



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2088 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JAMES KINYUA KIBIRU.....CLAIMANT

VERSUS

H. YOUNG & CO. (E.A) LIMITED.....RESPONDENT

JUDGMENT

1. INTRODUCTION

The Claimant filed a claim against the Respondent dated 11th October, 2016 and prays for a declaration that the termination of his employment was illegal and unlawful.

2. The Respondent filed a response dated 2nd November, 2016 and they allege that the Respondent's claim has no merits and should not be granted.

3. THE EVIDENCE

The Claimant states that he was employed by the Respondent for five years to or about 25th November, 2015 when he was unilaterally sacked without any reasonable cause and against the rules of natural justice.

4. He says he was employed on 3rd January, 2011. He says he was earning Kshs.45,022/= per month and was a driver of a trailer.

5. He says the said sacking caused him loss and damage and so prays for damages, terminal benefits and severance pay for every year worked as follows:-

- (a) Certificate of service
- (b) One month in lieu of notice.....Kshs.45,022/=
- (c) Severance pay for every year worked...Kshs.112,555/=
- (d) Leave days for years worked.....Kshs.225,110/=
- (e) Bonus allowance.....Kshs.210,000/=
- (f) General damages for years worked.....Kshs.540,264/=

Totaling.....Kshs.1,132,951/=

6. The Respondent admits Claimant was his employee but from 11th March, 2014 to 25th November, 2015 for 21 months.

7. The Respondent says he complied fully with all the relevant provisions of the law by giving the Claimant notice of termination, stating reason for termination and paying Claimant his terminal dues. The Respondent's witness says the Claimant's work was terminated because worked reduced.

8. The Respondent states that the Claimant was earning Kshs.40,895/= per month and was paid terminal dues of Kshs.28,362/= inclusive one month payment in lieu of notice, leave days and gratuity for one full year. The said money according to the Respondent was paid in the Claimant's bank account.

9. The respective parties had been given until 8th November, 2021 to file their submissions.

By 12th November, 2021 the respective parties had not put in their submissions and so that was now overtaken by events.

10. DETERMINATION

This was a case of redundancy because the Respondent's Human Resource Manager one Serah Wangechi said the Claimant's employment was terminated because work had reduced at the Respondent's company. The Claimant was served with a termination letter dated 25th November, 2015 and was told was effective the same day.

11. The Employment Act 2007 makes it mandatory for the process to be followed when declaring an employee redundant.

12. Section 40 of the Employment Act provides as follows:-

The employer will not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the Labour Officer in-charge of the area where the employee is employed of the reasons for, the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.

(b) Where the employee is not a member of the trade union, the employer notifies the employee personally in writing and the Labour Officer.

13. In other words Section 40 (1) a-g and 40(2) and 40(3) makes it mandatory and is not left to the prerogative of the employer the detailed process to be followed in declaring the employee redundant.

In this case the Respondent did not comply with these provisions at all. The wording in the said Section 40 of the Employment Act were not suggestive but where indeed meant to be mandatory. The same provides that an employer shall not terminate the employment of the employee without complying with the provisions herein.

14. The Respondent did not inform the Claimant he was considering declaring him redundant a month prior to the termination. He just wrote him a letter of termination the same day he gave him his marching orders.

He violated the provisions of the law provided in Section 40 of the Employment Act. In the case of **JANE KHALECHI VS OXFORD UNIVERSITY PRESS E.A. LIMITED (2013) eKLR** the Claimant was served by her employer with a termination letter on account of redundancy. She stated the redundancy was not justified since fair and proper procedure was not followed.

15. The court held that the decision taken by the Respondent to terminate the employment of the Claimant was procedurally unfair and was not based on any reasonable grounds and therefore was substantively unfair.

16. The Respondent in declaring the Claimant redundant was therefore required to give him a written notice and also to do an extensive consultation as to the criteria used in declaring Claimant redundant.

17. Then the Claimant should be paid for any unutilized leave days, severance pay and one month pay in lieu of notice.

18. The Respondent attempted to pay the same but clearly did not fully work out all what was due to the Claimant.

19. DECISION

The court has considered the obligations placed on the employer in declaring an employee redundant which include giving notice to the union or Labour Officer or the employee one month before termination, give criteria used to select who to declare redundant and where there is a Collective Bargaining Agreement to ensure the employee is not disadvantaged.

20. The Respondent had not met the statutory threshold of procedural fairness in the implementation of its redundancy decision as it failed in all the above set out obligations. The redundancy of the Claimant is therefore unfair and procedurally flawed.

RELIEFS

As provided in Section 40 of the Employment Act the Claimant is entitled to the following reliefs and is awarded the same accordingly:-

- (1) One month's salary in lieu of notice Kshs.45,022/= as in annexed payslip dated August, 2014.

(2) Severance pay from 2011 to 2015 as per letter of employment dated 12th January, 2011

5 years Kshs.111,555/=.

(3) Leave days for years worked 225 + 10 -23 days as per Respondent's document Kshs.180,088/=. In other words employer has records of 23 days of leave taken so the same is deducted.

(4) There is no justification to award general damages for wrongful termination as severance pay has been awarded.

(5) The prayer for bonus allowance has not been proved how it was arrived at neither in the pleadings nor in submissions and it would be wrong to award a figure in abstract. The same is declined.

CONCLUSION

The Claimant is awarded a total of Kshs.337,665/= for unfair declaration of redundancy. This is less any amount paid. He is also awarded costs and interest at court rates.

He is also to be issued with a certificate of service.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 18TH DAY OF NOVEMBER, 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE