



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT AT NAIROBI**

**CAUSE NO.1341 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 21<sup>st</sup> May, 2020)**

**FELIX MWALIMU.....CLAIMANT**

**VERSUS**

**NAIROBI SAFARI CLUB.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed the instant Claim on 4<sup>th</sup> August, 2015 January, 2013, seeking damages for wrongful dismissal from his employment with the Respondent and failure and/or refusal to pay terminal dues and other monies owed to him.
2. The Claimant states that on or about 1<sup>st</sup> November, 2014 he was employed by the Respondent, a limited liability company engaged in the Business of hotel and catering services in the capacity of Chief Engineer earning a monthly salary of Kshs. 200,000/-.
3. He further averred that he did serve a probationary period of three months following which the Respondent did confirm his employment to permanent having been satisfied with his overall performance in accordance with his employment contract.
4. The Claimant further stated that he continued to work diligently and to the Respondent's satisfaction until 26<sup>th</sup> June, 2015 when the Respondent without any justifiable and fair cause summarily terminated his employment.
5. Aggrieved by the decision to unfairly terminate his services the Claimant filed the instant Claim seeking the following reliefs:-
  - a) *A declaration that his employment services with the Respondent were terminated wrongfully and/or unfairly.*
  - b) *One month's salary in lieu of Notice Kshs. 200,000/-*
  - c) *Unpaid salary for the month of June, 2015 Kshs. 200,000/-*
  - d) *Award for damages equivalent to Twelve (12) Months' salary Kshs. 2,400,000/-*
  - e) *Unpaid untaken leave days (20 x 1.75 days wages) Kshs. 133,000/-*
  - f) *Severance Pay Kshs. 100,000/-*
  - g) *The Claimant be re-instated in his former employment without any loss of benefits and/or seniority.*
  - h) *The Claimant prays for costs of this suit*
  - i) *Any other or further relief that this Honorable Court may deem fit and just to grant.*
6. The Respondent in its Memorandum of Reply dated 16<sup>th</sup> May, 2013 and filed in Court on 7<sup>th</sup> March, 2017 admitted having engaged the Claimant as alleged in his Memorandum of Claim. It however maintained that following a compromise agreement between the parties hereto, the Claimant was reinstated back to work and even resumed duties on 1<sup>st</sup> September, 2015 and his salary reviewed upwards on 1<sup>st</sup> October, 2015 on the understanding that the suit would be withdrawn.

7. The Respondent further maintained that despite the Claimant's reinstatement and agreement the Claimant failed to withdraw the suit against it. It further maintained that the Claimant was paid all his dues and that the reliefs sought in the instant claim have been overtaken by events.

8. The Respondent further stated that the entire claim is misguided and an abuse to the Court process and therefore urged this Honourable Court to dismiss the same with costs to the Respondent.

9. The matter was thereafter fixed for hearing on 16/12/2019 when the Claimant testified on his own behalf and the Respondent called on witness to testify on its behalf.

#### **Claimant's Case.**

10. The Claimant, CW1 adopted his witness statement dated 31/3/2017 and filed in Court 5/4/2017, as his evidence in chief. The Claimant in his statement reiterated the averments made in his Memorandum of Claim.

11. CW1 further testified that he was unfairly dismissed on 26/6/2015 and no reason for the dismissal given save that he was told that the Respondent's Chairman was not happy with his work. He further confirmed that his termination letter talks of low business which is in fact a redundancy.

12. CW1 further confirmed that he was not given and/or issued with any notice prior to his termination and was also not paid in lieu of such notice. CW1 further maintained that he had no disciplinary issues with the Respondent during the subsistence of his employment contract.

13. CW1 also confirmed having been reinstated back to work and his salary increased to Kshs. 220,000/-. He however maintained that the reinstatement was only for a short period of time and that the Respondent dismissed him. He further confirmed that at that point he had already filed the instant claim.

14. On cross-examination CW1 stated that he filed the instant Claim on 4/8/2015, was reinstated back to work on 19/8/2015 and reported on 1/9/2015. CW1 further confirmed that he subsequently worked for the Respondent for a year before he was terminated again.

15. On further cross examination CW1 averred that he has a claim as against the Respondent herein as pleaded in his Memorandum of Claim.

16. He further confirmed being a member of NSSF. CW1 urged this Honourable Court to allow his Claim as prayed.

17. On re-examination CW1 maintained that he was unfairly terminated by the Respondent and is therefore seeking compensation from this Honourable Court.

#### **Respondent's Case**

18. The Respondent put up one witness one Hellen Wanjiru Muchiri, the Human Resource Manager at the Respondent Company. RW1 adopted her witness statement dated 3<sup>rd</sup> April, 2017 and filed in Court on 11<sup>th</sup> April, 2017 as her evidence in chief. In which statement RW1 confirms that the Claimant was indeed reinstated to his previous position at the Respondent Company and his salary reviewed upwards. She further testified that the Claimant continued working for the Respondent until 8<sup>th</sup> December, 2016 when his services were terminated.

19. RW1 also sought and was allowed to produce 3 documents filed alongside the Response herein as exhibits in this Claim.

20. She urged this Court to dismiss the Claim in its entirety.

21. On cross-examination RW1 confirmed that the Labour office was not informed when the Claimant's services were terminated. She further confirmed that his termination was due to low business and that no notice was issued to him prior to his termination.

22. On further cross examination RW1 confirmed that following the Claimant's first termination he was indeed reinstated to his position and continued working as such until December 2016 when he was later terminated. She insisted that his (the Claimant's) termination was not due to the filing of the instant claim.

23. Parties thereafter agreed to file and exchange written submissions to the Claim herein.

#### **Submissions by the Parties**

24. The Claimant submitted that from the evidence on record his services were terminated due to low business vide the Respondent's letter dated 26<sup>th</sup> June, 2015 and therefore the Respondent had the burden of proving the validity of such termination by dint of Section 43 of the Employment Act. He further maintained that the Respondent failed to show that it had a valid reason to terminate his employment.

25. The Claimant further submitted that his termination on account of redundancy did not follow the mandatory provisions as provided under Section 40 of the Employment Act, 2007 thereby making his termination unfair, wrongful and un-procedural. To buttress this argument the Claimant cited and relied on the case of **Kenya Airways Limited Vs Aviation & Allied Workers Union of Kenya & 3 Others (2014) eKLR** where the Court held that for any termination of employment under redundancy to be lawful it must be both substantially justified and procedurally fair failure to which such termination shall be deemed as unfair. The Court in that matter further maintained compliance with

the provisions of Section 40 of the Employment Act, 2007 in declaring employees redundant. For further emphasis the Claimant cited the cases of **Paul Wachiuri Ndonga Vs Keroche Breweries Limited (2018) eKLR**, **Mercy Gakii Nabea Vs Malindi Management Strategy Limited (2019) eKLR** and **Thomas De La Rue Vs David Opondo Omutelema (2013) eKLR** in which cases, emphasis on the need to comply with the mandatory provisions of Section 40 of the Employment Act, 2007 when declaring employees redundant.

26. The Claimant urged this Court to be guided by the above judicial decisions and find that the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act, 2007 and that he is therefore entitled to the reliefs sought in his Claim.

27. The Claimant further maintained even with his reinstatement he was not compensated for unfair termination of his employment by the Respondent and therefore urged this Honourable Court to allow his prayer for compensation for unfair termination.

28. In conclusion the Claimant urged this Honourable Court to allow his Claim in terms of the reliefs sought therein.

#### **Respondent's submissions**

29. The Respondent on the other hand submitted that the Claim for unfair termination cannot arise as the Claimant was reinstated back to work on 19/8/2015 a fact which the Claimant confirmed in cross examination.

30. The Respondent further submitted that the reliefs sought by the Claimant in his Memorandum of Claim have been overtaken by events the Claimant having been reinstated without any loss in benefits or position. For emphasis the Respondent cited the case of **Peter Njoroge Kibe Vs Teachers Service Commission (2017) eKLR**.

31. On the Claim for leave days the Respondent maintained that at the time of his termination the Claimant had worked for only eight months and therefore the Claim is misplaced. It is further contended that upon his reinstatement the Claimant utilized all his leave days.

32. On the Claim for severance pay the Respondent submitted that the Claimant is not entitled to the same by dint of Section 35 (6) of the Employment Act, 2007 being a member of NSSF and the necessary statutory deductions being made by the Respondent.

33. The Respondent maintained that the only reliefs that the Claimant is entitled to the one month's salary in lieu of notice and that of days worked in June 2015. For emphasis the Respondent cited the case of **Banking Insurance Finance Union Of Kenya Vs Kenya Commercial Bank Limited (2015)** where the Court held that the only claim that succeeds is the one on unpaid salary for the reinstated employees.

34. The Respondent did submit that having reinstated the Claimant and his acceptance, the Claimant has no claim as against it and relied on the case of **Parliamentary Service Commission Vs Christine Mwambua (2018) eKLR** where the Court of Appeal in dismissing the Appeal stated that reinstatement was a feasible remedy.

35. In conclusion urged this Honourable Court the claim herein be dismiss the Claimant having been reinstated back to work.

36. I have examined the evidence and submissions of the Parties. The Respondent aver that they indeed had terminated the Claimant on 26/6/2015 after he had worked for them for 7 months. They aver that this was due to low business but they later reinstated him and compromised this case.

37. From the letter of termination, reason for this termination has not been given. It is true also that he was given a new appointment on 15/8/2015 where he was reinstated in employment.

38. The new letter never indicated that this claim had been compromised as he had already filed this claim on 19/8/2015 when he was reinstated.

39. The Respondents have not established that they had any valid reasons in terminating him and neither have they established that they accorded the Claimant a fair hearing before termination in June 2015.

40. I find that the Claimant has established his case against the Respondent who terminated him without valid and witness any fair hearing.

41. I therefore award the Claimant as follows:-

***1. 1 months' salary in lieu of notice = Kshs.200,000/=***

***2. Unpaid June 2015 salary = Kshs.200,000/=***

***3. Unpaid leave for 8 months =  $8/12 \times 30 \times 200,000 = 132,000/=$***

***4. 8 months' salary as compensation for unfair termination =  $8 \times 200,000 = 1.6 \text{ million}$ .***

**TOTAL = 2,132,000/=**

***Less statutory deductions***

*5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

**Dated and delivered in Chambers via zoom this 21<sup>st</sup> day of May, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Aboge for Claimant – Present

Mugalo for Respondent – Present