



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2350 OF 2016**

**ERIC MWIDAKO MUGATSIA.....CLAIMANT**

**VERSUS**

**DHANUSH INFOTECH LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant brought the instant suit vide a statement of claim dated 18<sup>th</sup> November, 2016, through which he alleges that the respondent underpaid his salary, unlawfully declared him redundant, unilaterally changed his employment terms and through its omissions, exposed him to harassment in Gabon by the authorities. The claimant thus sought various reliefs against the respondent including, general damages, severance pay, unpaid salary, refund of unlawful deductions, unpaid leave, house allowance, underpayment of salaries, salary in lieu of notice, reimbursement of rent paid in Gabon but not utilized, compensatory damages for unfair termination and costs of household goods purchased in Gabon.

2. The claimant avers vide his statement of claim that he was employed by the respondent with effect from 23<sup>rd</sup> June, 2014 and was earning a gross salary of Kshs 314,300/=. He alleged that the respondent later forced him to sign another contract which altered his terms of contract from permanent and pensionable to a one year fixed term contract. He averred that the respondent later terminated his employment thus triggering the instant claim.

3. The respondent neither entered appearance nor filed a response in answer to the memorandum of claim. The claim was therefore undefended. The claimant through his Advocate filed an Affidavit of Service sworn by one Nornael Goganyo on 23<sup>rd</sup> November, 2016, through which he deponed that he effected service of the statement of claim and summons to enter appearance upon the respondent. Annexed to the Affidavit of service, was a copy of the summons to enter appearance bearing the stamp of the respondent.

4. On 25<sup>th</sup> May, 2017, the court directed that the matter proceeds for formal proof hearing. The said direction was once again reiterated by the court on 18<sup>th</sup> June, 2021.

5. Accordingly, the matter proceeded for formal proof hearing on 7<sup>th</sup> October, 2021, and the claimant testified in support of his case and also called one witness.

**Claimant's case**

6. At the outset, the claimant sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the bundle of documents filed together with his claim, as exhibits before court.

7. The claimant told court that he was employed by the respondent with effect from 23<sup>rd</sup> June, 2014 at a gross salary of Kshs 314,300/=. That the respondent later forced him to sign a new contract which had the effect of changing his employment terms from permanent and pensionable to a one year fixed term contract. That under the new contract, he was to earn a net salary of 3,000 USD and his leave days were reduced from 24 to 12 days.

8. The claimant further averred that he was assigned to work in Gabon and to this end, the respondent was to facilitate his issuance with a work permit. That initially, he was issued with a business visa/permit as opposed to a work permit and the respondent promised to facilitate the processing of the appropriate visa/permit in due course.

9. The claimant told court that on 14<sup>th</sup> October, 2015, he was summoned to the immigration department of the Gabonese government together with his coworker, Mr. Erastus Kwaka (CW1). That at the immigration department, they were given a deadline of 19<sup>th</sup> October, 2015 within which they were to leave the country. That however, they were deported back to Kenya on 17<sup>th</sup> October, 2015, before the expiry of the deadline hence they continued working for the Gabon offices remotely. That the respondent reassured them that it was working on

their paper work hence they would be back in Gabon within two weeks. He further told court that by the time he left Gabon, he had spent a total sum of 12,600 USD in rent and Kshs 200,000/= to purchase household items for his use, as he anticipated that he would go back. He thus averred that due to the omissions of the respondent, the unutilized rent was to the tune of 9,800 USD.

10. He further told court that the respondent reduced his salary from the month of May, 2016, failed to pay him his salary while he was in Gabon and also withheld his salary for the month of June 2016.

11. The claimant further averred that his services were terminated on grounds that the respondent had lost a contract with a client.

12. The claimant called Mr. Erastus Kwaka, his former coworker, who testified as CW2. Mr. Kwaka adopted his witness statement as part of his evidence in chief. He told court that he worked with the claimant in Kenya and in Gabon and that while in Gabon, they went through the same harrowing experiences as they were not issued with the right visa/permit.

