



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 72 OF 2017

IBRAHIM ABDINUR MOHAMED.....CLAIMANT

VS

READY CONSULTANCY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. In this claim the Claimant, Ibrahim Abdinur Mohamed seeks compensation for unfair termination of employment and payment of terminal dues.
2. The claim is documented by a Memorandum of Claim dated 27th January 2017 and filed in court on the same date. The Respondent's defence is by way of a Response dated 6th March 2017.
3. The Respondent did not attend the trial on 10th December 2019 but filed written submissions on 21st January 2020.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a security guard on contractual basis from September 2009. He earned a monthly salary of Kshs. 21,359. On 10th October 2016, the Claimant was issued with a termination letter.
5. The Claimant claims that the termination of his employment was unlawful and unfair. He therefore seeks the following:

- a. Salary in lieu of notice.....Kshs. 21,359.00
- b. Leave pay for 2015-2016.....21,359.00
- c. Severance pay (21,359*7*15/30).....74,756.40
- d. 12 months' salary in compensation.....256,782.40
- e. Certificate of service
- f. Costs plus interest

The Respondent's Case

6. In its Response dated 6th March 2017, the Respondent denies having employed the Claimant as a security guard from September 2009.
7. The Respondent goes on to state that the Claimant was erroneously issued with a redundancy letter which was later recalled and the Claimant offered another job with similar terms and conditions as the first job but the Claimant declined to take up the offer.
8. The Respondent denies the Claimant's entire claim and puts him to strict proof.

Findings and Determination

9. There are two (2) issues for determination in this case:

- a. Whether the Claimant has made out a case of unlawful termination;
- b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

10. On 10th October 2016, the Respondent wrote to the Claimant as follows:

“Dear Abdinur,

Termination of employment on account of redundancy

The purpose of this letter is confirm the outcome of recent review by our clients **Mombasa Maize Millers Ltd** of its operational requirements, and what this means for you.

As a result of the security department having been earlier outsourced to **Texas Alarms Security**, this regrettably means your employment will terminate. Therefore your employment will end on the 11/10/2016.

Due to your employment ending on account of redundancy, you will be paid as per the employment ACT 2007 as per the law of Kenya and any outstanding pay.

We thank you for your valuable contribution during your employment with us. Please contact the office incase of any queries.

Sincerely,

(signed)

Director.”

11. The Respondent produced a subsequent letter addressed to the Claimant four days later. The latter letter is dated 14th October 2016 and states:

“Dear Sir,

Re: Transfer Letter.

Refer to the above.

Following our letter dated the 10/10/2016 in respect to redundancy after further consultations with the directors, they have decided to cancel the redundancy and have decided to transfer and deploy you as follows.

You shall be transferred to Mombasa Maize Millers Ltd (Kisumu) as from the 14/10/16 and shall report to Kisumu-Mombasa maize millers ltd on the 30th OCT, 2016 and report to Mr. Festus Omollo the manager on the ground, to allocate you duties on that particular day.

We shall Endeavour to cater for your transport to Kisumu.

This is with immediate effect.

We ask that you cooperate.

Please note that all your salaries and benefits remain unchanged.

Please note the redundancy stands revoked.

Yours faithfully

(signed)

Director”

12. The Claimant denied receipt of letter dated 14th October 2016. On the face of this letter, there is a hand written note indicating that the Claimant refused to sign and accept the transfer letter. The Respondent did not however present any person in whose presence the Claimant declined to accept the letter.

13. The Respondent maintains that after refusing to take up the transfer to Kisumu, the Claimant was issued with a show cause letter dated 15th November 2016. The face of this letter indicates that the Claimant was called and texted but he refused to collect the letter. Again, no testimony was called to back this averment.

14. In this case the Respondent makes serious allegations against the Claimant without calling any supportive evidence. The said allegations were therefore unverified and unproved.

15. This leaves the redundancy letter issued to the Claimant on 10th October 2016 as the only solid evidence before the Court. According to this letter, the Claimant's employment came to an end on account of redundancy.

16. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define redundancy as:

“ 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 services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

17. By definition, redundancy bears two significant factors; first, it is undertaken at the instance of the employer and second, the conduct of the employee is not in question (see *Jane I Khalechi v Oxford University Press E.A.Ltd [2013] eKLR*).

18. While allowing employers to invoke redundancy as a legitimate mode of ending employment, the Employment Act at Section 40 sets out stringent conditions to be met. These conditions are 7 in number but may be placed in 3 broad categories namely; redundancy and termination notices, objective selection criteria and payment of statutory dues.

19. The Respondent made no attempt to observe any of the aforesaid conditions and as held by this Court in *Fatma Ali Dabaso v First Community Bank Limited [2018] eKLR* such failure amounts to unfair termination of employment. The Court therefore finds and holds that the Claimant has established a case of unlawful termination of employment and he is entitled to compensation.

Remedies

20. I therefore award the Claimant eight (8) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's failure to observe the law in bringing the employment relationship to an end.

21. I further award the Claimant one (1) month's salary in lieu of notice.

22. In the absence of leave records to the contrary, the claim for leave pay succeeds and is allowed.

23. Having been declared redundant, the Claimant is entitled to severance pay.

24. In the end, I enter judgment in favour of the Claimant as follows:

- a. 8 months' salary in compensation.....Kshs. 170,872
- b. 1 month's salary in lieu of notice.....21,359
- c. Leave pay for 1 year (21,359/30x21).....14,951
- d. Severance pay for 7 years (21,359/30x15x7).....74,757

Total.....281,939

25. This amount will attract interest at court rates from the date of judgment until payment in full.

26. The Claimant is also entitled to a certificate of service plus costs of the case.

27. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY MARCH 2020

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JUDGE

Appearance:

Mrs. Kariuki for the Claimant

Mr. Birir for the Respondent