



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 803 OF 2014

MR. GEORGE BUORO.....CLAIMANT

-VERSUS-

KENINDIA ASSURANCE COMPANY.....RESPONDENT

JUDGMENT

1. This is a claim for unfair termination of employment on account of redundancy. The claimant avers that the redundancy was done without following the procedure set out by section 40 of the Employment Act. He therefore prays for the following reliefs:-

(i) A declaration that the Respondent's termination of employment was indeed unlawful, malicious and that the Respondent's actions amounted to an act of wrongful dismissal.

(ii) The payment to the claimant actual pecuniary loss suffered since his redundancy including payment for salary/wages as would have been earned, housing allowance together with all accruing allowances as indicated herein below;

- a. Severance pay
- b. Notice pay
- c. Leave days
- d. Leave allowance

(vii) Maximum compensation of 12 months

(viii) General and aggravated damages, including exemplary damages

(ix) Such other and further relief that this honourable court may deem just and fit to grant.

(x) Costs of the suit and interest thereon at court rates.

2. The respondent denies the alleged unfair termination and avers that the redundancy was done in accordance with the procedure laid down by section 40 of the Act. She contended that one month notice was served on the claimant, Banking, Insurance and Finance Union (BIFU) and the labour office before terminating the claimant's services on account of redundancy. Finally she avers that she computed claimant's dues and the claimant acknowledged receipt of the same by signing a discharge voucher. She therefore prays for the suit to be dismissed with costs.

3. On 5.11.2019 the parties agreed to dispose of the suit by written submissions on the strength of the record. The claimant filed submissions on 16.12.2019 while the respondent filed hers on 17.1.2020.

Claimant's case

4. In his written testimony the claimant stated that he joined the respondent on 1.5.2003 earning Kshs. 2000 per month. On 1.7.2004 he was confirmed as Assistant Administration Officer but on 1.5.2009 he became Administrative officer.

5. On 30.4.2014 he received a redundancy notice from the respondent stating that his last working day would be 31.5.2014. After the lay off he received the letter dated 6.6.2014 advising him of the terminal dues payable to him and enclosing a discharge voucher for the same. He then signed the discharge and dated it 17.6.2014. He admitted that the computed dues were paid to him. However he contended that the termination was illegal and malicious because he was treated unfairly by being subjected to an arbitrary process which did not accord him any hearing.

Defence case

6. Ms. Prisca Akoto, respondent's Assistant General Manager – HR filed a written witness statement. She confirmed that the claimant was laid off on 31.5.2014. She contended that the termination was lawfully done because she served the claimants with one month redundancy notice dated 28.4.2014 citing the last working day as 31.5.2014. She further contended that she also served the labour office with the redundancy notice and thereafter negotiated the redundancy terms with BIFU.

7. She further testified that although the claimant was not in the union, he benefited from the negotiated favourable terms, and signed a discharge voucher. She contended that the claimant was issued with a Certificate of Service and prayed for the suit to be dismissed for lack of merit. Finally, she contended that the claimant had disciplinary issues.

Claimant's submissions

8. The claimant submitted that he was laid off without being accorded a fair hearing and just process. According to him the redundancy was prematurely declared because the procedure under section 40 of the Employment Act was not complied with. He contended that the respondent should not have proceeded with the redundancy exercise before according him a hearing. He therefore contended that the respondent's argument that there was consultation in terms of section 40 of the Employment Act does not hold any water.

9. In addition he submitted that, being a member of the management staff, he was part of the consultations between the respondent and the union. Consequently, he contended that the respondent acted arbitrarily without consulting or involving him in the redundancy process.

10. He further contended that respondent did not demonstrate what criteria she used to select him for the redundancy. He contended that the criteria used was not objective and consistent with the need of staff rationalization exercise. He also submitted that the respondent has not proved that he had a problem with performance and productivity.

11. He further contended that the termination was unfair both substantively and procedurally. For emphasis he relied on **Kenya Airways v. Aviation & Allied Workers Union Kenya & 5 others**[2014]eKLR, **Benson K. Nguti v. Kenfreight (EA) Ltd** [2014]eKLR and **Grace Basbori Nyamongo v. Kenya Institute of Administration** [2014]eKLR. In conclusion he submitted that he is entitled to the relief sought in the claim.

Respondent's submissions

12. The respondent submitted that she did not dismiss the claimant but rather terminated his service on account of redundancy under section 40 of the Employment Act. She contended that the redundancy was done lawfully procedurally by serving one month notice to the claimant and the labour office as required by section 40(1) (a) and (b) of the Act. She further contended that the redundancy notice indicated the selection criteria used as the necessary skill to keep her competitive. She relied on the appraisal forms (Appendix 13-20 to the defence) as the proof that the claimant's performance was deteriorating and unreliable. Therefore, she contended that she complied with the selection process under section 40(1)(c) of the Act.

