



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 796 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

PATRICK NAMBIKA MIKUZI.....CLAIMANT

VERSUS

ASHTON COURT APARTMENTS

LIMITED alias ASHTON COURT MANAGEMENT.....RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant's Statement of claim dated 23rd May 2018 and filed on 24th May 2018. It is the claimant's averment in the Statement of claim that he was employed by the Respondent herein on or about 10th June 2013 in the position of Caretaker and Cleaner with his last salary at the time of separation being Kshs.14,300.

The Claimant averred that during the subsistence of his employment with the Respondent he performed his duties diligently and to the Respondent's satisfaction until 22nd February 2018 when he received a notice of redundancy from the Respondent which was to take effect from 28th February 2018.

The Claimant further averred that his termination on grounds of redundancy was unlawful and unfair as it was not done in accordance with the provisions of Section 40 of the Employment Act, 2007 and is therefore null and void *ab initio*.

The Claimant averred that during his employment with the Respondent he was underpaid and now seeks for payment of the difference of the underpaid dues totalling to Kshs.458,750.30. He further contended that he is entitled to payment of house allowance as tabulated in his Statement of Claim.

In the instant Claim he seeks the following reliefs:-

- a) A declaration that the Claimant was unfair and unlawful.
- b) Kshs.458,750.30 being the underpaid wage;
- c) Kshs.321,687 as damages for unlawful termination;
- d) Kshs.29,704.72 as service;
- e) Kshs.188, 932.68 as unpaid house allowance;
- f) Costs of this suit plus interest on (b), (c), (d) and (e) above at Courts rate from the date of filing this suit.
- g) An Order directing the Respondent to issue a Certificate of Service to the Claimant and any other prayer the Court may deem necessary to meet the end of justice.

The Respondent in its Memorandum of Response dated 13th September 2016 and filed in Court on 17th September 2016 denies having

engaged the Claimant as alleged in the Statement of Claim.

The Respondent avers that the Claimant's employment was properly terminated on grounds of redundancy and the Claimant was paid all his dues at the time of separation. It is therefore the Respondent's contention that the instant claim is an afterthought. The respondent urges this court to dismiss the same with costs to the Respondent.

Parties agreed to dispose of the Claim herein by way of written submissions.

Submissions by the Parties.

The Claimant submitted that he has established the existence of an employer-employee relationship between himself and the Respondent herein by virtue of the existence of the Appointment letter that clearly outlines the relationship between the two parties. The Claimant relied on the Court findings in the case of **Christine Adot Lopeyio v Wycliffe Mwathi Pere (2013) eKLR** which set out the test to determine the existence of an employer-employee relationship to include the following:-

- a) A servant is a person subjected to the command of the master as to the manner in which he or she shall do the work;*
- b) Whether the worker is subjected to the rules and procedures of the employer rather than personal command; and*
- c) Whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.*

Having proved existence of the above conditions in his case the Claimant urged the Court to find that he was an employee of the Respondent herein.

The Claimant further submitted that his employment with the Respondent was unfairly and unlawfully terminated without notice, justification or following procedure as provided under the mandatory provisions of Section 40 Employment Act and that the termination was unfair and unlawful. The Claimant relied on the case of **Mary Nyawira Karimi v Pure circle (K) Limited (2018) eKLR** where the Court held that the notice under Section 40 is mandatory and implicit in the Employment Act itself and that in addition to issuing the notice to the employee in writing, the employer must also issue notice to the Labour Officer.

The Claimant further relied on the authority of **Luke Kinyua Kamunti v Amigos Nuts and Commodities Limited (2019) eKLR** where the Court emphasised on the issue of compliance with the mandatory provisions of Section 40 of the Employment Act, 2007 in terms of issuance of notices prior to declaring an employee redundant failure to which such redundancy would be unprocedural and therefore unfair.

The Claimant further submitted that having served the Respondent for a period of 4.75 years he was entitled to Kshs.63,667 as severance pay, yet he received Kshs.33,962.50. He therefore urged the Court to award him the balance of Kshs.29,704.

In conclusion the Claimant submitted that as a result of the unfair termination he is entitled to the reliefs sought in his Statement of Claim. He urged the Court to allow the claim as prayed.

Respondent's Submissions

The Respondent on the other hand submitted that the Claimant has failed to prove the existence on an employer-employee relationship between himself and the Respondent as the letter of Appointment he seeks to rely on lacks authenticity as it has nothing to identify it with the Respondent. As a result the Respondent urged the Court to dismiss the Claim herein in its entirety.

The Respondent further submitted that the Claimant's termination by way of redundancy was fair, valid and procedural. The Respondent relied on the case of **Paul Wachiri Ndonga v Keroche Breweries** which cited the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** where the Court opined 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 and the termination is in accordance with a fair procedure.

The Respondent maintained that the reason for terminating the employment of the Claimant was valid, fair and in accordance with fair procedure in line with Section 45. It is further the Respondent's submission that the Claimant is not entitled to any reliefs sought in his Claim

On the issue of underpayment, the Respondent maintained that the Claimant was never engaged as a caretaker but as cleaner and that his salary was overpaid. The Respondent further maintained that the Claimant was paid a monthly salary that was inclusive of house allowance and therefore urged this Court to dismiss the Claimant's Claim for payment of house allowance as pleaded in his Claim.

On the Claim for payment of additional severance pay, the Respondent submitted that the Claimant is not entitled to the same as the claim is based on a fictitious position which the Claimant never held.

In conclusion the Respondent submitted that the instant Claim is void of merit and urged the Court to dismiss the same with costs to the Respondent.

Analysis and Determination

Having considered the facts of this cause, evidence adduced by the parties hereto, submissions and authorities cited by both the Claimant and the Respondent, the issues for determination are: -

1. Whether an employee-employer relationship existed between the Claimant and the Respondent herein
2. Whether the termination of the Claimant's employment by way of redundancy was lawful and fair.
3. Whether the Claimant is entitled to the reliefs sought

Whether an employee-employer relationship existed between the Claimant and the Respondent herein

The Claimant in his pleadings, evidence and submissions averred that he was employed by the Respondent on 10th June, 2013 and attached an Appointment letter duly signed and executed by the Respondent confirming his employment with the Respondent in the position of Caretaker/Cleaner.

The Claimant further relies on the notice of redundancy issued to him by the Respondent dated 22nd February, 2018 that also confirms this employment with the Respondent herein.

The Respondent on the other hand maintained that the Claimant has failed to prove that there existed an employer-employee between himself and the Respondent as the Appointment letter he refers to is not authentic.

I have examined the said documents and find that indeed the Claimant has proved that there existed an employer- employee relationship between himself and the Respondent as the letters are self-explanatory and clearly establish the existence of such relationship. In the case of **Elijah Kipkoros Tonui Versus Ngara Opticians T/A Bright Eyes Limited (2014) eKLR** where the Court considered letters placed on record by the Claimant and at page 2 of the List and Bundle of Authorities and made the following findings:

“There is abundant evidence showing the Claimant was, and the Court finds he was, an employee of the Respondent on the terms and conditions stated in the Statement of Claim.”

Redundancy is defined under Section 2 of the Employment Act as–

“redundancy” means 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;

Section 40 sets out the procedure for redundancy. Section 40(1)(a) as read with Section 40(1)(b) requires the service of relevant notices to be made to the employees affected by the redundancy as well as a notice to the local Labour Officer.

The Claimant in his pleadings, evidence and submissions contends that the Respondent did not follow due process while declaring his position redundant.

The Claimant maintains that the Respondents failed to follow the mandatory provisions of Section 40 of the Employment Act, 2007 therefore his termination on account of redundancy is unlawful and unfair.

