



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO. 1822 OF 2017

DISHON KULEMA MUSUMBA.....CLAIMANT

-VERSUS-

ATHI RIVER MINING LIMITED.....RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent from 14.11.2014 to 4.8.2017 when his employment was terminated. He therefore brought this suit seeking the following reliefs:-

- a. A declaration that the claimant's termination is unlawful and unfair
- b. Compensation of Kshs. 206,164/-
- c. Costs of this suit
- d. Interest in (b) and (c) above

2. The respondent entered appearance but never filed any defence thereafter to dispute the claims by the claimant. Consequently, the suit proceeded by way of formal proof whereby the claimant relied on his written statement and filed written submissions.

3. The claimant's case is that he was employed as a General Labourer at the respondent's Athi River Factory from 14.11.2014. On 4.8.2017 at 12.00 o'clock, he learned that 37 employees had received termination letters from the Head Office and it was a matter of time before he was served with his. After a while he was informed that there was a termination letter for him but the HR Office told him to first proceed for General Elections break and report back on 14.8.2017 for further instructions.

4. On 14.8.2017, he reported back to HR office and was served with the termination letter. He was also given clearance form to clear with the company after which he was told that his terminal dues would be sent to his bank. However, no terminal dues were ever paid to him.

5. He further contended that the termination was not preceded by any notice and it was unfair because there was no valid reason. He therefore prayed for the reliefs set out in the claim.

6. In his written submissions, he contended that the termination bordered on redundancy without following a fair procedure.

7. I have carefully considered the pleadings, evidence, and submissions. The termination letter dated 4.8.2017 stated as follows in part.

“ . . .the company reviewed the structure of the Mavuno Department in line with the new HR requirements. Regrettably, your position is now not necessary in the new organizational structure.

Therefore the company hereby issues this letter as notice of termination of your services as per your contract letter. The notice is of one month and the company reserves the right to pay one month salary in lieu of the notice period in accordance with the terms of your letter of employment. You will also be paid your accrued entitlements and any outstanding pay up to and including your last day of employment as per the company policy. Your last working day will be 4th August 2017.”

8. I agree with the claimant's submissions that the message passed by the foregoing letter is that the respondent did organizational restructuring as a result of which his position became redundant. The claimant confirmed that 37 other employees were also laid off on 4.8.2017. The issues for determination are:

- a. Whether the redundancy was done in accordance with the statutory procedure set out under section 40 of the Employment Act.
- b. Whether the reliefs sought should be granted.

The procedure to be followed

9. Section 40 of the Employment Act provides a strict and mandatory procedure through which an employee may be dismissed on account of redundancy. The first is the mandatory notice in writing which must be served on the employee and the Labour Officer in the area. Secondly, a fair selection process must be done to identify the victims of the lay off. Finally, terminal dues must be paid as set out by the said provision.

10. In this case the claimant was served with the termination notice dated 4.8.2017 on 14.8.2017 and there is no evidence that the area Labour Officer was served with the redundancy notice. Likewise, there is no evidence to prove that the claimant was selected through a fair process and finally, the claimant was promised terminal dues but none was paid. Consequently, I return that the termination of the claimant's services was not done in accordance with section 40 of the Employment Act.

Reliefs

11. In view of the foregoing finding, I make declaration that the claimant's employment was unfairly and unlawfully terminated by the respondent. Accordingly, he is entitled to one month salary in lieu of notice plus 6 months salary compensation for unfair termination by dint of section 49 of the Employment Act. In awarding the said compensation, I have considered the fact that the claimant did not contribute to the termination through misconduct and also because he had served for over three (3) years without any warning.

12. The claim for severance is declined because I have declared the redundancy to be unfair termination, and sufficiently compensated the same under section 49 of the Act. However, I award the claim of service pay at the rate of half salary per year of service for 2 years as prayed.

Conclusion

13. I have found that the termination of the claimant's services was unfair and unlawful. Consequently, I enter judgment for the claimant as follows:

a. NoticeKshs. 13,468.00

b. Compensation Kshs. 80,808.00

c. Service for 2 yearsKshs. 13,468.00

TOTALKshs. 107,744.00

The claimant will also have costs plus interest at court rates but less statutory deductions.

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

ONESMUS N. MAKAU

JUDGE