13. As regards the reliefs sought, the respondent submitted that she paid the claimant all his rightful dues and he acknowledged the same by signing a discharge voucher as proof that the sum received was in full and final settlement. She urged that the discharge was signed voluntarily and the claimant has not made any allegations of fraud, duress, mistake or misrepresentation when executing the same. Consequently, she contended that the claimant is not entitled to the reliefs sought.

14. For emphasis she relied on **Katiwa Kanguli v. Bamburi Cement Limited**[2015]eKLR where it was held that, by signing a discharge voucher on terms set out herein, the employee undertook not to lodge any claim for further dues unless he can show that the undertaking was vitiated by fraud, duress, mistake, undue influence or misrepresentation.

Issues for determination

15. There is no dispute that the claimant was employed by the respondent from 2003 until 2014 when his services were terminated by the respondent on account of redundancy. There is also no dispute that after the lay off the claimant was paid terminal dues and he signed a discharge voucher acknowledging the payment as full settlement and undertook to not to raise any further claim in relation to the employment contract and the termination. The issues for determination are:

- (a) Whether the redundancy was justified by a valid reason.
- (b) Whether the procedure set out by section 40 of the Employment Act was followed.
- (c) Whether the claimant is entitled to the relief sought.

Whether the redundancy was justified by a valid reason.

16. The redundancy notice to the labour officer dated 28.4.2014 stated as follows:

“We are in the process of reorganizing the company in order to make it more efficient. This will lead to redundancy of at least 20 management employees.

The redundancies will be effective upon expiry of this notice. Each affected employee will be informed accordingly.

Yours sincerely,”

16. The claimant was served with Redundancy Notice dated 30.4.2014 which stated as follows:-

“This is to inform you that the company is undergoing restructuring and consequently you are one of the employees whose service will be declared redundant. This letter therefore serves as redundancy notification of one month from today, 30th April 2014. Your last date of service will be 31st May, 2014.

The selection criteria was based on the necessary skills required to keep the organization competitive in the market. Please note that we are in the process of working out your dues and shall be communicating to you again with full details . . .”

17. I have considered the two redundancy notices and it appears clear that the reasons for the termination were restructuring/reorganization of the company in order to remain competitive. Under section 45 (2) (b) the reasons for termination is fair if it is based on the operational requirements of the employer. In this case the respondent contended that as a result of the restructuring process of the company, the claimant's services were no longer required.

18. In **Kenya Airways case**, *supra* the Court of Appeal held that:

“ . . . redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer . . . The phrase ‘based on operational requirements of the employer’ must be construed in the context of statutory definition of redundancy. What the phrase means in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

21. Considering the redundancy notices served on both the claimant and the labour officer, I am satisfied that the reasons for the redundancy herein was valid and fair in relation to the operational requirement of the respondent. The employer has demonstrated that the redundancy resulted from re-organization of the company in order to remain competitive in the market. The court cannot assume the role of an investigator to prove wrong what the business managers consider to be the best decision for their business to remain competitive.

Whether the statutory procedure was followed

22. There is no dispute that the respondent served redundancy notice on the claimant and the labour officer as required by section 40 of the Employment Act. However the claimant contended that he was not consulted or accorded a hearing before the termination on redundancy. He further contends that the selection process was not fairly done as required under section 40(1) (c) of the Act.

23. The respondent has on the other hand indicated in the redundancy notice that the claimant was selected for redundancy on the basis of skills required to keep the organization competitive in the market. The respondent amplified the foregoing by producing performance appraisal records to prove that the claimant was not a stellar performer. I therefore, do not agree with the claimant that his selection for the redundancy was malicious and unfair. All what section 40 (1) (c) requires is that 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 a particular class of employees affected by the redundancy.”***

24. Considering the evidence on record I am satisfied that the termination herein was done through a fair procedure as set out under section 40 of the Employment Act.

Reliefs

25. In view of the finding that the redundancy herein was grounded on a valid and fair reason and that the statutory procedure under section 40 of the Employment Act was followed, I decline to declare the termination as unfair and unlawful. I further decline to award him any damages because the redundancy was justified and fairly done.

26. Even, if the redundancy had been proved to be unfair and unlawful, the claimant could still not be entitled to any award of damages because he voluntarily executed a settlement agreement discharging the respondent from any further claims in relation to the employment contract and the termination thereof . The discharge voucher he signed constituted a binding contract unless the same is viated by fraud, mistake, duress, under influence or misrepresentation.

27. In conclusion, I find that the claimant has not proved his case in the required standard of proof and I proceed to dismiss it with costs.

Dated, signed and delivered in Nairobi this 26th day of May, 2020.

ONESMUS N. MAKAU

JUDGE