



**REPUBLIC OF KENYA**

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

**AT KERICHO**

**CAUSE NO.20 OF 2019**

**BENJAMIN MAUNDU SYANDA.....CLAIMANT**

**VERSUS**

**TELKOM KENYA LIMITED..... RESPONDENT**

**JUDGEMENT**

On 25<sup>th</sup> February, 2009 the claimant was employed by the respondent as the Distributor Territory Manager and On 26<sup>th</sup> October, 2018 the respondent issued the claimant with notice of intended redundancy within the business and that there was intention to terminate his employment on such grounds.

At the time of the issuance of redundancy notice the claimant had various work benefits;

- a. Unpaid leave days amounting to Ksh.204, 145.76;
- b. 3 days unpaid salary at ksh.16, 825;
- c. Transport allowance of Ksh.70, 000;
- d. Unpaid traveling allowance for 2017 at ksh.22, 176;
- e. Severance pay Ksh.1, 626,436;
- f. Notice pay Ksh.168, 252;
- g. Protection of interest pay per paragraph 12 of the employment contract at a monthly pay for 3 months at ksh.504, 756.

The claimant worked until 3<sup>rd</sup> December, 2019 when the notice of redundancy took effect. The claimant legitimately expected the payment of his terminal dues. At the time the claimant was earning ksh.168, 252 gross salaries per month.

The claim is that employment terminated in breach of the law and contrary to section 41 of the Employment Act (the Act). There was no due process followed under section 40 of the Act and this resulted in unfair termination of employment. The claimant had expected to work until age 60 and the termination of his employment under redundancy provisions that did not exist was unfair and contrary to fair labour practices.

The claimant is seeking the terminal dues owing; damages for paid suffered for the loss of employment; interests on his dues and costs of the suit.

The claimant testified that upon employment by the respondent he worked diligently until 26<sup>th</sup> October, 2018 when he was issued with letter and notice of redundancy and was laid off. He worked until 3<sup>rd</sup> December, 2018 and cleared the next day but was paid nothing. His dues were Ksh.2, 622,590.

The claim by the respondent that there was a case of summary dismissal and not redundancy is not true. The letter issued related to a redundancy and not dismissal. The alleged poor work performance did not exist and he had commendation letters up to the last year of service.

The claimant also testified that the letter and notice to show cause dated 4<sup>th</sup> March, 2018 was issued to him and he replied. The notice dated 9<sup>th</sup> November, 2018 only came to his attention after leaving his employment and had no knowledge that he was required showing cause. There was no invitation to attend before any disciplinary process and such letter and notice ought to have been issued by his supervisor, Rita Mutuku and who was not aware.

The claimant also testified that he reported the matter to the Labour Officer, made a demand to be paid his dues but the respondent failed to oblige. This has caused him pain, loss and suffering together with his family as she was the only source of income and thus claims for damages.

The claimant also testified that in the year 2016 he replied to a notice to show cause with regard to poor performance and was issued with a caution letter. He was invited for a disciplinary hearing on the same grounds.

Rita Mutuku sent letter dated 26<sup>th</sup> October, 2018 a redundancy notice and the claimant did not know how many employees received a similar notice. The letter stated that over 500 employees would be laid off. It was a general letter and an invitation to attend at a meeting for redundancy preparations. He then received a notice terminating employment. The claimant understood these notices to mean that he had been laid off and his position rendered redundant and went through the clearance process.

## Defence

The defence is that the claimant was employed from 11<sup>th</sup> March, 2009 and re-designated from Territory manager to Senior Indirect Sales Representative and posted to Kericho Zone under Central Rift Area. Employment was terminated on grounds of insubordination and after the due process of a disciplinary hearing and not on account of redundancy. There was summary dismissal from employment. There was a mere coincidence of redundancy and the disciplinary process against the claimant.

The notice of intended redundancy issued to the claimant was not a notice to terminate employment but issued to all employees and resulting into consultations as required under section 40 of the Act. The dues owing at the time of summary dismissal were processed and paid and the claim for unpaid salary for December is without foundation; the claimant took all his leave days; in the year 2017 there was no transport allowance payment outstanding; severance pay is not due since this was not a redundancy as alleged; the compensation claimed is not available in summary dismissal.

On 3<sup>rd</sup> December, 2018 the claimant was never issued with a redundancy notice or termination of his employment on such account. There was no reason to clear on 4<sup>th</sup> December, 2018 since summary dismissal letter was sent on 6<sup>th</sup> December, 2018. The claimed terminal dues should be dismissed with costs.

