



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.314 OF 2014

JAMES OYOYA OMUSOTSI.....CLAIMANT

VERSUS

MEAS AGRICULTURAL CENTRE LIMITED.....RESPONDENT

JUDGEMENT

The claim is that the claimant was employed by the respondent as a store keeper but by letter dated 16th March, 2012 employment was terminated on the grounds that the respondent was downsizing its staff due to tough economic times. The claimant was at a wage of ksh.7, 000 per month. He was compensated with a total sum of Ksh.43, 750 being 3 months' salary and 15 days service pay.

The claim is that there was underpayment of wages and the claimant was entitled to ksh.10,638 per month and a house allowance of ksh.1,600 and 21 days of annual leave and hence claim the following dues;

- a) Underpayments for 6 years ksh.349,248;
- b) House allowance ksh.153,187;
- c) Severance pay ksh.21,552;
- d) Leave allowance Ksh.85,104; and
- e) Costs of the suit.

The claimant testified that he was issued with letter of appointment dated 1st September, 2005 and paid Ksh.7, 000 and worked for 6 ½ years when his employment was terminated following a downsizing of employees. That he was the only one targeted and there was discrimination against him an claim damages and terminal dues.

The claimant also testified that he was paid a consolidated wage which was basic without a house allowance and below the minimum wage. He never took annual leave or paid. He worked overtime and without compensation.

Service pay was paid at ksh.22, 750 but there was no severance pay.

The defence is that the claimant was employed as a cleaner and was only elevated to storekeeper later. There was no underpayment of wages as alleged and upon termination of employment due to downsizing he was paid his terminal dues in full. the claims made should be dismissed with costs.

No witness was called.

Both parties filed written submissions.

By letter dated 1st September, 2005 the claimant was appointed by the respondent as a store keeper at a wage of ksh.7,000 per month and with benefits including 21 annual leave days.

By letter dated 15th December, 2006 the respondent confirmed the claimant's employment as a storekeeper.

Employment was terminated vide letter and notice dated 16th March, 2012 on the grounds that the respondent business was going through difficult times and had to reduce some staff. The claimant was given 3 months' notice upon the expiry of his leave effective 7th March, 2012 and off days of 42 days effective 8th March to 27th April, 2012 and was to be paid for 3 months' notice at 7,000 per month all being Ksh.21,000 and 15 days service for 6.5 years all at Ksh.22,750 to be paid less NSSF and NHIF/statutory deductions and total paid ksh.42,670.

Section 40 of the Employment Act, 2007 read together with section 2 of the Act allow an employer to legitimately terminate employment where there is an operational requirement resulting from a redundancy. The employer must issue the employee with notice and cause to be paid the due terminal benefits.

In this case, the claimant was notified of the reasons leading to termination of employment. These are not contested save that he was targeted and discriminated against as he was the only one who was terminated in his employment.

In defence the respondent does not address this aspect of the claim save to make general denials. This is equally not addressed in the written submissions.

Discrimination against any employee is a matter outlawed under the provisions of Article 27 of the Constitution and section 5 of the Employment Act, 2007 (the Act). Where there is evidence of discrimination against any employee on the given grounds, a sanction should issue. With regard to laying-off employees following a redundancy, such resulting from no fault of the employee, the employer when called upon should give the rationale leading to termination of employment on such basis

Section 40(1) (a) requires that;

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

In giving the due notices under section 40 of the Act, the employer is required to outline *the reasons for, and the extent of, the intended redundancy*.

A redundancy therefore affecting employment should not be applied to target an individual employee. Rationale as to the affected employees should be given as required under section 43 (2) of the Act read together with section 45(2) that;

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

It is the duty of the employer to demonstrate that there is an operational requirement leading to termination of employment on account of redundancy as otherwise, the termination of employment is unfair. A redundancy cannot target an individual employee as held in the case of **Mary Nyawira Karimi v Pure Circle (K) Limited [2018] eKLR** that;

*... There is no material evidence that there was prior notice of the intended redundancy and that only her position became affected and there was no chance of redeployment. The specific target of the claimant for termination of her employment is not explained as held in **Jane I Khalachi versus Oxford University Press E. A Ltd, Cause no.924 of 2010**. A redundancy cannot be undertaken to target a single employee. Such would defeat the purpose of the law as set out in section 43(2) of the Act. a notice ought to have issued to the claimant before termination of her employment even where the respondent intended to pay for notice as under section 40(1) (f) and which pay is mandatory.*

Without any material evidence as to the extent of the downsizing of employees and which required the termination of the claimant's employment vide notice issued to him and dated 16th March, 2012 action taken by the respondent to terminate employment even where there may have been an underlying reason of redundancy lacked procedural fairness. This is contrary to the provisions of section 40 read together with section 45 of the Act. compensation is due.

The last due wage for a storekeeper under the applicable Wage Orders in the year 2012 is ksh.10,682. This shall apply in computation of dues.

Compensation awarded at ksh.10,682.

The court taking into account that the respondent paid most of the terminal dues instantly finds an award of compensation at one month's pay

is appropriate in this case.

The claimant is seeking that there was underpayment of wages. On the letter of appointment dated 1st septmebr,2005 as a storekeeper at a wage of ksh.7,000 per month, under the Regulation of Wages (General)(Amendments) Orders, 2005 which came into operation on 1st May, 2005 the wage due to a storekeeper per month was Ksh.6,531 and there was no underpayment.

These wages are graduated over the years and what was due as at 1st May, 2011 was ksh.10,682 and the claimant continued to be paid ksh.7,000 per month an underpayment of ksh.3,682 for the 10 month worked in the phase he was underpaid by ksh.13,682 which is due.

For the period of May, 2010 to April, 2011 the minimum wage was ksh.9, 495 and the underpayment for the 12 months is 2,495 x 12 all being Ksh.29, 940.

In the period of May, 2009 to 2006 the minimum wage was Ksh.7,135 per month and less ksh.135 The claimant continued to be paid ksh.7,000 per month and the total underpayment from May, 2006 to April, 2010 is assessed at Ksh.6,480.

Total underpayment is ksh.50, 102.

On the claim for house allowance, this is due for the position held by the claimant. The letter of appointment cannot legally make provisions for a consolidated wage in an underpayment. The applicable wage Orders make provision for a basic wage inclusive of a house allowance. The claim for payment of Ksh.153, 187 is reasonable and justified.

On the claim for severance pay, the claimant has admitted that he was paid service pay. This was not due from the reasons that his statutory dues were deducted and remitted. This payment ought to have been for *severance pay* under the provisions of section 40 of the Act. what was paid was for the period of 6.5 years instead of 6 full years and therefore generous. to make another payment for a similar amount is unjust.

On the claim for leave pay, in the letter terminating employment, the claimant is allowed 3 months leave *expiring 7th March* and 42 off days from 8th March to 27th April, 2012 together with a notice of 3 months. To claim for annual leave in this context is unjust enrichment.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a) **Declaration that employment terminated unfairly;**
- b) **Compensation awarded at one month pay ksh.10,682;**
- c) **Underpayments ksh.50,102;**
- d) **House allowance Ksh.153,187; and**
- e) **Costs.**

Dated and delivered electronically this 11th May, 2020.

M. MBARU JUDGE

Upon request by the firm of Ikua & Co. Advocates for 45 days stay of execution, the court hereby allows for stay of execution for 30 days and where more time is required, a formal application shall be filed and addressed on the merits.

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 the Order herein shall be delivered to the parties via e-mails. this 11th May, 2020.

M. MBARU

JUDGE