demonstrate the alleged difficult financial situation at the material time. In the circumstances this court finds and holds that the termination of the Claimant was malicious, unfair, unjust, and unlawful.

VIII. PROCEDURAL FAIRNESS

30. **Section 40 of the Act** caters for the procedure to be adopted by an employer who intends to terminate an employee on account of redundancy. A plethora of court decisions is now available on the substantive and procedural fairness in terminating on redundancy. In **Kenya Airways Limited VS. Aviation and Allied Workers Union of Kenya and 3 Others (2014) eKLR**, the Court of Appeal pronounced itself as follows:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

31. The Respondent has not demonstrated that a notice of not less than a month was issued to the Claimant and the area labour officer prior to the termination. There is no evidence on the criteria that the Respondent applied in selecting the Claimant for termination, and there is no evidence of payment of pending leave days in cash prior to the termination, if any was due.

32. This court finds and holds that the Respondent acted in blatant disregard to **Section 40 of the Act** in declaring and terminating the Claimant on account of redundancy both in substance and the procedure applied. The evidence on record which was not rebutted is that the Claimant was not invited for a hearing or to make any presentations and or dispositions that he might have wished to present during the encounter of 12th May, 2020 with the manager or the finance manager. The Claimant was simply informed of the decision to terminate him on redundancy and handed a termination notice. The claimant was hence denied due process as enshrined in Article 47 of the Constitution, **Section 4 of the Fair Administrative Actions Act**, and Section 45 of the Employment Act. The Respondent was not fair, just, and equitable in deciding to and actually terminating the Claimant.

33. This court has said enough in demonstrating that the substance and procedure adopted by the Respondent in terminating the Claimant on account of alleged redundancy was unfair, unjust, and unlawful.

VIII. RELIEFS

34. The remedies that the Claimant is seeking have been set out at the inception of this judgment. This court shall now proceed to deal with each item as hereunder.

35. On the termination of the Claimant on 12th May, 2020 on account of alleged redundancy, this court has already dealt with this issue at length in a preceding part of this judgment and emphatically found that the termination was unfair, unjust, and unlawful. I say no more on that issue.

36. In paragraph 14 of the memorandum of claim, the Claimant is seeking monetary compensation under various heads amounting to a total of Kshs.2,449,115/=.

37. On one month's salary in lieu of notice this court has already found that the Respondent did not issue notice as required under Section 40 of the Act before terminating the Claimant. This notice shall be issued whether an employer intends to pay in lieu thereof or not. This court finds no difficulty in allowing this prayer calculated as **Kshs.92,500 X 1 = Kshs.92,500/=**. It is important to note that the Claimant admitted in his evidence that this amount had already been paid to him by the Respondent.

38. On severance pay for eight (8) completed years of service, this is provided for under Section 40(1) (g) of the Act. On this issue the Claimant testified that he was paid net of Kshs.272,298/= on 2nd June, 2020 after he complained. The total dues to the complainant under this head is **Kshs.92,500/30 X 8 = Kshs.370,000/ = Less Kshs.364,932/=** which has already been paid leaving a balance of **Kshs.5,068/=**.

39. On outstanding leave days, clause 2.0 of the appointment letter provides the answer. While the Claimant was entitled to 21 working days annual leave, such leave was to be taken within one year failure to which the same was deemed forfeited. Further, leave was to be applied for in writing. While this court sympathises with the Claimant on this issue, the court notes that no evidence was produced whatsoever by the Claimant to demonstrate that he had such leave days pending. There were no letters or written notes wherein the Claimant applied for leave. Even if such records were in possession or custody of the Respondent, the Claimant has legal avenues of demanding from the Respondent to avail the same in court during the trial. If the Respondent failed to comply the court would then have taken the appropriate steps including taking the presumption that the Respondent failed to produce the same because the evidence would have been against it. In the circumstances, this prayer is denied.

40. On house allowance, this court makes reference to Clause 1.5 of the letter of appointment dated 1st July, 2013. It is evidently clear that the starting basic cum gross salary of Kshs.35,000/= included house allowance. This letter of appointment is the primary contract of employment between the Claimant and the Respondent. It is upon that basic contract that the relationship between the Claimant and Respondent was founded. There was a steady increment of the salary of the Claimant and as at the time of termination on 12th May, 2020 the same stood at Kshs.92,500/=. The element of house allowance was carried along as a pertinent item of the gross pay. In other words, the said monthly pay was all inclusive, with the aspects of house allowance in-built. That is the only logical and reasonable conclusion that this court can arrive at in the circumstances.

41. This court takes this position because even as early as August and October 2012, as per the pay-slips produced by the Claimant as exhibits, the element of house allowance though well captured in the letter of appointment(contract) the same aspect was not captured separately as such.

42. In the circumstances, this court makes the finding that the Claimant was paid house allowance as agreed by and between the parties for the entire period of employment of eight (8) years. This court awards nothing under this head.

43. On compensation for unfair and unlawful termination, the Claimant has prayed for the maximum compensation of 12 months' salary. In evaluating what would be reasonable and fair compensation to the Claimant a number of factors come into play as provided for under Section 49(4) of the Act.

44. The Claimant has not expressed an intention of going back to work with the Respondent. It is clear from the pleadings, written submissions filed, and the oral testimony that the Claimant has moved on, although he stated that he was as at the time of the hearing hereof still unemployed.

45. Clearly, the Claimant did not in any way contribute to his termination. The Claimant had served the Respondent continuously for eight (8) years. In a small economy like ours where jobs are not easy to come by, it is not easy for the Claimant to secure comparable or suitable employment.

46. However, the court notes that the Respondent paid some dues to the Claimant and this good gesture, though only paid after some probing by the Claimant, cushioned the Claimant from serious financial embarrassment in the short term.

47. Section 49(1) (c) caps the maximum award payable under this head at 12 months gross pay. Courts have also held that only under special circumstances may the maximum award of 12 months gross salary be awarded. This court notes that the Respondent made payment for one months' salary in lieu of notice and some severance pay for the eight (8) years, although not in full as noted elsewhere in this judgment.

48. Considering all the factors enumerated above and the entire circumstances of this cause, this court finds that an award of ten (10) months' gross salary under this head is fair compensation.

49. Courts have variously noted that the maximum award of 12 months' gross salary may be awarded only under special circumstances. Such circumstances, in my view, may include where the termination was clearly and manifestly based on malice, discrimination, or other utterly ulterior motive.

50. Under this head, the Claimant is awarded **Kshs.92,500/= X 10 = 925,000/=** . This amount is subject to statutory deductions.

51. Under Section 51 of the Act the Claimant entitled to be issued with a certificate of service by the Respondent. The Respondent is ordered to issue and deliver the certificate to the counsel for the Claimant within 30 days of this judgment.

52. On the issue of costs, the same follow event and there is no reason for this court to depart from that general principle in this cause. The Claimant is awarded costs based on the award made. The said costs may be agreed by and between counsel for both parties or the same may be taxed before the Deputy Registrar of this court.

53. In final disposal of this cause, the court grants the following:

(a) An order of declaration be and is hereby issued declaring that the decision by the Respondent to terminate the Claimant on 12th May, 2020 on account of redundancy was unlawful for lack of substantive and procedural fairness.

(b) The Claimant is awarded the following monetary awards:

(i) Balance of severance pay - **Kshs. 5,068**

(ii) Compensation for unlawful

termination - **Kshs.925,000**

TOTAL - **Kshs.930,068**

(This amount is subject to lawful statutory deductions).

- (c) The amounts in (b) shall earn interest at court rates from the date of this judgment till payment in full.
- (d) The Respondent is ordered to issue and deliver to the Claimant a certificate of service within 30 days of this judgment.
- (e) The Claimant is awarded costs of this cause.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF NOVEMBER 2021.

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DAVID NDERITU

JUDGE