### **Submissions**

13. Upon close of the hearing, the claimant filed written submissions through which he stated that his termination on grounds of redundancy were unfair, unprocedural and unlawful. To fortify his submission, he relied on several authorities including **Aviation & Allied Workers Union vs Kenya Airways limited and 3 others (2012) eKLR, Ibrahim Kamasani Amoni vs Kenital Solar Limited (2018) eKLR, Mary Nyawira Karimi vs Pure Circle (K) limited (2018) eKLR**. The claimant further submitted that the respondent violated his constitutional rights by withholding part of his salary and exposing him to harassment by the Gabonese authorities. As a result, he sought compensatory damages.

### **Analysis and Determination**

14. Having considered the claim before me, the evidence on record, the oral testimonies rendered before court and the submissions tendered, to my mind, the issues falling for the court's determination are;

**i. Whether the claimant subjected to unfair labour practice(s)?**

**ii. Whether the claimant's termination was lawful and procedural?**

**iii. Whether the claimant is entitled to the reliefs sought?**

#### **Whether the claimant subjected to unfair labour practice(s)?**

15. The claimant has averred that the respondent reduced his salary without any justifiable cause. The claimant has also averred that the claimant unilaterally altered his contractual terms from permanent and pensionable to a fixed term contract of one year. He termed these actions by the respondent as amounting to unfair labour practices.

16. **Article 41(1)** of the Constitution guarantees every person right to fair labour practices. In as much as this provision does not assign definition as to what would constitute an unfair labour practice, it nonetheless, underpins most of the provisions contained in the Employment Act, in particular the rights and duties enunciated thereunder.

17. Therefore, it is not possible to pin point what constitutes an unfair labour practice. Rather, it would be circumstantial, hence the specific acts of violation alleged to have been committed by an employer, would determine whether or not, there has been an unfair labour practice.

18. In the instant case, the claimant has alleged that the respondent unilaterally amended the terms of his employment contract. Indeed, it is discernable that the claimant's contract was amended vide the second contract of employment. The claimant has averred that the second contract amended his terms of service from permanent and pensionable to contractual. From a perusal of his initial contract, this fact is not apparent as the said contract is silent as regards his terms of service.

19. It is also notable that the offer letter to the claimant dated 10<sup>th</sup> August, 2015 referred to previous discussions between the claimant and the respondent. It would therefore appear that the amendment to the contract was not unilateral. Besides, it is also apparent that the claimant's salary was reviewed upwards vide the second contract, hence it cannot be deemed that the same was entirely to his detriment.

20. The claimant has also alleged that the respondent unlawfully effected deductions from his salary and that it also withheld part of his salary thereby underpaying him to the tune of Kshs 392,163/=.

21. The duty of the employer to fully compensate an employee for services rendered is fundamental in any employment relationship. This position is appropriately captured under **Section 17(1)** of the Employment Act (Act) and reads as follows;

**“Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service...”**

22. From the evidence presented before court through email communication, the respondent did not advance any plausible reason for withholding the claimant's salary. If anything, it kept apologizing to the claimant and promised to remit the balances.

23. In light of the foregoing and considering the circumstances appertaining this case, it is apparent that the act of withholding the claimant's salary without any justifiable cause constituted an unfair labour practice on the part of the respondent. This is coupled with the fact the actions of the respondent exposed the claimant to financial hardship.

**Whether the claimant's termination was lawful and procedural?**

24. The claimant executed an agreement dated 10<sup>th</sup> August, 2015, which was to run for one year from 10<sup>th</sup> August, 2015 to 9<sup>th</sup> August, 2016. Be that as it may, the same was subject to extension depending on his performance and business requirements. The contract was also terminable by either party giving the other one month's written notice or pay in lieu thereof.

25. Indeed, the respondent exercised the option to terminate the claimant's contract vide an email of 6<sup>th</sup> May, 2016, to the effect that;

*“As discussed earlier our contract with the client is expiring on 16<sup>th</sup> June, 2016 and it is not being extended hence we will not be able to sustain you in the organisation. Through this email we are issuing you with the required notice as quoted in your contract with effect from 15<sup>th</sup> May, 2016.”*

26. Essentially, the means through which the claimant's services were terminated falls within the ambit of redundancy. Section 2 of the Employment Act defines “**redundancy**” to mean “**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. Section 40 (1) of the Employment Act addresses the issue of redundancy and spells out the following preconditions;

**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, and 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 an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**

**c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**

**d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**

**e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**

**f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**

**g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.**

28. In this case, the claimant was notified vide email of the intended redundancy. There is no evidence that the said notice was also issued to the labour officer as required under subsection (1) (b). There is also no evidence in regards to the selection criteria applied by the respondent prior to the claimant being declared redundant.

29. Further, the notice did not indicate whether the claimant was paid severance pay or was compensated for the period he did not proceed on leave. Simply put, there is no evidence that the respondent complied with the conditions prior to terminating the claimant on account of redundancy.

30. In as much as the respondent had the right to reorganize his personnel as it deemed fit, it was also mandatory that it complies with the procedure stipulated under section 40(1) (a).

31. It is also instructive to note that the provisions of section 40 (1) ought to be read together with section 45 (2) of the Employment Act which provides as follows;

**A termination of employment by an employer is unfair if the employer fails to prove—**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason—**

**(i) related to the employee's conduct, capacity or compatibility; or**

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

32. The reason given for the redundancy was that the respondent had lost a contract with a client hence it could not sustain the claimant any more. The reason seemingly falls within section 43 (2) (c) (ii) of the Employment Act as it was based on respondent's operational requirements and ought to have been proved. This was not done as the respondent did not tender any defence nor participate in the proceedings herein. The redundancy thus fell short of the legal requirements.

33. The court in the case of **Hesbon Ngaruiya Waigi vs Equatorial Commercial Bank Limited (2013) eKLR** held that;

**“Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of Section 40 of the Employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair.”**

34. In a similar fashion, and having found that there is no evidence that the respondent complied with the requirements set out under section 40 of the Employment Act, I return a verdict that the claimant's termination on account of redundancy was unfair and unprocedural.

### **Reliefs**

#### **House allowance**

35. The claimant has prayed for house allowance in the sum of Kshs 556,100/=. I have noted that clause 6 of his contract provides in part as follows, *“The said salary includes an element to be used by the employee for housing accommodation, local transport...”* Essentially, the house allowance was included in the salary payable to the claimant hence the prayer for the same is declined. Besides, the salary payable was in net, hence it can be presumed that in arriving at the same, the aspect of housing allowance had been factored in.

#### **Compensatory damages**

36. The claimant has prayed for compensatory damages on account of the redundancy which he termed as unlawful. To this end, he seeks the sum of 36,000 USD being equivalent to 12 months of his monthly salary. Having found that the claimant's termination by way of redundancy unlawful and unprocedural, I will award him damages equivalent to 4 months. This award has been informed by the fact that the claimant had 3 months to the termination of his contract and the fact that the respondent withheld his salary without any justifiable cause thus subjecting him to unfair labour practices.

#### **Severance pay**

37. As I have found herein, the claimant was exited from employment by way of redundancy hence he is entitled to severance pay pursuant to section 40 (1) (g) of the Act.

#### **Salary for June, 2016**

38. The claimant has averred that he was not paid salary for June, 2016. I will award him the same as there is no evidence that he was paid, judging from the email communication between the claimant and the respondent.

#### **One months' notice**

39. Under section 40 of the Employment Act, an employee who has been terminated on account of redundancy is entitled to one month's notice or payment of salary in lieu thereof. I have noted that the claimant was issued with the requisite notice as he served from the date of the notice that is 6<sup>th</sup> May, 2016 until June, 2016 when the termination took effect. On this account, the prayer under this head is declined.

#### **Reimbursement of expenses**

40. The claimant has prayed for reimbursement of the expenses he incurred in Gabon but remained unutilized. The expenses include purchase of household goods and rent for the months of October, 2015 to February, 2016.

