



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

AT NAKURU

CAUSE NO.28 OF 2019

JOSHUA TORONI NTABO.....CLAIMANT

VERSUS

HIPORA BUSINESS SOLUTIONS (EA) LIMITED.....RESPONDENT

JUDGEMENT

On 30th October, 2009 the claimant was employed by the respondent as a loss control officer working during public holidays and had a uniform deduction of Ksh.3, 000 which he had to surrender at the end of employment. The claimant was deducted ksh.2, 000 for PLO T-shirt and a monthly deduction of Ksh.1, 500 for lunch fees for 2 years.

The respondent had a work policy that upon a work transfer to pay a relocation allowance of ksh.6,000 to the subject employee which was not done in the claimant's case despite being moved from Kericho to Nairobi;

From Nairobi to Kakamega;

From Kakamega to Kericho;

From Kericho to Kisumu; and Kisumu to Nakuru.

A total of 5 transfers and was only paid twice.

The claim is that the claimant contributed a total sum of ksh.38, 000 to Vachu Saco which was owned by the respondent and which only refunded ksh.14, 000 upon termination of employment.

The claimant joined Metropolitan Sacco after being advised by the respondent that he would not be eligible for salary advance and where he took a loan of ksh.47, 000 and where he had a loan balance of ksh.28, 209.23 at the time employment terminated since he was repaying from his wages but not remitted. He had paid a total of Ksh.18, 790.77 to offset the loan.

The claimant had Sacco shares amounting to Ksh.24,000 and had contributed ksh.1,200 for 13 months which was not remitted all being Ksh.15,600 and claim the same from the respondent.

By letter dated 5th March, 2018 the respondent terminated the claimant's employment. There was no notice. The claimant was not allowed an opportunity for a hearing. The declaration of redundancy was

contrary to section 40 of the Employment Act and claim gratuity/severance pay since he was only paid ksh.113, 000.

The claims are for the following dues;

- a) Compensation for unfair termination of employment;
- b) Notice pay Ksh.27,000;
- c) Public holidays pay Ksh.79,741.50;
- d) Severance pay Ksh.67,500;
- e) Uniform deductions Ksh.3,000;
- f) Lunch deductions 36,000;
- g) Relocation allowance Ksh.18,000;
- h) Refund of polo t-shirt deduction Ksh.2,000;
- i) Sacco refund to Vachu Sacco Ksh.24,000 and Metropolitan Sacco Ksh.11,390.77;
- j) Breach of contract Ksh.270,000
- k) Costs

Total dues Ksh.826, 622.27 less what was paid ksh.113, 279 total due ksh.749, 352.27.

The claimant testified that he worked for the respondent for a total of 8 years but the certificate of service show 5 years. He was a security officer and then in loss and control office checking on money and goods in the supermarket, checking on goods quality and the systems .he started at Tuskeys supermarket on 30th September, 2009 at Kericho and was moved to Eastmatt, Quickmatt and then Gilanis and the respondent remained the employer and not the supermarket. He was contracted and placed with different clients of the respondent.

The claimant also testified that his position was declared redundant and was issued with notice at the end of day and directed not to report the next day. This was the only notice issued. At the time he was earning Ksh.27, 000 per month and seeks compensation as notice was not issued in accordance with section 40 of the Employment Act.

The claimant also testified that he remained at work the full week and on public holidays without compensation.

He was paid ksh.113,000 which comprised notice pay at Ksh.25,000 basic pay instead of Ksh.27,000 gross and for each year he was paid Ksh.2,000 instead of Ksh.9,200. There were deductions made which were not refunded, relocation allowances and Sacco refunds.

He was paid for overtime and this is not part of his claims.

The defence is that the claimant was employed on 30th October, 2009 as a loss control officer earning a gross wage of ksh.25, 000 per month and there was no work during public holidays.

As a policy all staff were deducted a fee for uniforms and which was refunded upon return of the uniforms at Ksh.3, 000.

For two years the claimant was placed at nakumatt supermarket and deducted ksh.1, 500 for lunch per invoices sent to the respondent. There was no violation of the law in this regard.

There is no policy to pay for relocation allowance and only pays Ksh.3, 000 to 5,000 on a normal transfer initiated by the respondent. A transfer from one branch to the other in the same town does not attract an allowance; transfer initiated by the client does not attract an allowance, self-initiated or disciplinary transfer does not attract an allowance.

On 7th November, 2012 the claimant was moved from Eastmatt Kitengela to Tuskys Kakamega following misconduct that led to his rejection by the client and thus not entitled to an allowance;

On 11th May, 2013 there was a normal transfer to Tuskys Ndoyo and an allowance was paid;

On 9th April, 2014 there was normal transfer and allowance paid;

The claimant was moved to Qicukmattt Shabab Nakuru as a result of theft of a mobile phone and no allowance due;

The claimant was moved to Natumatt Nakuru within the same town; and

Last station was Gilanis within Nakuru.

