



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 308 OF 2018

CHADWICK ONYANGO OGOLLAH.....CLAIMANT

- VERSUS -

BANDARI SAVING & CREDIT CO-OPERATIVE SOCIETY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th December, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 08.05.2018 through Oduor Siminyu & Company Advocates. The claimant was employed by the respondent from 17.09.2016 in the Accounts Department for a term of 3 years with a 3 months' probationary period. His gross pay was Kshs.218, 000.00. His employment was terminated by the letter dated 28.02.2017 and effective 1st March, 2017 with payment of one month in lieu of notice and upon the following grounds:

- a) The inspection report by the Mombasa County Department of Trade, Investment & Industrialisation, Directorate of Co-operative Development dated 28.11.2016 reported that the claimant's employment was irregular causing the establishment structure to be bloated. The claimant's employment had been outside the respondent's approved budget and establishment structure and hence null and void.
- b) The job evaluation report done by Top Edge Consultants Limited dated 03.01.2017 on affordable organisation structure of the respondent recommended a total number of 28 employees.
- c) The financial report on statement of comprehensive income of 2016 and the budgeted income and expenditure statement of 2017 which adopted the above mentioned two reports.

The letter concluded that the respondent had decided to carry out retrenchment of Sacco employees by use of LIFO method per Sacco HRM policies, and the claimant's position had been rendered redundant with payment of one-month salary in lieu of notice.

The claimant's case was that the termination was unfair, against rules of natural justice and null and void. He prayed for judgment against the respondent for:

- a) Salary in lieu of notice Kshs. 218, 000.00.
- b) 12-months' salary in compensation Kshs. 2, 616, 000.00.
- c) Gratuity for 3 years' Kshs. 1, 464, 453.90.
- d) Payment of salary for remainder of contract Kshs.6, 758, 000.00.
- e) Certificate of service.
- f) Medical allowance Kshs.750, 000.00.
- g) Costs of this claim and interest thereon.

The respondent filed the response to the memorandum of claim on 19.06.2019 through Akanga Alera & Company Advocates. The respondent pleaded as follows:

- a) The respondent employed the claimant by letter dated 17.09.2016 as Accountant FOSA at Kshs. 150, 000.00 exclusive allowances and emoluments. It was a fixed term contract of 3 years with 3 months' probation term.
- b) The claimant worked from 17.09.2016 to 21.11.2016 when the respondent placed him on paid special leave pending re-organisation of staff and inquiry in to respondent's employment structure.
- c) The Directorate of Co-operatives Development reported and recommended that the claimant's employment was not regular because no vacancy had been advertised and there had been no interviews; no vacancy had been declared to the respondent's CEO for filling per the respondent's Head of Relations Policy; and the claimant's employment caused the respondent's establishment to be bloated resulting in challenges of placement and budget overruns due to the excessive in-post staff.
- d) The respondent engaged Top Edge Consultants and their report dated 03.01.2017 which recommended optimal staffing for respondent at 28 employees.
- e) The respondent adopted the reports and in the interest of shareholders the claimant's employment was terminated per the letter dated 28.02.2017. The claimant has worked for only 3 months before proceeding on a paid leave and culminating in the termination. The claimant was paid one-month in lieu of notice. The respondent was willing to issue certificate of service per section 51 of the Employment Act, 2007.
- f) The termination was upon fair procedure, valid reasons and the respondent's operational requirements per section 45 of the Act and one-month salary was paid per section 40 (f) of the Act. The termination was not unfair, unlawful or unjust. The claimant had been employed for only 6 months and he cannot allege unfair termination per section 45(3) of the Act.
- g) The claimant was not entitled as claimed and prayed fo and the suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness (RW) was Joseph Otieno Bee, the CEO. Final submissions were filed for the respondent but the claimant failed to file submissions as was directed. The Court has considered the material on record and finds as follows:

- 1) Parties, per pleadings and evidence, are in agreement that they were in a contract of service.
- 2) The contract of service was terminated per letter dated 28.02.2017.
- 3) The claimant confirmed he was paid all salaries for days worked and he was paid one-month salary in lieu of termination notice and the Court returns that his claim for notice pay was unjustified.
- 4) The evidence is that the claimant worked for two months then he was emplaced on special leave and the events took place during the 3 months' probationary service. In the circumstances, the Court returns that while the respondent has by evidence established that it had a bloated service rendering the claimant's service redundant, the termination events being substantially within the probation period, the termination was as well a termination of a probationary service and parties having agreed upon a one-month payment in lieu of notice, the termination did not amount to unfair termination, both upon merits and procedure. The Court has considered that in fact, the claimant actually worked for only two months and for the rest of the service he was on paid special leave. The Court has considered section 42(2) of the Act that probationary service shall not be for more than six months and may be extended for a further period of not more than six months and, section 42(4) of the Act that a probationary service is terminable with 7 days' notice or pay in lieu thereof (but in this case parties had agreed on a month's notice.) Applying those provisions to the present case where redundancy situation run into probationary service with payment throughout the special leave substantially overlapping with most of the probationary period, the Court finds that the parties separated fairly and the respondent substantially acted within the contract and minimum statutory safeguards. The claim for unfair termination and compensation will collapse.
- 5) As submitted for the respondent, the claimant was in the respondent's service for about 5 months and he had not accrued severance pay as he had not served a complete year per section 40(1) of the Act.
- 6) The respondent did not exhibit the reports relied upon to declare the claimant's service redundant and did not show that the 30-days' notice to the claimant and labour officer per section 40(1) had issued. But for the probationary service overlapping the redundancy situation, the Court considers that the termination would otherwise have been unprocedural.
- 7) The claimant did not establish the basis for the medical allowance as claimed and NHIF having been remitted in his favour, the prayer will collapse as submitted for the respondent.
- 8) The Court finds that the prayer for payment for unexpired tenure was unfounded and will collapse.
- 9) RW confirmed that the claimant was entitled to 31% of basic salary in gratuity for period served. He is awarded $31/100 \times 5 \times$ Kshs.150, 000.00 (per respondent's pleading on basic pay) making **Kshs. 46, 500.00**. The certificate of service will issue. The claimant failed to file submissions as was directed and considering parties' margins of success, each to bear own costs of the suit.

In conclusion judgment is hereby entered for:

- 1) The respondent to pay the claimant **Kshs. 46, 500.00** by 01.02.2022 failing interest to be payable thereon at Court rates.

2) The respondent to deliver the certificate of service by 01.02.2022.

3) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 17TH DECEMBER, 2021.

BYRAM ONGAYA

JUDGE