Kerry Francis Ochang the human resource manager testified that in the year 2011 the claimant's work performance was not good. He had a 25% score. There was a performance improvement plan (PIP) process of 4 months from February, 2011. The claimant was given a chance to improve and he replied on 16<sup>th</sup> February, 2011 and he gave action items and areas of improvement of performance.

The respondent had a set procedure on poor performance. The claimant was issued with a notice to show cause and he replied to it and the output from the process was issuance of a caution letter. The claimant was also advised that if there was a repeat of poor performance there would follow a disciplinary action.

In December, 2016 the claimant was issued with a notice to show cause with regard to poor work performance. He was put on PIP for 3 months from January to March, 2017. A new PIP process was commenced. The claimant was given a chance to improve on his work performance and if he remained at good performance this placed him in good standing but there was any other matter arising, a final warning would be issued on 6<sup>th</sup> March, 2017.

In the year 2018 the claimant was charged with insubordination and negligence of duty. The supervisor said the claimant was not doing his duties and a notice to show cause why his employment should not be terminated was issued on 9<sup>th</sup> November, 2018 on negligence of duty and insubordination for failure to report on the PIP. He was given 3 days to reply and he failed to attend or write a reply thereto. On his silence this was taken as admission.

The claimant was invited to attend a disciplinary hearing which he failed to attend. Hearing proceeded and the respondent found the claimant had failed to obey lawful orders contrary to section 44(4) of the Act and this resulted in his summary dismissal recommendation on 28<sup>th</sup> November, 2018. The claimant was then served with letter dated 6<sup>th</sup> December, 2018 for summary dismissal.

Mr Ochang also testified that the claim that the claimant was laid off in a redundancy on 26<sup>th</sup> October, 2018 is not correct. This was a general notice issued to all employees following a *town hall meeting* and all employees received a similar notice. This was followed by consultations with the union and the Labour Officer. The employees affected by the redundancy were served with individual notices terminating employment. On the letters the redundancy package was attached. The claimant was not issued with such letter.

The claimant failed to heed the notices issued to him and was sanctioned with summary dismissal. The claims made should be dismissed with costs.

Rita Mutuku the Area Sales Manager, Nakuru for the respondent testified that the claimant was not submitting his reports to the respondent as required under his work performance and as the supervisor she issued him with notice dated 9<sup>th</sup> November, 2018 which was delivered via email and registered mail. The claimant received and signed. She followed up and asked the claimant to do clearance as he was not replying

to the notices issued.

The claimant was invited to a disciplinary hearing on 28<sup>th</sup> November, 2018 but he failed to attend. He sent a message to one of the committee members and said that he could not make it to the meeting.

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

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

Whether there was summary dismissal or redundancy;

Whether the remedies sought are available; and

Who should pay costs.

The claimant's claim is that he was laid off following a redundancy process within the respondent. That there was notice dated 26<sup>th</sup> October, 2018 resulting in termination of his employment on 3<sup>rd</sup> December, 2018 when he cleared and was not paid his terminal dues.

On the other hand the defence is that the claimant had been taken through a process of PIP following poor work performing and in the year 2017 he was issued with final warning and placed on a PIP when he failed to file his reports resulting in the issuance of notice to show cause to which he failed to respond and when invited to a disciplinary hearing he failed to attend resulting in summary dismissal from employment on the grounds of disobeying lawful instructions.

The claimant has filed letter and notice dated 26<sup>th</sup> October, 2018. The notice relates to *NOTICE OF INTENDED REDUNDANCY EXERCISE AT TELKOM KENYA*. Indeed the author of the notice, chief Human Resource Officer relied on the provisions of section 40 of the Act and that this notice related to an intended redundancy affecting 500 employees and such served as a general notice to all employees.

The claimant has not attached any other notice to him issued by the respondent subsequent to the redundancy notice. He testified that his employment was terminated on 3<sup>rd</sup> December, 2018 and upon which he cleared on 4<sup>th</sup> December, 2018 and he left. The letter terminating employment is missing.

The court takes it there was no such letter terminating the claimant's employment on account of redundancy. Had such letter been issued, the claimant ought to have filed it as required under section 47(5) of the Act. He was alleging that his employment was unlawfully terminated by the respondent. The burden to prove unlawful termination of employment is upon the employee while the burden to prove the grounds leading to termination of employment is upon the employer. See **Gibson D Mwanjala versus KRA [2015] eKLR** and in **Standard Group Limited versus Jenny Luesby [2018] eKLR** the Court of Appeal in analysing the provisions of Section 47 (5) held that;

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.**” [Emphasis added].

On the claim that the claimant's employment terminated following a redundancy, on the evidence before court, this was not the case. The intention to declare a redundancy issued, the individual notice to the claimant pursuant to section 40(2) of the Act was not issued. Such notice is a key prerequisite to a claim of redundancy dues which is not the case here.