The defence is also that Virtuous Sacco recruited its employees and who made contributions but ended up being a scam and the matter is under investigations. Such entity is not owned by the respondent and did not advise the claimant to join metropolitan Sacco.

The respondent was facing financial challenges and notified the Minister and Labour officer and due to resulting redundancy issued termination notice to the claimant on 5th March, 2018. The claimant was paid for notice of ksh.25, 000 payable at the time.

The redundancy was done in accordance with the law. There was an explanation given to the claimant together with other employees and he was paid his terminal dues. The gross wage was Ksh.25, 000 and the difference of ksh.2, 000 was overtime pay and nothing owes.

Edward Ntonyiri testified that as the human resource manager for the respondent he is aware of the facts of the claim. The respondent is in the business of recruiting labour services for supermarkets and bill the clients then pay the employees. There was contract with Tuskys countrywide and no lunch was offered. Nakumatt would offer lunch to all its employees and bill the respondent ksh.2, 100 for each employee which the respondent would subsidise and deduct ksh.1, 500 per month. The employees who did not wish to be offered lunch would write and seek to be removed from this arrangement.

The respondent would provide all staff with uniforms as brand and deduct from the wages and refund he same upon return of the uniform.

Mr Ntonyiri also testified that the respondent would move and transfer its employees for different reasons. Where there was a normal transfer an allowance would be paid but when it was self-initiated, rejection by a client for given reasons of following misconduct, these instances would not attract an allowance.

The claimant stole a phone while at Kisumu and he admitted to this facts and the client rejected him. To avoid a termination of employment he was moved to Nakuru and within the same town he was moved to different work locations but there was no movement outside.

The claimant voluntarily joined the Sacco outside control by the respondent.

The claimant would not be at work on all public holidays as alleged. He worked for 6 days each week. The respondent had a system for taking off days which would fall on any week day. Any overtime due was paid and there was a monthly provision of Ksh.2, 000.

On the issued uniforms, the claimant upon clearance is entitled to a refund. The issuance of a certificate of service is not evidence of clearance. Where not returned, the claimant forfeited his deductions.

At the end of employment the claimant was paid his terminal dues at Ksh.151, 335 in full and final settlement and he signed a discharge voucher. Such pay included the following dues;

Pay for days worked;

Leave pay;

Notice pay

Severance pay

Paid less statutory deductions and the claims made are without merit and should be dismissed with costs.

At the close of the hearing both parties filed written submissions.

From the pleadings, the evidence and written submissions, the issues which emerge for the court determination can be summarised as follows;

Where the declared redundancy complied with the law; Whether there is breach of contract; Whether the remedies sought should issue.

The employment relationship between the parties was regulated under a written contract of service. The claimant has attached several such contracts;

One dated 1st January, 2013 at a salary of ksh.22, 000 per month and ending 31st December, 2013;

Contract dated 1st January, 2014 to 31st December, 2014 earning ksh.21, 739.13 and house allowance of ksh.3, 260.87;

Contract dated 1st January, 2018 and ending 31st December, 2018 at a gross wage of Ksh.27,000 comprising basic pay at ksh.16,703.79, house allowance of Ksh.2,505.57, overtime Ksh.5,790.64 and 66 work hours per week spread over 6 days each week with a lunch break.

The respondent has also attached contracts dated 1st January, 2014 and ending 31st December, 2014 at a wage of Ksh.25, 000 and inclusive of house allowance.

Contract dated 1st February, 2011 covering 1st January to 31st December, 2011. Section 10 of the Employment Act, 2007 (the Act) requires the employer to issue the employee with written contracts of service. Such written contract can be for a fixed term, open or upon agreed terms and conditions.

The parties herein opted for annual fixed term contracts of service the last such contract being the one dated 1st January, 2018 and contemplated to end on 31st December, 2018 save for the declaration of redundancy. Such term contract is lawful and legitimate and operated on its terms. Each term contract is separate and distinct from the other the last contract being the operational and regulating document of the employment relationship. See **Johnston Luvisia v Allpack Industries Limited [2019] eKLR** and in **Stephen M. Kitheka v Kevita International Limited [2018] eKLR** that fixed term contracts operate on their terms and conditions and are separate from any other written contract. See Fatuma **Abdi v Kenya School of Monetary Studies [2017] eKLR** that a fixed term contract of employment is a lawful mode of

employment with a start and end date.

In this regard, by letter and notice dated 5th March, 2018 the respondent informed the claimant that due to operational requirements his employment would be terminated *the company will be forced to lay off in excess of one hundred members of staff across the organisation* effective 6th March, 2018. He was to be paid terminal dues as follows;

Notice pay of one month;

- a) *Days worked to 6th March, 2018;*
- b) *Severance pay for 15 days for every completed year;*
- c) *Accrued leave days*

These dues were to be paid upon the claimant's clearance with the respondent. He was paid and certificate of service issued.