The Respondent on the other hand averred that it had reasons to declare the Claimant's position redundant. It further maintained that due process as set out in the Employment Act, 2007 were followed and that the Claimant was paid his terminal dues at the time of his separation.

There was no evidence availed of any notice to the Labour Office by the Respondent herein. In the case of **Bernard Misawo Obora v Coca Cola Juices Kenya Limited [2015] eKLR**,

Whether the Claimant is entitled to the reliefs sought

a) A declaration that the Claimant's termination was unfair and unlawful

Having found that the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act the Claimant is entitled to this relief. In the case of **Anastacia Mutindi Kibutu v Liason Group (IB) Limited (2019) eKLR** the Court held that where a termination violates the mandatory provisions of Section 40 of the Employment Act such termination is unfair within the meaning of Section 45 of the Act.

I thus find the redundancy of the claimant unprocedural and therefore unfair for failure to comply with Section 40 of the Act.

b) Kshs.458,750.30 being the underpaid wage

From the letter of appointment, it is clear that the Claimant was engaged as a caretaker/cleaner. Further, the Claimant's appointment letter indicates that his working hours were 48 hours per week. There is no minimum wage for caretaker in the General Order. Thus the statutory minimum wage for the claimant can only be reckoned by reference to the wage of a cleaner.

Under the Regulations of Wages General (Amendment) Order 2013, 2015 and 2017 the minimum wage for a cleaner is Kshs.9,780.95, Kshs.10,940 and Kshs.12,926.55 respectively which amounts are below the Claimant's wage of Kshs.14,300 for 2013 and 2015 General Order. However from 2017 to 2018 the minimum wage inclusive of 15% house allowance was Kshs.14,865.45. He was therefore underpaid by Kshs.565.45 per month. For the 10 months to March 2018, he was underpaid by **Kshs.5,654.50** which I award him.

c) Kshs.321,687 as damages for unlawful termination

Having found that the termination of the Claimant's employment on grounds of redundancy was unlawful and unfair, I award him 3 months' salary as compensation. This is considering that the only loss to the claimant was the notification period and perhaps the advice by the Labour Officer.

Kshs.14,865.45 x 3 = **Kshs.44,596.35** based on correct statutory minimum wage which this court is bound to apply by virtue of Section 48 of the Labour Institutions Act.

d) Kshs.29,704 as service

The Claimant in his pleadings and submissions maintained that he is entitled to the above payment having received only Kshs.33,962.50, which amount he claimed was less than the amount he was entitled to.

The Respondent on the other hand maintained that the Claimant was paid what was due and owing to him under this head and the Court was urged to accordingly dismiss this Claim.

According to Section 40(1)(g), the claimant was entitled to not less than 15 days pay per year worked. Having worked for 4 complete years, the claimant was entitled to Kshs.34,305 based on statutory minimum wage of Kshs.14,865.45. He was thus underpaid by the sum of **Kshs.342.40** which I award him.

e) Kshs.188,932.68 as unpaid house allowance

The Respondent submitted that the salary paid to the Claimant was a consolidated salary and therefore urged this Court to dismiss this Claim.

The Claimant on the other hand submitted that he is entitled to payment of house allowance as he was not housed by the Respondent and did not receive any payment in lieu thereof.

The minimum wage for a cleaner during the period of the Claimant's employment was below the salary he received. I find that the said salary was indeed consolidated and inclusive of house allowance. The claim for house allowance fails and is dismissed.

Conclusion

In conclusion Judgment is entered in favour of the Claimant against the Respondent in the following terms:

- i.. One month's salary in lieu of notice.....Kshs.14,865.45
- ii. Underpayments.....Kshs. 5,654.50
- iii. 3 months' salary compensation.....Kshs.44,596.35
- iv. Underpayment of severance pay.....Kshs. 342.40

Total Award

Kshs.65,458.70

v. Costs of this suit.

Interest shall accrue at Court rates from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MAY 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They 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, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE