



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1585 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

NOOR MOHAMED..... CLAIMANT

VERSUS

RED COURT HOTEL LIMITED T/A

BOMA HOTELS..... RESPONDENT

JUDGMENT

By memorandum of claim dated 14th August 2017, the claimant herein states that he was employed by the respondent on 16th April 2012 as a Protective Services Manager. He worked for the respondent until 13th June 2017 when he was issued with a letter of redundancy in a restructuring which the claimant alleges was a disguise to terminate his employment and employ other people at a lower pay. He states that the redundancy was carried out without informing him of the intention to do so.

It is the claimant’s averment that the process was arbitrary, hasty, unlawful and without justification. That the respondent did not follow the law as there was no notification of redundancy and the Labour Officer was not notified.

The claimant prays that judgment be entered in his favour against the respondent as follows –

1. A declaration that the Act of the Respondent of terminating the service of the Claimant on grounds of redundancy was not procedural, illegal and unlawful.
2. 3 months’ salary in lieu of notice
187,000 x 3..... Kshs.561,000
3. Personal pension fund for 5 years amounting to
 - a. Employer contribution..... Kshs.9,340
 - b. Employee contribution
14,025 x 62 months..... Kshs.1,448,630
4. 12 months’ compensation
187,000 x 12 months..... Kshs.2,244,000
5. Leave days (30 days) for 2016/2017 and travelling allowances
(187,000 +20,000) Kshs.207,000
6. Gratuity for years worked
187,000 x 5 years..... Kshs.935,000

7. Certificate of service.

8. Salary for days worked from 1st June 2017 to

17th June 2017..... Kshs.93,500

9. The Respondents do meet the Claimants costs of this case.

Together with the memorandum of claim, the claimant filed a witness statement in which he reiterates the averments in the memorandum of claim.

The respondent filed a memorandum of defence on 1st August 2018. The same is dated 31st July 2018.

In the defence the respondent admits declaring the claimant redundant but denies that the same was not in accordance with the law. The respondent states that in May 2017 its Board made a decision to restructure in order to return the hotel back to profitability as it was making losses. That the decision was communicated to staff through the departmental heads at a meeting held on 6th June 2017 and a general staff meeting held on 8th June 2017 and to individual departmental heads at a meeting held on 9th June 2017. That hereafter a circular was circulated to all staff. That at the meetings the staff were informed that there would be some job loses as some roles may be merged and some positions declared redundant.

That the claimant's position was declared redundant and his skill sets did not suit any other position. That the claimant was accordingly informed of the redundancy and the terminal benefits due to him.

The respondent avers that at the time of being declared redundant the claimant was already running his own security company and agreed to be declared redundant. That the termination letter was duly copied to the Ministry of Labour and the claimant advised to clear so that he could be paid his terminal dues. That the claimant has to date not cleared and has therefore not collected his terminal dues.

It is further the respondent's averment that the claimant was entitled to only one month's notice and not three months as provided his letter of appointment as the same was reviewed as per respondent's memo to all management staff issued on 1st September 2016.

The respondent prays that the claim has no merit and should be dismissed with costs.

On 23rd January 2019, the case was by consent fixed for hearing on 19th June 2019. However, on the hearing date only the claimant appeared in court. The case thus proceeded in the absence of the respondent.

The claimant testified that he worked at Boma Hotel as Protective Services Manager from April 2012 to 13th June 2017 when he was declared redundant. That he appealed against the redundancy and received a response dated 7th July 2017 declining his appeal and upholding the redundancy.

He testified that there was no meeting called on 8th June 2017 and he was never made aware of the intended redundancy. He testified that he had never seen the memo dated 1st September 2016 reducing termination notice period to one month, that his letter of appointment provides for notice of 3 months. He denied that he agreed to be declared redundant as alleged in the reply to the memorandum of claim.

The claimant testified that on 13th June 2017 he was called at around 2 pm but because he was busy at work he requested to go for the meeting at 4 pm. When he arrived at the meeting at 4 pm he was issued with a letter of redundancy. He stated that had he wanted to leave employment as alleged by the respondent he would have resigned before the redundancy.

The claimant further testified that he was discriminated as he was the only Head of Department declared redundant.

The claimant filed written submissions on 23rd July 2019. It is submitted that the respondent did not comply with Section 40 of the Employment Act. The claimant relied on the decision in **Hesbon Ngaruiya Waigi v Equatorial Commercial Bank Limited (2013) eKLR** where the court held that –

“...these conditions outlined in the law are mandatory and not left to the choice of an employer. Redundancies affect workers' livelihoods and where this must be done by an employer, the same must put into consideration the provisions of the law.”

The claimant further relied on the decision in **Francis Maina Kamau v Lee Construction (2014) eKLR** where the court held –

“Where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the redundancy becomes an unfair termination within the meaning of Section 45 of the Act.”

The claimant further relied on **Article 15 of the Supplementary Provisions of ILO Recommendation No. 119 – Termination of employment Recommendation, 1963** which states –

(1) The selection of workers to be affected by a reduction of the work force should be made according to precise criteria,

which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

He further relied on **Article 13 of Recommendation No. 166 of ILO Convention No. 158 – Termination of Employment Convention, 1982** which provides that –

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers’ representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers’ representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

He submitted that Maraga J. (as he then was) echoed the provisions of the Convention 158 in **Kenya Airways Limited v Aviation and Allied Workers Union Kenya and 3 Others (2014) eKLR** where he stated –

“The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees.”

It is submitted for the claimant that the respondent having failed to comply with Section 40 of the Act and further having failed to consult the claimant before declaring him redundant, the redundancy was an unfair termination of employment and the claimant is entitled to his prayers as sought in the memorandum of claim.

Determination

There is no disagreement over the facts of this suit. The parties are in agreement that the claimant was employed by the respondent as Protective Services Manager on 16th April 2012. He was declared redundant by letter dated 13th June 2017. At the time of termination of his employment the claimant’s salary was Kshs.187,000 as per letter of review of remuneration dated 5th January 2016 at page 16 of the claimant’s bundle of documents.

There is also no dispute that there was no letter addressed to the claimant informing him of intention to declare him redundant before he received the letter of redundancy dated 13th June 2017.

The respondent however referred to its appendix 4 at page 7 of the respondent’s bundle of documents being a circular dated 12th June 2017 which it states was sufficient notification to the claimant. It further refers to a meeting held on 6th June 2017, with Heads of Departments, a staff meeting of 8th June 2017 and a meeting with individual heads of departments on 9th June 2017 at which there was communication of the impending redundancy.

Section 40(1) of Employment Act provides for the procedure for redundancy as follows –

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(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.

In the case of **Nairobi Court of Appeal, Civil Appeal No. 65/2012, Thomas De La Rue (K) v Thomas Opondo Omutelema** the court observed that –

“It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40(b) does not stipulate the notice period as is the case in 40(a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

There must be a sound reason why there is a distinction in section 40 based on whether the employee is or is not a member of a trade union. The right to form, join or participate in the activities and programmes of a trade union is underpinned by Article 41(2)(c) of the Constitution.

That right is then actualized in the Labour Relations Act. Under that Act, membership in a trade union is voluntary. Section 57 of the Act empowers an employer and a trade union which the employer has recognized to enter into collective agreement setting out terms and conditions of service for all unionisable employees. Ordinarily those terms and conditions of service are better and more favourable to the employee than the terms in individual contracts of employment or the minimum conditions set in statutes. Under the Act the terms of the collective agreement are incorporated into the contract of employment of every employee covered by that agreement and under section 59 a collective agreement is binding upon all parties including all unionisable employees employed by the employer.”

From a reading of Section 40(1)(a) as expounded by the court in the case of **Thomas De la Rue (K) Limited v Omutelema**, it is clear that the employer must notify both the Labour Officer and the employee of redundancy at least one month in advance. In the present case the meetings referred to by the respondent, which in any event, the claimant denies attending and which the employer has not proved by providing either a register or minutes, were held on 6th, 8th and 9th June 2017 and the circular referred to by the respondent is dated 12th June 2017. Neither were the meetings held nor the circular issued a month before the claimant was declared redundant. This therefore means that the respondent failed to issue notice of intended redundancy as provided in the Act.

The claimant further stated that there was no proof of selection on the basis of seniority in time, what is popularly referred to as “*last in, first out*” rule. He alleges he was singled out thus he was discriminated. No evidence was adduced by the respondent on this as no mention is made about selection criteria in either the defence or the witness statement filed with the defence. I find that the respondent failed to establish fair criteria in selection of the employees to be declared redundant thus the claimant's claim that he was discriminated has not been rebutted.

The respondent pleaded at paragraph 15 of the defence that the claimant had not been paid his terminal dues. The wording of the Act is unequivocal and couched in mandatory terms; “**An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following ...**” Payment of notice, leave and salary due to the last date of work and severance pay are part of the conditions to be met by an employer before declaring an employee redundant. The respondent did not adduce evidence that the terminal benefits of the claimant were ready for collection upon him clearing. There is no evidence of a cheque or any tabulation of the amount due to the claimant in the defence or documents filed by the respondent.