There is no breach of contract as alleged so as to cause a claim for payment of such breach. The parties were bound in the employment relationship through fixed term contracts.

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.

The claimant was issued with notice effectively immediately but was paid in lieu of the requisite notice period. There was notice to the labour officer and the claimant was paid his terminal dues which he acknowledged and signed a discharge voucher.

The respondent complied with the provisions of section 40 of the Act. There is no case for unprocedural termination of employment.

Under the existing fixed term contract, the claimant had only served for 3 complete months. Under section 40(1) (g) of the Act, severance pay is payable for the completed year of service. Each contract of service having been distinct and spate from the other, to pay the claimant for the entire duration of his employment with the respondent was generous. A strict application of section 40(1) (g) would not entitle him to the payment to ksh.98, 911.97 which was paid.

The claim for compensation and notice pay are found without merit. These are dismissed.

On the claim for work during public holidays, the claimant was under his contract entitled to work for 6 days and was paid overtime allowance for each month. The chronology of public holidays set out go over and above his fixed term contract he was serving under. Such contract running for January to December, 2018 did not attract the Public Holidays set out.

The claim for uniform refund is due upon clearance. This is admitted subject to the claimant returning the issued uniforms. This is a reasonable requirement and the claimant should abide and get access to his monies as deducted.

Section 33 of the Act allow an employer to provide for food for the employee but on condition that it has expressly been agreed upon in the contract of service and that such provision should not place the employer at any liability to provide the employee with food while away from work.

(1) An employer shall, where the provision of food has been expressly agreed To in or at the time of entering into a contract of service, ensure that an employee Is properly fed and supplied with sufficient and proper cooking utensils and means of cooking, at the employer's expense.

(2) The provisions of this section shall not be deemed to impose upon an employer any liability in respect of an employee during the time the employee is absent from his place of employment without the permission of the employer or without other lawful excuse.

Under the claimant's fixed term contract, there is no clause for the provision of food. Even where this was a term, which is not the case here, where there was an arrangement with the client at the work site, the claimant provided with food at a subsidised rate, the claimant having enjoyed the service and without any objections should not place the expense at the respondent. the respondent as the employer has attached invoices from the client for Ksh.2, 100 but charged the claimant Ksh.1, 500 per month.

Without an express agreement to be provided with food as a term and condition of employment, the claimant cannot claim back what he consumed while placed at Nakumatt.

On the claim for relocation allowance, under the fixed term contract, there was provision for a transfer of the claimant from one region to another and to be rotated every 3 months and the respondent had the discretion to transfer the employees as required. These are operational requirements for any business.

There is no provision for the payment of an allowance save that there was a policy to pay a transfer allowance initiated by the employer. Such policy allowed the respondent to transfer the claimant on two occasions and was paid the due allowance.

There are transfers which resulted from disciplinary matters. The claimant does not challenge the fact that he was found of gross misconduct while at Kisumu and this resulted in his transfer to another location. In essence this should have resulted in summary dismissal but instead there was a transfer. To seek to be paid for the movement would be to reward misconduct. the explanations by the respondent as to how the transfer policy was applied with regard to the claimant in this instance is legitimate, reasonable and applied with justice.

With regard to the claimant being moved within Nakuru town between different clients/branches, relocation does not apply. To claim for an allowance in such instances is not reasonable.

The respondent required its employees to wear branded polo t-shirts. To deduct the cost therefrom is an unfair labour practice. however, upon termination of employment, the requirement to return all such branded items so as to get back the deducted wages is reasonable. The claimant shall clear and get his refund.

With regard to claims on Vachu Sacco and Metropolitan Sacco, such entities run separate and outside of the respondent. For membership, the claimant has to give his application and consent outside of the respondent. even where the respondent was making wage deductions from the claimant to the Sacco, the foundation is the membership of the employee. Within such membership, each Sacco regulated under the Societies Act, the claimant ought to address his claims therefrom under the rules and regulation governing Saccos and not claim for his unpaid dues from the respondent.

In the case of **JAVAN WERE MBANGO V H. YOUNG & CO. (EA) LTD [2012] eKLR** the court held that;

Employees who out of their own free will join employees Sacco do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and for the collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, there are owed all their savings without taking into consideration the collective agreement under their Sacco and or cooperative society. Where an employee has enjoyed a loan facility from the collective kitty he is equally under a duty to make good any dues where his

relationship with the collective is severed by virtue of the termination of his relationship with the principal.

Accordingly, the claimant ought to address Sacco claims made herein accordingly and with the subject saccos.

Accordingly, the claims made are dismissed. The claimant shall clear with the respondent to access the wage deductions for uniform and polo t-shirt. Each party shall pay own costs.

Dated and delivered electronically this 11th May, 2020.

M. MBARU

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 the Order herein shall be delivered to the parties via emails.

this 11th May, 2020.

M. MBARU

JUDGE