With regard to summary dismissal, the respondent filed its list of document dated 16<sup>th</sup> May, 2019 and including letter dated 6<sup>th</sup> December, 2018. The letter relates to summary dismissal of the claimant from his employment with the respondent on the grounds of negligence of duty and insubordination.

This letter and notice of summary dismissal from employment goes to the root of the claims made.

Whereas the dispute registered with the court is premised on alleged redundancy and which the court has addressed above and that this did not apply to the claimant's employment with the respondent, the letter terminating employment resulted from negligence of duty and insubordination and hence the sanction of summary dismissal. The remedies therefore sought with regard to a redundancy are not available to the claimant in these circumstances.

The foundation of the claim that there was a redundancy and hence payment of redundancy dues is lost.

The defence hence stand true that the reasons leading to termination of employment were gross misconduct under the provisions of section 44(4) of the Act with regard to failure to obey lawful instructions by the employer, failure to attend and respond to issued notices on work performance and duties and failure to attend at the disciplinary hearing as required by the employer. In these circumstances, the sanction of summary dismissal is lawful and justified.

On the remedies sought, severance pay, compensation and notice pay are payments not available where there is no termination of employment on account of redundancy and where the court finds summary dismissal justified.

On the claim for unpaid leave days amounting to Ksh.204,145.76 the claimant did not set out how such payment arose and the number of leave days outstanding and not taken. The respondent also failed to address this claim or file any work records to confirm that the claimant had completed and or taken his leave days at the time of summary dismissal on 6<sup>th</sup> December, 2018.

The records of clearance attached as annexure 2 to the Memorandum of Claim is plain and does not offer much. The supervisor Rita Mutuku signed the clearance on 8<sup>th</sup> January, 2019 and there is no indication of any dues owing.

The claimant shall attend at the shop floor and where there are any leave days pending, this shall be paid as he is issued with his Certificate of Service.

Similarly with regard to the claims for 3 days worked in December, 2018 on the one hand the respondent's case is that the summary dismissal was on 6<sup>th</sup> December, 2018 whereas the claimant asserted that his last day at work was on 3<sup>rd</sup> December, 2018. As noted above, employment terminated by summary dismissal on 6<sup>th</sup> December, 2018 and not 3<sup>rd</sup> December, 2018. The pay due is for days at work that is 3 days in December, 2018. Where the claimant was not paid for the 3 days worked and or was paid up and until 6<sup>th</sup> December, 2018 after he had left his employment on 3<sup>rd</sup> December, 2018 the respondent shall address and pay for days worked and or make deduction for paid days not at work.

In addressing the above, on the payment of owing dues to the claimant, the respondent shall take into the provisions of section 19(1)(c) of the Act.

On the claim for transport allowance, save for the contract of service at clause 4 providing for the payment of a travelling allowance while the claimant is on official duty, the background with regard to the claim for the payment of Ksh.70,000 is not given. There is no evidence as to how such a claim arose.

With regard to the claim for *protection of interests* pay for three months pursuant to clause 12 of the contract of service, the rationale given is that under such clause the claimant is entitled to a payment upon exiting employment. The court reading of this clause is that it is similar to a *confidentiality clause* and requiring the claimant's *undertake, carry on or be employed, engaged or interested in any capacity in any capacity in either any business which is competitive with our business*. These provisions apply upon *termination* of employment which is dissimilar to summary dismissal. Whereas clause 12 of the contract makes such provisions, this should be read in the whole and particular clause 11 on *termination* of employment which is by notice by either party and *summary dismissal* which does not require notice and premised on *any conduct by you tendering to bring the Company into disrepute*.

Where the intention of the parties to the contract of service was to require the application of the *protection interests* clause to apply in both case of *termination* of employment and in *summary dismissal* from employment, this is not the case here. The letter of the contract is specific. Clause 12 only relates to *termination* from employment.

Summary dismissal is a serious sanction following gross misconduct. On the finding that summary dismissal in this case was justified, the claimant invited the sanction upon himself for gross misconduct. The claim that he has suffered following the loss of employment cannot be visited against the employer.

On the requirement to attend at the shop floor for clearance on any leave days not taken and for payment and deductions for days worked, it is imperative that each party meets own costs.

Accordingly, save for the claimant attendance at the shop floor to have his leave days, days worked tabulations done; the claims made are found without merit and are hereby dismissed. Each party shall bear own costs.

**Dated and delivered electronically this 30<sup>th</sup> July, 2020.**

**M. MBARU**

**JUDGE**