The letter of redundancy informs the claimant that he is entitled to the following –

“13th June 2017

OUR REF: HR/REDUNDANCY/NM/2017

Noor Mohamed

Protective Service Manager

The Boma Hotels, Nairobi

Dear Noor,

Termination on Redundancy

The above refers.

Reference is made to the ongoing operational restructuring and subsequent communication on the same during the last staff meeting on Friday 8th June 2017. In view of this, your position has been declared redundant.

In light of the above, this serves as a one month's notice and your terminal dues will be paid as follows:

- 1. Salary for days worked up to 17th June 2017.*
- 2. Severance pay of 15 days for each complete year of service.*
- 3. Leave days accrued but not utilized.*
- 4. 1 month pay in lieu of notice.*
- 5. Withdrawal of accrued pension benefit subject to conditions set by the Retirement Benefits Authority (RBA).*
- 6. Gratuity Payment where applicable.*

The dues will be paid to you less any liability owed, to the Hotel and that your dues will be released to you after you have completed the enclosed Clearance Certificate and returned all company property in your possession.

On behalf of the management of the Hotel, I take this opportunity to thank you for your services during the period of your employment and wish you the very best in your future endeavours.

Please acknowledge receipt of this letter by signing and returning the attached duplicate copy.

Yours Sincerely

SIGNED

Gianfranco Astori

Acting General Manager

cc. Ministry of Labour"

The certificate of service at page 9 of the respondent's bundle of documents shows that the claimant's last day of service was 17th June 2017, only 3 days after receiving the letter of termination. It means the letter did not serve as one month's notice as stated in the body of the letter.

For the foregoing reasons I find that the redundancy was unprocedural.

The respondent stated that the claimant was entitled to only one month's notice relying on a memo dated 1st September 2016 which is reproduced below –

To All Management Staff

From Group, Head Human Resources

Thru Acting General Manager, Boma and Boma Inn, Nairobi/GM Boma Inn Eldoret

Date 1st September 2016

Subject Revision of Notice Period

All contracts of employment provide both the employee and the Hotel with the opportunity to terminate employment contract at any time during the course of employment provided the both parties gives the stipulated written notice period or pays salary in lieu of notice in accordance with the contract of employment.

In order to promote efficiencies and manage transitions effectively, we hereby inform you that the management has amended this policy as follows:

General Manager: *Two Months' written notice or payment of two months' salary in lieu*

All other Management Positions: One Month's written notice or payment of One month's salary in lieu.

Please be advised of this amendment that takes effect from September 1, 2016.

SIGNED”

The memo is not addressed to the claimant but to all management staff. There is no evidence that it was served upon the claimant who has denied receipt of the same. Further, Section 13 of the Employment Act provides as follows in respect to changes in employment terms –

13. Statement of changes

(1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

A circular is not the kind of written statement to the employee contemplated under Section 13. As provided in Section 9, changes in the contract should be signed by an employee, especially where the same has a negative implication in the employer's terms of employment, to signify acceptance of such terms(s) by the employee.

I thus find that the memo dated 1st September 2016 could not negatively change the claimant's terms of employment in the absence of a letter addressed to the claimant requiring him to sign as proof of admission of the changes to his contract terms.

Reliefs

In conclusion I find the redundancy unprocedural and unlawful. The claimant is thus entitled to compensation and benefits set out in Section 40(1) of the Act. On compensation I award him 8 months' salary as compensation taking into account his service of 5 years and the failure to observe the statutory requirements of redundancy.

For the foregoing reasons I enter judgment for the claimant against the respondent as follows –

1. A declaration be and is hereby made that the termination of the service of the Claimant by the respondent on grounds of redundancy was not procedural and was thus unlawful.

2. I award the claimant the following –

i. 3 months' salary in lieu of notice

187,000 x 3..... Kshs.561,000

ii. 8 months' compensation

187,000 x 8 months..... Kshs.1,496,000

iii. Leave days (30 days) for 2016/2017 and travelling allowances, as this was not contested by the respondent is awarded.

187,000 +20,000..... Kshs.207,000

iv. Salary for days worked from 1st June 2017 to

17th June 2017..... Kshs.93,500

Kshs.2,357,500

3. Certificate of service.

4. In addition the claimant will be entitled to all payments due for redundancy as set out in the letter of redundancy.

5. Gratuity for years worked

Having been a member of the pension scheme the claimant is not entitled to gratuity. This prayer is rejected.

6. The Respondents shall meet the Claimants costs of this case. Interest shall accrue at court rates date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE