THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 947 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

GEORGE K. KANGETHE.....CLAIMANT

VERSUS

ZIWA GARMENTS AND APPARELS LIMITED..... RESPONDENT

JUDGMENT

By Memorandum of Claim dated and filed on 2nd June, 2015 and filed on 3rd June, 2015 (the **Memorandum of Claim**), the Claimant avers that he was employed by the Respondent while they were trading in the name Vishva Business Park as an Administration and Human Resource Officer on 10th October, 2011 at a salary of KES 35,000/=.

The Claimant avers that the Respondent later changed its name to Ziwa Apparrels Limited and reviewed his salary to KES 40,000/= before his employment was terminated on grounds of redundancy without basis on 15th January, 2015. At the time of termination, his salary was KES 40,000/=. He also avers that the Respondent failed to pay his terminal dues. The Claimant prays for remedies as follows:-

i) A declaration that the Respondent's dismissal of the Claimant from employment was unprocedural and improper and the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.

ii) An order for payment of the Claimant's terminal dues and compensatory damages totalling to KES 673, 230 tabulated as follows:-

i. Payment in lieu of notice – KES 40,000/=

ii. Pro rata leave of 14 days from June 2014 to January 2015 – KES 25,230/=

iii. 15 days worked in the month of January – KES 20,000/=

iv. House allowance (19 months) at 15% on basic salary (40,000x15%x12 monthsx1.5 years worked) – KES 108,000

v. Severance pay (40,000x12months) – KES 480,000/=

iii) An order for the Respondent to pay costs of this suit plus interest thereon.

iv) Any other relief the Court may deem just.

The Claimant filed documents in support of his claim which are annexed to the Memorandum of Claim which included:-

i. A Letter of Appointment issued by Vector Solutions dated 10th October, 2011.

ii. A Letter of Appointment issued by the Respondent dated 30th May, 2013.

iii. A Notice of Termination of employment issued by the Respondent dated 15th January, 2015.

iv. A Demand Letter issued by the Claimant's Advocate addressed to the Respondent dated 11th May, 2015.

v. A letter issued by the Respondent to the Claimant's Advocate dated 25th May, 2015

The Claimant also filed his witness statement dated 24th April, 2018 on 7th May, 2018 wherein he re-iterated the averments in the Memorandum of Claim and further stated that:-

i. On 15th January, 2015 at 8:00am when one of the Directors – Michael Oddenyo- informed him that Ambrose, one of the Directors did not want to see him in the office.

ii. Upon inquiring the reason why Ambrose did not want to see him in the office, the said Michael Oddenyo told him that he and Ambrose were of equal ranks and he (Michael) could not question his decision.

iii. He was then given a letter by Michael Oddenyo which stated that the business was facing difficulties with production and could not sustain him.

iv. The Claimant then asked for his terminal benefits but Michael

Oddenyo told him that he could not pay him as Ambrose could not sign a cheque in the Claimant's favour.

v. In the said letter, it was communicated that his terminal dues would be computed and settled at the end of the notice period which to his understanding would have been on 15th February, 2015.

vi. The Claimant did not receive communication from the Respondent up to and after 15th February, 2015 which he followed up with emails of 25th April, 2015 and 30th April, 2015.

The Respondent filed a Reply and Defence to the Claim dated 23rd June, 2015 (the **Reply to the Claim**) in which it admitted that the Claimant was indeed employed as an Administration and Human Resources Manager. However, it denies the claim that it previously operated as Vishva Business Park as pleaded in the Memorandum of Claim and avers that it employed the Respondent on 30th May, 2013. Further the Respondent averred that:-

i. Due to financial difficulties and negative operations, it was unable to maintain the Claimant's services which necessitated the Claimant's termination by the Respondent on grounds of redundancy.

ii. The Respondent communicated to the Claimant its financial

difficulties during various management meetings.

iii. The Claimant even proceeded on leave and thereafter commenced half day duties during the process and was recalled fully on a humanitarian basis.

iv. It issued the Claimant with the one months' notice and paid the Claimant KES 36,500/= as terminal dues under the terms of the contract and subject to tax deductions.

v. The claims with respect to notice, leave, salary, house allowance and severance pay no legal basis derivation and that the dismissal of the Claimant was lawful, valid and procedural done under the due process of the law.

The Respondent also filed a List and Bundle of Documents contemporaneously with the Reply to the Claim which included:-

i. An email dated 30th April, 2015 from the Claimant to the Respondent

ii. The Claimant's leave application form dated 12th September, 2014

iii. The Notice of Termination dated 15th January, 2015 by the Respondent issued to the Claimant

iv. The Letter of Appointment dated 30th May, 2013 issued by the Respondent to the Claimant.

The Respondent however did not file any Witness Statement in support of its case.

Submissions

This Court issued directions on 29th October, 2019 for the matter to proceed by way of written submissions. The Claimant filed his written submissions dated 11th November, 2019 on 12th November, 2019. In support of the averments in the Memorandum of Claim and Witness Statement, the Claimant submitted briefly that:-

i. The Respondent admits through their own documents to have terminated the services of the Claimant on grounds of redundancy.

ii. The Respondent however failed to follow the laid down procedure for termination on grounds of redundancy as provided under Section 40 of the Employment Act, 2007 in that:-

a. There was no evidence provided by the Respondent that it had given the requisite notice to the Claimant

b. That the labour officer was notified.

c. The principle of first in last out was adhered to

iii. In support of his submissions, the Claimant cited the Court of Appeal decision in **Thomas De La Rue (K) Limited v David Opondo Omutelema [2013] eKLR** that:-

> *"It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer..."*

iv. The Respondent failed to provide any evidence in their pleadings as to whether the criteria and the principle of "last in, first out" was adhered to in terminating the Claimant's services. Through the letter of termination, the Respondent did not demonstrate whether this criterion was followed thus the Claimant's termination was wrongful. In support of his submission the Claimant relied on the case of **Kenya Plantation and Agricultural Workers' Union v Harvest Limited, Case No. 77 of 2014**.

The Respondent filed its written submissions dated 16th January, 2020. Briefly, its submissions were that:-

i. Pursuant to the letter dated 15th January 2015, the Claimant's termination was lawful and done fairly.

ii. The Claimant was given the required one months' notice prior to redundancy termination under Section 40 (a) of the Employment Act.

iii. The termination letter confirms that the Claimant's terminal dues were computed and settled.

iv. The Claimant was the only person executing administrative and human resource duties – compliance with Section 40(1) c of the Employment Act as to seniority, skills and ability was not possible in the circumstance. Indeed, the termination letter stated categorically that the functions under the Claimant's department would be outsourced.

v. The Claimant was duly given one months' notice of impending termination. Therefore, the claim for payment of 1 months' pay in lieu of notice does not lie.

vi. The Respondent cannot be faulted for any unfair termination. The 12 months' compensation claimed lies at the honourable courts discretion which is the maximum compensation and taking into account the facts and circumstances of the case where notice was given and the reason for termination given as negative operations, one months' compensation will suffice.

Determination

There is no dispute that the Claimant was declared redundant. The Claimant claims that he was employed by the Respondent while it was previously trading as Vector Solutions and produced a letter of appointment dated 10th October, 2011 by the same, a fact which is contested by the Respondent. This I find has not been proved by the Claimant and indeed, the relief sought by the Claimant in the Memorandum of Claim for house allowance indicates that Claimant is seeking the same for a period of 19 months which would translate to the period between May 2013 and January 2015 which the Respondent has admitted to have been the period that the claimant was in its employment.

Thus the remaining issues for my determination are whether the redundancy was in accordance with the law and if the Claimant was paid his full terminal dues.

Redundancy is provided for in Section 40 of the Employment Act as follows:

40. Termination on account of redundancy

(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;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.

Section 40 sets out the procedure for redundancy. Under Section 40(1)(a) and (b) the employer is required to notify the union and the Labour Officer at least one month before the redundancy is effected, of the intention to declare the employee redundant.

Subsection 40(1)(b) required the employee and the Labour Officer to be notified where the employee is not a member of the union.

The Court of Appeal in the case of **Thomas De La Rue (K) Ltd v David Opundo Omutelema**, **(supra)** found that the notification period of one month provided for in Subsection 40(1)(a) applies to the notification under Subsection 40(a)(b) as well when the court stated –

> *"... in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice."*

It is clear that in both sections the provision is that the notice is given to the employee and the Labour Officer, or the union and the Labour Officer. It means that in each case, the Labour Officer must be given at least one month's notice before the redundancy is effected, and the employee or union must also be notified at least one month before the redundancy is effected.

The Respondent in its Reply to the Claim contends that it followed due process and complied with the applicable law but has not produced any evidence to show that the requisite one months' notification was issued to both the Claimant and the Labour Officer.

The fatality of this inaction by the Respondent is expressed in my findings in the case of **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR** that:-

> *"The word used is notification. This period of one month is intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under Section 40(1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the Labour Officer to ensure that the redundancy will be carried out in accordance with the Act.*
>
> *For a redundancy to be valid, the employer must prove that both the Labour Officer and the employee or the employee's union, where there is one, have been notified at least one month before the redundancy takes place.*
>
> *This notification of intention under Section 40(1)(a) and (b) is different from the notice of termination under Section 40(1)(f).*
>
> *In the present case, the claimant was not notified of the intention to carry out the redundancy. What the respondent did was to issue notice of termination under Section 40(1)(f). This is evident from the fact that the claimant received only one letter dated 4th September 2017 which is appropriately entitled "TERMINATION OF SERVICE ON ACCOUNT OF REDUNDANCY". The letter does no mention the notification period which should have come a month earlier.*

The facts of **Gerrishom Mukhutsi Obayo case (Supra)** are relatively similar to the present case in that while the Respondent contends it communicated to the Claimant during various management meetings of its financial struggles, there is no proof that the said meetings were indeed held or that a notification was issued to the Claimant or the Labour Officer in compliance with the provisions of Section 40(1)(b).

The Respondent instead issued a letter titled *"NOTICE OF TERMINATION OF EMPLOYMENT AS ADMIN AND HUMAN RESOURCES OFFICER"* which appropriately notified the Claimant of his termination and not the intention to terminate, essentially jumping the gun to

effectively terminate the Claimant with a month's notice. Within the said letter, it was communicated to the Claimant he was to proceed on leave from 16th January, 2015 and that his dues would be computed and settled.

The uncontroverted testimony of the Claimant in his statement was that he received the letter on the morning of 15th January 2015 while reporting to work and he was informed by one of the Directors that he should not be seen at the office. Despite sending email correspondence to which receipt is confirmed having been produced by the Respondent in its bundle of documents, the Claimant did not receive any further communication or indeed any terminal dues as espoused in the Respondent's Notice of Termination.

The Respondent avers that it paid the Claimant a sum of KES 36,500 as dues under the terms of the contract which dues were subject to statutory deductions. No evidence of payment of the terminal dues has been submitted by the Respondent even though the same is alluded to in the list of documents. **Section 10(6) and (7)** as read with **Section 74** of the Employment Act provides that where an employer fails to produce prescribed records the burden of proving or disproving an allegation by the employee shifts to the employer. In this case there is no evidence of payment of the said dues, issuance of the notices of intention to terminate by way of redundancy served to the Labour Officer and the Claimant or indeed any other relevant employment records other than the letter of appointment.

On these facts alone, the only conclusion that may be drawn is

that the redundancy did not comply with the provisions of **Section 40** and amounts to an unfair termination. I need not dwell further into the particulars of the redundancy process and will now proceed to consider the reliefs sought by the Claimant.

Payment in lieu of Notice

Taking into account that the Claimant was entitled to both the one month's notice of intention to terminate and a month's notice for termination, I find that the Claimant is entitled to two months' notice and award him the sum of **KES 80,000/=** accordingly.

Pro-rata Leave

The Claimant seeks pro rata leave of 14 days accrued between the months of June 2014 January 2015. The Respondent has only made a blanket denial of leave days owed to the Claimant but has failed to provide any proof as required under Section 10 as read with Section 74 of the Employment Act. The Claimants averments stand uncontroverted to the standards set by the Employment Act and I therefore award the Claimant pro-rata leave of 14 days which to my calculations amount to **KES 18,667/=** and not KES 25,230 as pleaded by the Claimant.

15 days worked in the month of January

It is not contested that the Claimant worked up until 15th January

2015. There being no proof of payment for the days worked, the Claimant's averments stand uncontroverted and I accordingly award him the sum of **KES 20,000/=.**

House Allowance

The Letter of Appointment issued by the Respondent to the Claimant containing terms of the contract indicates that the salary was a consolidated salary. This prayer thus fails.

Severance Pay

The Claimant prays for KES 480,000/= as severance pay being 12 months' salary. Section 40(1)(g) of the Employment Act provides for the payment of 15 days' pay for each completed year of service. Having found the Claimant was only employed for 19 months, I award the Claimant **KES 20,000/=.**

Compensation

Having found the Claimant's termination was un-procedural and unfair, I award the Claimant 3 months' salary as compensation amounting to **KES 120,000/=**. In making this award I have taken into account the Claimant's length of service, his seniority and the Respondent's conduct in the termination process.

Conclusion

In conclusion judgment is entered in favour of the claimant against the respondent as follows: -

i).... 2 months' salary in lieu of notice..... KES 80,000

ii)... 14 days' pro-rata leave..... KES 18,667

iii).. 15 days worked in the month of January ..... KES 20,000

iv).. Severance Pay ..... KES 20,000

v)... 3 months' salary as compensation..... KES 120,000

Total Award **KES 258,667.00**

vi)... The Respondent shall pay the Claimant's costs of this suit.

vii) The decretal sum shall attract interest at court rates from date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JUNE 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