41. From the evidence presented before court, it is evident that the claimant was deployed to Gabon by the respondent. He was solely there on account of the respondent. Indeed, under clause II of the agreement, the respondent was responsible for the claimant's costs for visa and airfare. From the evidence adduced, the claimant's short stay in Gabon and eventual deportation was on account of not possessing the appropriate visa/permit. It was his evidence that since his deportation was unprecedented, he had to leave behind the household goods he had purchased. Further and despite his deportation, he continued paying house rent so as to maintain the house he had leased in Gabon. To this end, he has produced receipts to evidence the expenses.

42. The sequence of the foregoing events as well as the resultant expenses is all attributable to the acts and omissions of the respondent, hence it is liable to reimburse the claimant for his costs to the extent proved.

43. The claimant stated that the monthly rent payable for the house he had leased was 1400 USD. He avers that he only stayed in Gabon for 2 months, hence the rent for the remainder period was unutilized. The receipts annexed by the claimant indicate that he paid rent upto February, 2016. Therefore, the sum of the unutilized rent as can be discerned from the receipts, is for 5 months hence 7,000 USD. I have noted that the receipts bear the names of the claimant and CW2, his former coworker. I will therefore not award the claimant the full amount as claimed but I will split the figure into half hence he is entitled to 3,500 USD.

44. As regards the costs of the household goods, the claimant claims reimbursement of the sum of Kshs 200,000/=. The receipt produced by the claimant is in the sum of 1,156,400 XAF. Upon conversion against the prevailing exchange rate then, the same is equivalent to Kshs 210,254, which is more or less close to the amount claimed. Subsequently, I will award the claimant the sum of Kshs 200,000/= as prayed in his claim.

#### **Salary underpayment**

45. The claimant has prayed for the sum of Kshs 392,163/= being the total amount reduced from his salary from the month of February to July 2015 and in January and February, 2016, March to May, 2016 thus paid him a net salary of Kshs 180,000/= instead of Kshs 304,500/= (when applied against the prevailing exchange rate in 2016). Therefore, the underpayment is to the tune of Kshs 235,500/=. He has produced bank statements and pay slips to evidence the same. Evidently, the respondent did not meet his ends of the bargain under the contract hence underpaid the claimant in several instances during the contractual period.

#### **Leave**

46. The claimant has prayed for payment of untaken leave days during his contractual period. From the agreement executed between the claimant and the respondent, he was entitled to an annual leave of 12 days. This is below the minimum leave entitlement spelt out under section 28 (1) (a) of the Employment Act. As the respondent failed to tender a defence and participate in the instant proceedings, there was no evidence to rebut the claimant's assertions that he never proceeded on leave.

47. From the evidence before me, he had served for a period of 10 months under his second contract, which ran from August, 2015 to May, 2016. Under section 28 (1) (a) of Employment Act, an employee is entitled to a minimum of 21 days leave days per annum. When prorated, the claimant had earned 17.5 days at the time of his termination hence is entitled for compensation.

#### **Orders**

48. In conclusion, I enter Judgment in favour of the claimant against the respondent as follows;

Compensation equivalent to 4 months' gross salary 3,000 USD at the prevailing exchange rate hence Kshs 112.70	1,352,400.00
Unpaid salary for June, 2016 1500 USD	152,250.00
Severance pay for 10 months 1,250 USD	140,875.00
Salary underpayment 392,163.00	
Accrued leave days (17.5 days) 1,750 USD at the prevailing exchange rate of Kshs 112.70	197,225.00
Reimbursement of rent expense 3,500 USD at the prevailing exchange rate in 2016	355,250.00
Reimbursement of purchase for household goods 200,000.00	
<b>Total</b>	<b><u>2,790,163.00</u></b>

49. The award shall also be subjected to interest at court rates from the date of judgment until payment in full.

50. Costs follow the event, hence the respondent shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2021.**

.....  
**STELLA RUTTO**

**JUDGE**

**Appearance:**

Mr. George Gilbert for the Claimant

No appearance for the Respondent

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**