



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE NO 74 OF 2017

ALI SESE.....CLAIMANT

VERSUS

READY CONSULTANCY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. Before me is an employment dispute between Ali Sese and Ready Consultancy Limited. The Claimant’s claim is by way of a Memorandum of Claim dated 27th January 2017 and filed in court on the same day. The Respondent filed a Response on 9th March 2017.
2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called Ibrahim Bocha. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a Security Guard on contractual basis, from September 2009 until 10th October 2016, when his employment was terminated, on account of redundancy.
4. At the time of termination, the Claimant earned a monthly salary of Kshs. 20,020.
5. The Claimant’s case is that the termination of his employment was in violation of Section 40 of the Employment Act. He therefore claims the following:

- a) Salary in lieu of notice.....Kshs. 20,020
- b) Pay in lieu of leave for 2015-2016.....20,020
- c) Severance pay (20,020*6*15/30).....60,060
- d) 12 months’ salary in compensation.....240,240
- e) Certificate of service
- f) Costs plus interest

The Respondent’s Case

6. In its Response dated 6th March 2017 and filed in court on 9th March 2017, the Respondent denies having employed the Claimant as a Security Guard on contractual basis.
7. The Respondent further denies that the Claimant’s employment was unlawfully terminated and states 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 one, which the Claimant declines.
8. The Respondent therefore denies the Claimant’s entire claim.

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 of employment;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

10. The Claimant claims that the Respondent terminated his employment on account of redundancy without observing the provisions of Section 40 of the Employment Act.

11. While denying this claim, the Respondent avers that the Claimant was erroneously issued with a letter of redundancy which was later withdrawn and the Claimant offered another job, which he declined.

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

“Dear Sese,

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.”

13. The Respondent produced a subsequent letter, addressed to the Claimant four days later on 14th October 2016, stating thus:

“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”

14. The Claimant denied receipt of this latter letter, which carries a hand written note to the effect that the Claimant refused to sign and accept the transfer letter.

15. The Respondent’s witness, Ibrahim Bocha told the Court that he did not personally hand over the transfer letter to the Claimant. Moreover, the persons in whose presence the Claimant is reported to have declined to accept the letter, were not called to testify before the Court.

16. The Respondent further states that after refusing to take up a transfer to Kisumu, the Claimant was issued with a show cause letter dated 15th November 2016. On the face of this letter is a hand written note to the effect that the Claimant was called and texted but he refused to collect the letter. Again, the author of this note was not called as a witness.

17. Overall, the Respondent makes serious allegations against the Claimant, without calling any supportive evidence. The said allegations were therefore unverified and unproved.

18. 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.

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

20. 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*).

21. While employers are allowed to terminate employment on account of redundancy, they must comply with the conditions set under Section 40 of the Employment Act. These conditions are 7 in number but may be categorised under 3 heads namely; redundancy and termination notices, objective selection criteria and payment of statutory dues.

22. From the evidence on record, the Respondent did not make any attempt to comply with any of the conditions set out under Section 40 of the Employment Act, and as held by this Court in *Fatma Ali Dabaso v First Community Bank Limited [2018] eKLR* a redundancy undertaken outside the four corners of Section 40 of the Employment Act is unfair within the meaning of Section 45 of the Act.

Remedies

23. I therefore award the Claimant eight (8) months’ salary in compensation. In making this award, I have considered the Claimant’s length of service, plus the Respondent’s failure to observe the law, in bringing the employment relationship to an end.

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

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

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

27. Finally, I enter judgment in favour of the Claimant as follows:

a) 8 months’ salary in compensation.....	Kshs. 160,160
b) 1 month’s salary in lieu of notice.....	20,020
c) Leave pay for 1 year (20,020/30*21*1).....	14,014
d) Severance pay for 7 years (20,020/30*15*7).....	<u>70,070</u>
Total.....	264,264

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

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

30. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF MAY 2020

LINNET NDOLO

JUDGE

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 March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

LINNET NDOLO

JUDGE Appearance:

Mrs. Kariuki for the Claimant

Mr. Birir for the Respondent