



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 843 OF 2017

BETWEEN

VERONICA MKIWA MWALWALA.....CLAIMANT

VERSUS

FAIZA BHANJI t/a VILLA KALISTA ENTERPRISES.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates, for the Claimant

Federation of Kenya Employers [FKE], for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 9th November 2017.
2. She states, she was employed by the Respondent as a Manager on 15th November 2012, until 17th July 2017, when her contract was terminated on account of redundancy. She was on compulsory leave between 13th July 2017, and 17th July 2017, when her contract was terminated. She had returned to work on 18th July 2017 when she was informed her contract was no more. She never took annual leave. She worked overtime, on normal days and over public holidays. There was no notice of termination.
3. Her monthly salary at the time of termination was Kshs. 91,200.
4. She states, there was no genuine redundancy situation. The Respondent was driven by discrimination against the Claimant. She seeks Judgment against the Respondent for:-
 - a. 1 month salary in lieu of notice at Kshs. 91,200.
 - b. 98 days of annual leave at Kshs. 343,490.
 - c. 41 public holidays at Kshs. 287,410.
 - d. Double shift/ overtime at Kshs. 1,897,958.
 - e. 12 months' salary in compensation for unfair termination at Kshs. 1,094,400.

Total... Kshs. 3,714,458.

f. Costs.

- g. Interest.
- h. Declaration that termination was unfair, unlawful and unjust.
- i. Declaration that dismissal of the Claimant from service was unfair and unjust.
- j. Any other suitable order.

5. The Respondent filed its Statement of Response on 1st March 2018. Employment of the Claimant on terms stated in the Claim, is not disputed. The Respondent was compelled to declare redundancy involving its staff, the Claimant included. The Respondent issued notice of its intention to declare redundancy to the Claimant and the Labour Office, on 19th June 2017. The Claimant was paid salary for days worked at Kshs. 59,578 and severance at Kshs. 210,277. She acknowledged the sum as her final dues.

6. The Claimant gave evidence and closed her case on 8th July 2019. The Respondent did not call evidence and closed its case the same date as the Claimant.

7. The Claimant adopted her Statements of Claim and Witness on record. She was asked to take leave of 35 days around May 2017. She was issued notice of intention to declare redundancy on 19th June 2017. The Respondent claimed it was compelled to declare redundancy by financial constraints it was experiencing. She was the Manager, overseeing housekeeping, guest relations, human resource, and security etc. She handled everything including financial reports. She would know if the Respondent experienced genuine economic problem. She worked 24 hours on certain occasions. She would stay awake until guests departed. She did reservations. She was not compensated for overtime worked. A new General Manager named Eldad, joined the Respondent on 2nd February 2017. The Claimant continued to discharge the role of Manager. The new man would just sign letters drawn by the Claimant.

8. Cross-examined, the Claimant told the Court she was the General Manager. Her Certificate of Service indicated she was Manager, not General Manager. She did not go on leave. Her Witness Statement indicates she was asked to take annual leave of 35 days. She claims 98 days of annual leave. 98 days should be less 35 days. She did not provide a breakdown in her Statement of Claim. She worked on public holidays. She did not identify the public holidays. She was forced to sign the Final Dues acknowledgment by Eldad and the new Accountant, Otieno. This is not disclosed in the Witness Statement. Final dues should have been separate from the monthly salary. Redundancy was in July 2017. Eldad joined 4 months before. The Claimant was not aware other Employees left.

The Court Finds:-

9. The Claimant was employed by the Respondent as a Manager on 15th November 2012, until 17th July 2017 when her contract was terminated on account of redundancy. She was running all the departments in the Respondent hospitality business.

10. She was asked to take leave commencing 13th June 2017. She states she was to resume on 17th July 2017. She was advised her contract had been terminated when she returned to work on 18th July 2017.

11. The Court is not able to say if there was a genuine redundancy situation at the Respondent. There are no financial statements of any nature placed before the Court, to support the position that the Respondent experienced financial constraints.

12. The Respondent made general and populist statements about difficulties it was experiencing, “ *because of lack of business during this electioneering year,*” in the notice of intention to declare redundancy dated 19th June 2017. Nothing by way of financial data is exhibited by the Respondent, to establish the presence of a genuine redundancy situation.

13. Procedure was likewise flawed. The notice of intention of redundancy served as the notice of termination. The law as far as this Court understands it, contained in Section 40 of the Employment Act, is that the Employer must first issue a notice of its intention to declare redundancy.

14. After the intention is communicated, either to the Union or Individual Employees who are not represented by the Union, a period of consultations involving the Union, the Employee, the Employer and the Labour Office follows.

15. It is after consultations, that a decision to terminate, is made. The Employer would then issue a notice of termination, which is not the same thing as notice of intention to declare redundancy, a notice along the same vein, as applies in general to termination of contract of employment under Section 36 of the Employment Act, or pay salary in lieu of notice under Section 40 [f] of the Act. Section 40 [a] and [b] must be understood as relating to notice of intention. The decision to terminate has not been made, and notice pay would not arise where there is no decision to terminate. The law here speaks about intended redundancy, not redundancy. Notice pay would not suffice in lieu of notice of intention. Salary in lieu of notice of intention is not contemplated under the law. Why would it be necessary to issue notice to the Labour Office, if the law intended merely that the Employee only has notice of termination or pay in lieu thereof? In the view of this Court, notice of intended redundancy is completely different from a notice of termination. Failure to issue notice of intended redundancy under Sections 40 [a] and 40 [b] can only result in unfair and unlawful termination from the outset, and cannot be redressed by payment of salary in lieu. Notice issues in either provision to the Union/ Employee and the Labour Office. It paves way for consultation, before the decision to terminate is made. If decision to terminate is made, then a notice of termination would issue. If the Employer fails to notify the Labour Office, default cannot be cured by payment of salary in lieu of notice. It similarly would not be cured in event the Employer fails to notify the Employee. Default in issuing notice under Section 40 [a] and 40[b] would in the view of the Court amount to procedural defect, which would be remedied by compensation for unfair termination. The Employer would be deemed to have failed to open the way for consultation. Notice under Section 40 [a] and 40 [b] is not a notice of termination, subject to payment of salary in lieu.

16. What the Respondent issued was a notice of intention, which is referenced as much. The Claimant was on leave, and was not issued a notice of termination.

17. She merits notice pay under Section 40 [f], read with Section 36, of the Employment Act.

18. The Respondent did not show that termination was based on valid reason, under Sections 40, 43 and 45 of the Employment Act.

19. The Claimant has not established her prayers for accrued leave of 98 days. She testified she never went on leave, yet she was on leave when her position was made redundant. She makes a general prayer for public holidays without specifying when she so worked, and providing the Court with documents showing she indeed worked on public holidays. She alleged in her evidence that she used to work 24 hours. The Court is extraordinarily boggled by such evidence, which has become common from a good number of Employees coming before this Court, seeking overtime pay. It is simply not humanly possible to work 24 hours a day. Such evidence is of disservice to the credibility of the giver. The prayers for holiday pay, normal overtime and accrued leave are declined.

20. The Claimant's salary as shown in the salary voucher dated 31st July 2017, was basic of Kshs. 50,641 and house allowance of Kshs. 8,937 – total Kshs. 59,578.

21. ***She is granted 1 month salary in lieu of notice at Kshs. 59,578.***

22. She had worked for 4 years. She was deployed to oversee all of Respondent's departments. She applied herself fully, and termination was not on account any fault on her part. The decision was made without valid reason, and executed unlawfully and unfairly. Her record was clean. She was paid severance and salary for days worked upon termination, at a net sum of Kshs. 184,735. Her signing acknowledgment does not bar her claim for unfair termination from being considered by the Court, or prevent the Court from granting her compensation and other statutory benefits she may not have received. The Court is under obligation in Section 49 [4] [h] and [m] of the Employment Act to consider the value of any severance payable; and any compensation including ex- gratia payment, in respect of termination of employment, paid by the Employer and received by the Employee. Acknowledgement by the Claimant, does not bar her from making the Claim she has made, but is to be considered by the Court in assessing the amount of compensation to be paid for unfair termination. ***She is allowed equivalent of 4 months' salary in compensation for unfair termination at Kshs. 238,312.***

23. ***Costs to the Claimant.***

24. ***Interest is granted at the discretion of the Court, under Rule 29 of the E&LRC [Procedure] Rules 2016, and is allowed at the rate of 16% per annum from the date of Judgment till payment in full.*** The rate of interest is not static, and cannot be the same from decades ago. The E&LRC must exercise its discretion judiciously, having in mind the same factors that inform wage adjustments, in adopting a rate of interest.

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: notice pay at Kshs. 59,578 and equivalent of 4 months' salary in compensation for unfair termination at Kshs. 238,212 – total Kshs. 297,890.

c. Costs to the Claimant.

d. Interest granted at the rate of 16% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 20th day of January 2020.

James Rika

Judge