



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

EMPLOYMENT CLAIM NO 35 OF 2018

AHAMED MWARUMBA MWAVITA.....CLAIMANT

VERSUS

KOCOS KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant has instituted this cause against the Respondent seeking compensation for unlawful termination. The claim has been opposed by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent on 7th July 2006 in the position of a supervisor. That he continued serving the Respondent in this position until 4th September 2017 when he was informed by the Respondent that he had been retrenched.
3. The Claimant contends that the Respondent's decision to terminate his contract of service allegedly on the ground of redundancy contravened the provisions of the Employment Act regulating declarations of redundancy at the work place. The decision also violated the right to fair labour practice as enshrined in article 41 of the Constitution.
4. Consequently, it is the Claimant's case that his dismissal from employment was unfair, unjust and unconstitutional. The Claimant seeks a declaration in this regard. He also prays for monetary compensation of Ksh. 470,000/=. He also prays for interest on the amount claimed and costs of the suit.
5. On its part, the Respondent admits that on 1st July 2006, it engaged the Claimant as a supervisor. That however, on 4th October 2016 the Respondent was forced to communicate to the Claimant the decision to lay him off due to financial constraints the Respondent was experiencing following the death of one of its directors and the collapse of its bankers.
6. It is the Respondent's averment that the decision to declare the Claimant redundant was first brought to the attention of the labour office Kilifi County by a letter dated 1st October 2016. That this was well before a letter was written to the Claimant on 4th October 2016 communicating the Respondent's decision to terminate the Claimant's services with effect from 4th November 2016.
7. The Respondent pleads that contrary to the assertion by the Claimant that he was terminated on 4th September 2017, his termination happened in 2016. That the Claimant was first notified verbally of the intention to declare him redundant long before September 2016.
8. In the Respondent's view, it followed the legal procedure stipulated under the Employment Act in bringing the contract of the Claimant to an end. Consequently, the Respondent asserts that the claim by the Claimant is devoid of merit and should be dismissed with costs to the Respondent.
9. On 1st November 2021 when the cause came up for hearing, the Respondent's counsel was not in attendance. And neither were the Respondent's witnesses. The court noted that counsel had been served with a notice for the day and there was an affidavit of service on record. It therefore allowed the suit to be prosecuted in the absence of the Respondent.
10. At the trial, the Claimant adopted his witness statement as his evidence in chief. He also produced the documents attached to his list of documents filed on 23rd March 2018 as exhibits. These are the letter of appointment dated 1st July 2016 and a demand letter dated 9th September 2017.
11. The Claimant's Advocates filed submissions on 16th November 2021. The submissions identify four issues for determination.
12. I have considered the evidence adduced by the Claimant and his exhibits. There is no dispute regarding the fact of his employment by the Respondent. Indeed, the Respondent concedes this fact in its defense to the claim.

13. The parties agree that the contract of service between them was terminated. However, it is unclear on exactly when this event took place. While the Claimant, in his pleading, asserts that he was terminated on 4th September 2017, the witness statement he filed mentions 4th September 2016 as the date of termination. Further, the demand letter issued by the Claimant's lawyers to the Respondent mentions 4th September 2016 as the date the Claimant was terminated. This same date is mentioned in the Claimant's final submissions. It does appear to me therefore that the date the Claimant intended to set out in the pleadings is 4th September 2016.

14. On its part the Respondent pleaded 4th November 2016 as the actual date when the Claimant was terminated. The letter communicating the decision to terminate was however allegedly sent on 4th October 2016.

15. Despite the apparent imprecision on the date of termination of the Claimant, the Respondent pleads that the termination did occur and for reasons of redundancy. I therefore find that the Claimant's contract of service was terminated by the Respondent.

16. The question of concern is whether the Respondent terminated the said contract lawfully on account of redundancy or whether this is a case of unfair termination.

17. The law on redundancy in Kenya is encapsulated in section 40 of the Employment Act, 2007 as read with article 41 of the Constitution of Kenya 2010. Briefly, before the employer terminates a contract of service on account of redundancy, he/she must have a justifiable ground for doing so. This must be an event that has rendered the position of the affected employee obsolete or superfluous.

18. Developments such as: adoption by the employer of new technology; business relocation; downturn in business; and merger of businesses are some of the obvious triggers for a redundancy declaration. However, they are not the only triggers. The important thing is that whatever the event, it must have the ultimate effect of rendering the employee's position superfluous.

19. Where the employer is faced with the foregoing, the law provides him with the managerial tool of redundancy to re-organize his business or simply react to the challenge presented. However, he must do this in strict compliance with the procedure for declaring redundancies. Only then shall it be said that he has upheld the employee's right to fair labour practice as protected under article 41 of the Constitution.

20. Section 40 of the Employment Act requires an employer to follow the following procedure in case he wishes to declare a redundancy: -

a) To issue notice of the anticipated redundancy to his employees. This is a general notice issued at least 30 days before the actual termination on account of redundancy. It is addressed to the employees and local labour office where the employees are not members of a Trade Union. Where the employees are in a union, the notice goes to the Trade Union and the local labour office.

b) The notice should indicate the grounds for the proposed redundancy. It must also indicate the extent of the redundancy in the context of how many employees will be affected and from which departments.

c) The employer must then embark on a selection process of the employees to be terminated while having regard for the seniority in time of the employees, their reliability, ability and skills. The general principle here is that all factors remaining constant, the employer should implement the first in last out rule. This is to say, employees who were last to join the organization should be the first to leave it. However, the law permits the employer to depart from the rule on justifiable grounds in order to enable him retain the employees whom he believes are critical to his organization.

d) The employer must then pay the employees identified for release: severance pay; leave dues; and a month's salary in lieu of notice.

21. Under section 43 of the Employment Act, the employer has the duty to prove that a termination is valid. And where he fails, the termination is deemed as unfair within the meaning of section 45 of the Act.

22. Under section 45, a termination on grounds of redundancy shall be considered unfair if the employer cannot demonstrate that it was based on the operational requirements of his business and that the employment was terminated in accordance with fair procedure.

23. Did the Respondent meet these statutory requirements? In its statement of defense, the Respondent asserted that it gave the Claimant notice of the redundancy. It also asserted that it notified the local labour office of the intended redundancy. However, copies of these notices were not exhibited in evidence.

24. In the absence of these documents, it is not possible to confirm if the redundancy notices were generated. It is also impossible to confirm their content and whether they met the timelines provided for in the law. It is therefore impossible to tell whether the Respondent disclosed the reasons and extent of the purported redundancy to the Claimant.

25. Further, there is no evidence that the decision to settle for the Claimant as the suitable candidate for release was arrived at using a fair selection process. It is not clear whether the Respondent implemented the first in last out principle or if it departed from it on some acceptable ground in law.

26. There was also no evidence provided that the Claimant was paid severance pay. It is not disclosed whether he had leave days and how they were compensated.

27. In a nutshell, the Respondent did not furnish the court with evidence to demonstrate how it ensured that the requirements of section 40 of the Employment Act were met. Consequently, the Respondent has failed to demonstrate that the termination of the Claimant on account of redundancy was fair in terms sections 43 and 45 of the Act. The termination is accordingly declared unfair.

28. Having so found, the court is obligated to consider the relief to grant the Claimant. The Claimant has prayed for severance pay. However, where a purported redundancy has been declared unlawful, my view is that the Claimant cannot seek severance pay. He can only be compensated in terms of section 49 of the Employment Act. The right to severance pay presupposes a valid redundancy process. Therefore, I decline to order severance pay in this matter.

29. The Claimant has sought payment in lieu of the alleged accrued leave. However, no cogent evidence was led to demonstrate that the Claimant had not taken his leave. I will therefore decline to award pay in lieu of accrued leave.

30. In his statement of claim, the Claimant indicates that his exit salary was Ksh. 18,800/= per month. This was from the initial Ksh. 10,750/= per month that the Claimant was to earn as his entry salary as can be seen from the letter of appointment dated 1st July 2006. This fact is not denied in the statement of defense. I therefore take it that the Claimant's salary at the time of his termination stood at Ksh. 18,800/=.

31. The Claimant was entitled to notice to terminate his contract of service in terms of section 35 of the Employment Act. Where such notice could not issue, the Respondent was obligated by section 36 of the Act to pay the Claimant salary in lieu of notice. And the last clause in the letter of appointment fixes the notice period to two (2) months. Thus the Claimant was entitled to the two months notice or salary equivalent to this period. There is no evidence on record that the Claimant was paid this money. I would have entered judgment for the Claimant for Ksh. 37,600/= on this item. However, he has pleaded Ksh. 18,800/=. Accordingly, I enter judgment for the Claimant for Ksh. 18,800/=.

32. On compensation for unlawful termination, I note that the Claimant did not provide evidence of what he has done to mitigate his loss. The law obligates him to mitigate his losses. I will therefore award him a maximum of the aggregate of six (6) months' salary of Ksh. 112,800/=.

33. I also award the Claimant interest on the amounts aforesaid to run from the date of this judgment. The Claimant also gets costs of the claim.

34. For the avoidance of doubt, this award is subject to the applicable statutory deductions as dictated by section 49 of the Employment Act.

Summary of Award: -

- a) *The Claimant's termination is declared unfair.*
- b) *The Respondent to pay the Claimant damages as follows:-*
 - i) ***Ksh. 18,800/= being one month's salary in lieu of notice.***
 - ii) ***Ksh. 112,800/= being compensation for unlawful termination.***
- c) *The Respondent to pay the Claimant costs and interest. Interest to run from the date of the judgment.*
- d) *The award is subject to the applicable statutory deductions.*

DATED, SIGNED AND DELIVERED ON THE 6TH DAY OF DECEMBER, 2021

B. O. M. MANANI

JUDGE

IN THE PRESENCE OF:

JUMBALE 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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE