



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.384 OF 2016

SAMMY GITAU NDIRO.....1ST CLAIMANT

WILSON WERU WANGOMBE.....2ND CLAIMANT

STEPHEN MAINA GITONGA.....3RD CLAIMANT

VERSUS

GOLDEN CARA INVESTMENT LIMITED.....RESPONDENT

JUDGEMENT

The claimants filed the Memorandum of Claim on 28th September, 2019. The respondent entered appearance and filed Notice of Appointment of Advocate on 19th October, 2016. No defence was filed.

The respondent's advocate filed application dated 5th September, 2019 seeking to cease to act for the respondent, hearing directions were issued on 9th October, 2019 and 10th December, 2019 for the respondent to be served and to secure a hearing date at the registry and for the respondent to be served with a hearing notice for 4th February, 2010 but there was no compliance. The respondent remains represented by the appointed advocates.

The claimants were heard on their case in the absence of the respondent. The claimants were employees of the respondent.

The 1st claimant was employed on 23rd July, 2014 as a concrete mixer operator at a wage of Ksh.17, 000 basic and ksh.3, 000 house allowances per month. The wages were increased over time last earning ksh.25, 000 per month. The claimant worked for 1 year and 7 months until April and May, 2016 when his wages were not paid and employment terminated.

The 2nd claimant was employed in May, 2014 as an assistant plant mechanic at a wage of Ksh.20, 000 per month and worked for 10 months when employment was terminated.

The 3rd claimant was employed in March, 2015 as a carpenter earning ksh.800 per day.

The claimants' employment was terminated on account of redundancy but there was no complaint with the provisions of section 40 of the Employment Act. There was no notice and the claimant was deducted NSSF dues which were not remitted. This resulted in unfair termination of employment.

The 1st claimant is seeking the following;

- a) Notice pay Ksh.28, 750;
- b) Leave for one year and 10 months Ksh.36, 247;
- c) Gratuity pays ksh.14, 375;
- d) Salary for April and May, 2016 ksh.57, 500;
- e) House allowance Ksh57, 709;

f) Salary deductions Ksh.4, 400;

g) Compensation

The 2nd claimant is seeking the following:

a) Notice pay Ksh.23, 000;

b) Leave pay Ksh.29, 000;

c) Gratuity Ksh.11, 500;

d) Salary deductions Ksh.3, 600;

e) Compensation.

3rd claimant is seeking the following:

a) Notice pay ksh.19, 200;

b) Public holidays Ksh.9, 846;

c) Compensation.

The 1st claimant testified in support of the claims made and for and on behalf of the claimants.

The respondent terminated employment on 7th June, 2016 without giving notice and was to take effect instantly save to state there was redundancy. All the claimants were employed by the respondent and employment terminated on 7th April, 2016 on the grounds of redundancy.

Without a defence or filing of any work records, the court is left with the claimant's memorandum of claim, the evidence and nothing else. The claimants have filed their payment statements, work cards and letter terminating employment issued by the respondent. Employment terminated on the grounds that;

TERMINATION OF EMPLOYMENT;

Following consultations between the Directors and the Management term concerning Organisation re-structuring, it is regrettable that we wish to inform you that on account of downsizing we would no longer requires your services. This letter serves as you official termination with immediate effect. ...

You will however receive your outstanding wages when the rest of the members of staff are paid their salaries and remuneration for the month of March, 2016. ...

This was vide letter dated 7th June, 2016.

The claimant however testified that employment terminated on 7th April, 2016.

There is also letter dated 7th June, 2016 a general communication that the claimants were employed by the respondent until March, 2016.

Section 40 of the Employment Act, 20077 allows an employer to terminate employment following declaration of redundancy. However, the mandatory provisions of the law must be adhered to.

In **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** the Court of Appeal, it was held as follows;

Section 40 of the EA deals with termination of employment on account of redundancy and provides:

...

Section 43(1) of the EA provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

43. (2) *the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the*

contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45(1) of EA prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

Section 40(1) of the EA is merely procedural by its tenor. It has to be read together with sections 43, 45 and Section 47(5) of EA. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:

(I) the reasons or reasons for termination.

(II) That reason for termination is valid and that ... [emphasis added].

In this regard therefore, even where the employer has a valid reason leading to termination of some employees due to redundancy and the redundancy therefore results in the need to downsize the workforce, the employer must issue a general notice to the employees and individual letters or notices of termination of employment. It is not sufficient to give the reasons without the due process of the law in the two (2) notices required under section 40 of the Act.

In this case, save for the individual notice issued to the claimant and which was to take effect instantly, there was no due process or any effort to follow the law. Without any defence being filed or any work records, the evidence by the claimants stands true. There was unfair termination of employment.

The claimants are entitled to a notice pay equivalent to one (1) month gross wage.

The claimants are also awarded compensation following the unfair termination of employment equivalent to one (1) months gross wage as an appropriate compensation in the circumstances of this case.

On the evidence that employment terminated with effect, March, 2016 the claims for the payment of wages for April and May, 2016 is not justified. Despite their being no defence, on the evidence before court, these claims are without merit.

Under section 40 of the Employment Act, 2007 the employee should be paid for untaken leave days in cash. Without any work records that the respondent paid for the same, these shall be assessed for each claimant in accordance with section 28 of the Act.

On the claim for gratuity pay, the payment statements filed confirm the claimants were registered with the NSSF. Save for the evidence that the deductions were not remitted, the claim for payment of gratuity is not due on the basis that such benefits is only available where there is a private treaty or agreement to pay. Where the employer fails to comply with section 35(5) and (6) of the Employment Act, 2007 the remedy is not to claim for gratuity pay.

The claims for house allowance where not paid shall be assessed for each claimant noting the respondent has not filed any work records.

On the claims for deducted statutory dues and not remitted, such are statutory dues and not available to the employee. Where the employer fails to remit statutory deductions, the remedy is to claim service pay and not the refund of what is due to a statutory body.

The 1st claimant filed several payment statements with different figures in gross payments;

August to December, 2014 gross wage Ksh.20, 000;

January to April, 2015 gross wage ksh.25, 000;

May to September, 2015 gross wage of ksh.23, 000.

The gross wages kept on shifting. The differences are major save the payment statements are different for each period. The initial payment statements for the year 2014 are well outlined and signed by several officers of the respondent. There is a breakdown of the payments made. This is the record the court shall apply.

Accordingly, judgement is hereby entered for the claimants against the respondents as follows;

The claimant is awarded as follows;

(a) Notice pay Ksh.21,811;

(b) Compensation Ksh.21,811;

(c) Leave pay due Ksh.29080;

2nd claimant is awarded as follows;

(a) Compensation ksh.23,000;

(b) Notice pay ksh.23,000;

(c) Leave pay ksh.29,000;

The 3rd claimant is awarded as follows;

(a) Compensation ksh.19,200;

(b) Notice pay ksh.19,200;

(c) Work on public holidays ksh.9, 846.

The claimants are also awarded costs.

Orders accordingly.

Delivered at Nakuru this 27th day of February, 2020.

M. MBARU

JUDGE

In the presence of:

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