



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 922 OF 2017

JACOB CHACHA.....CLAIMANT

VERSUS

LTI KISHI SAFARI INNS LTD T/A KASKAZI BEACH HOTEL.....RESPONDENT

JUDGMENT

Introduction

1. The dispute before me is between Jacob Chacha and LtiKisii Safari Inns Ltd trading as Kaskazi Beach Hotel.
2. The Claimant’s claim is documented by a Memorandum of Claim dated and filed in court on 15th December 2017. The Respondent filed a Reply and Counterclaim on 7th February 2018 but did not attend the hearing, in spite of due notification. The Claimant responded to the Respondent’s Reply and Counterclaim on 16th April 2017. At the trial, he testified on his own behalf.
3. In reaching my judgment, I have considered the Respondent’s Reply on record.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent in the position of Chief Financial Officer from 1st February 2012 until 31st December 2014, when his position was declared redundant. The Claimant earned a monthly salary of Kshs. 250,000.
5. The Claimant claims that he was unlawfully and unfairly declared redundant on account of restructuring and downsizing of the Respondent, without adherence to the law.
6. The Claimant states that on 2nd March 2015, the Respondent issued him with a payment plan of his contractual dues calculated at Kshs. 2,458,000.
7. The Claimant further states that despite his insistence on lump sum payment of his contractual dues, comprising of his salary and leave arrears, the Respondent proceeded to issue post-dated cheques amounting to Kshs. 1,265,400. A payment of Kshs. 525,600 was dishonoured by the Respondent’s Bank for lack of sufficient funds.
8. The Claimant avers that from 31st December 2014, when his position was declared redundant, the Respondent had failed, neglected and/or refused to pay his salary and leave arrears amounting to Kshs. 1,718,200.
9. The Claimant further avers that the termination of his employment on account of redundancy was unlawful and unfair for lack of substantive and procedural fairness. He adds that the redundancy was not genuine but was driven by bias and discrimination.
10. The Claimant maintains that the Respondent did not comply with Section 40(1)(a)-(g) of the Employment Act and that the decision to terminate his services on account of redundancy was unreasonable and unfair as there was no valid reason for the said action.
11. The Claimant therefore claims the following from the Respondent:

a) One month’s salary in lieu of notice.....Kshs. 250,000

- b) Unpaid outstanding salary and leave arrears.....1,718,200
- c) Severance pay.....432,692
- d) 12 months' salary in compensation.....3,000,000
- e) General damages for breach of contract
- f) Costs plus interest

The Respondent's Case

12. In its Reply and Counterclaim dated and filed in court on 7th February 2018, the Respondent denies having employed the Claimant on 1st February 2012 as alleged. The Respondent further denies backdating any letter of appointment.

13. The Respondent avers that it complied with the strict provisions of Section 40 of the Employment Act and all other provisions of the law, in so far as the termination of the Claimant's employment was concerned. The Respondent points out that it issued a one-month termination notice to the Claimant and that the Claimant was paid all his dues. The Respondent denies that the cheques issued were dishonoured.

14. The Respondent denies that the termination of the Claimant's employment was unfair or actuated by malice. The Respondent states that it terminated the services of the Claimant as part of a necessary restructuring and down- sizing of its business, following a downturn within the hospitality industry.

15. In its Counterclaim, the Respondent states that the Claimant failed to correctly advise the Respondent on its statutory obligations, specifically requiring monthly remittance of Value Added Tax (VAT), Pay as You Earn (PAYE), National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF).

16. The Respondent further states that the Claimant never prepared a financial balance sheet and/or report for any financial year during the period of his employment; thereby making it impossible for the Respondent to audit its accounts and/or comply with tax obligations.

17. The Respondent adds that as a result of the foregoing negligence and/or derogation from his contractual and statutory duties, the Claimant has occasioned the Respondent stiff financial constraints as it was required to comply with its tax obligations as well as all other statutory obligations at once.

18. The Respondent accuses the Claimant of professional negligence citing the following particulars:

- a) Failing to prepare annual financial reports, or any reports at all;
- b) Failing to advise the Respondent on its statutory obligations;
- c) Failing to keep proper books of account;
- d) Failing to comply with standard statutory requirements on tax; in particular:
 - i) Failing to calculate the Respondent's tax obligations;
 - ii) Failing to remit the mandatory VAT and PAYE taxes to the Kenya Revenue Authority;
 - iii) Failing to remit to NSSF and NHIF the requisite deductions as per the law.
- e) Negligently, without any just cause and/or authority from the Directors of the Respondent, giving Kshs. 600,000 to one Mr. Campbell, a former employee of the Respondent, without verifying the status of the statements/records of the said Campbell or considering the Respondent's financial status and failing to ensure execution of an acknowledgement note for the said payment for record purposes.

19. The Respondent therefore claims from the Claimant the sum of Kshs. 600,000 plus interest thereon at commercial rates.

20. The Respondent also lays a claim for general damages for professional negligence and financial loss against the Claimant.

Findings and Determination

21. There are three (3) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought;

c) Whether the Respondent has made out a proper counterclaim against the Claimant.

The Termination

22. On 2nd November 2014, the Respondent wrote to the Claimant as follows:

“Dear Mr Chacha,

Re: YOUR EMPLOYMENT WITH THIS COMPANY

We refer to your discussions with the General Manager and the Human Resources Manager, held on the 28th and 29th October 2014.

As part of the ongoing restructuring and down-sizing of our establishment, we hereby regretfully notify you that your employment with this company will terminate on 31st December 2014. As explained during the discussions, this is a consequence of the downturn our business, and the hospitality industry in general, continue to experience, having started in 2012.

Prior to your departure, please ensure all financial records are updated. You should then hand over your office and all company property in your possession to Robert, the Chief Accountant, with whom you are also to agree on the amount and settlement of your final dues, comprising the following:

a) Arrears of net salaries for the following months, to the extent that they are not yet paid:-

i) 2 013: May; August; September; October and November.

ii) 2014: March; May; June; July; August; September; October; November and December.

b) Pay in lieu of leave for 2013 and 2014 – 42 days.

Needless to mention, any debts owing to the company shall be offset against your dues.

Finally, the directors wish to thank you for your services and wish you all the best in your future endeavours.

Yours faithfully,

For and on behalf of-

KISII SAFARI INNS LTD T/A KASKAZI BEACH HOTEL

DR (MRS) CHRISTA M OTARA

Director

(signed)

DR C G OTARA

Chairman

(signed)”

23. From the foregoing letter, it is evident that the Claimant’s employment was terminated on account of redundancy. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define redundancy as:

“ the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

24. The law allows an employer to terminate employment on account of redundancy subject to the following conditions issued in Section 40 of the Employment Act:

40. (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 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 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.

25. These conditions, 7 in number, may be classified in 3 broad categories; notices, objective selection criteria and statutory dues. With regard to notices, it is now well settled that two separate and distinct notices of at least 30 days each are required.

26. The first is a redundancy notice to the employee or their trade union (where one exists) and to the local Labour Officer. By definition, this notice should set out the reasons for and extent of the intended redundancy. The second is a termination notice addressed to each affected employee.

27. In his final submissions, the Claimant makes reference to the decision in *Gerrishom Mukhutsi Obayo v DSV Air and Sea Travel Limited [2018] eKLR* where my sister, **Maureen Onyango J** stated the following:

“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).”

28. In reaching this decision, my sister Judge was guided by the earlier decisions of the Court of Appeal in *Thomas De La Rue (K) Limited v David Opondo Omutelema [2013] eKLR* and *Kenya Airways Limited v Aviation and Allied Workers Union Kenya & 3 others [2014] eKLR*.

29. The condition in Section 40(1)(c) on selection criteria is reinforced by *Article 15 of the Supplementary Provision to the ILO Recommendation No 119: Termination of Employment Recommendation 1963* concerning reduction of the workforce which states:

(1) The selection of workers to be affected by a reduction of the workforce should be made according to precise criteria, which it is desirable should be established wherever possible in advance and which give due weight both to the interests of the undertaking, establishment or service and the interests of the workers.

30. In the *Kenya Airways Case* (supra) the Court of Appeal held that where the selection criteria is non-existence or opaque, the statutory threshold of Section 40 (1)(c) cannot be said to have been met.

31. As held in *Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR* the conditions set under Section 40 of the Employment Act are mandatory not optional.

32. Further, in its decision in *Francis Maina Kamau v Lee Construction [2014] eKLR* this Court held that a redundancy undertaken outside the four corners of Section 40 of the Employment Act is an unfair termination within the meaning of Section 45 of the Act.

33. Apart from the termination letter issued to the Claimant on 2nd November 2014, the Court did not find any evidence of compliance with the conditions set under Section 40 of the Employment Act.

34. Additionally, in its Reply and Counterclaim filed in court on 7th February 2018, the Respondent introduces accusations bordering on poor performance and misconduct against the Claimant. These accusations were not proved either at the shop floor or before the Court.

35. What is more, these accusations disclose that the termination of the Claimant’s employment was motivated by reasons other than redundancy. This, coupled with the fact that the Respondent did not adduce any evidence in support of its case, plant doubts in the mind of the Court as to whether there was a genuine case of redundancy in the first place.

36. Overall, I find and hold that the subject redundancy was coloured and the ensuing termination was substantively and procedurally unfair and the Claimant is entitled to compensation.

Remedies

37. Pursuant to the foregoing findings, I award the Claimant six (6) months’ salary in compensation. In arriving at this award, I have considered the Claimant’s length of service, together with the Respondent’s failure to observe the law in executing the redundancy.

38. From the evidence on record, the Claimant was given a one-month termination notice. The claim for pay in lieu thereof is therefore misplaced and is disallowed.

39. The claim for salary and leave pay arrears was uncontested and is payable.

40. Having been declared redundant, the Claimant is entitled to severance pay.

41. No basis was laid for the claim for general damages for breach of contract which is dismissed.

The Respondent's Counterclaim

42. The Respondent's Counterclaim against the Claimant arises from an accusation that the Claimant made an irregular payment of Kshs. 600,000 to a former employee of the Respondent by the name Campbell.

43. This accusation was however not supported by any evidence and the Counterclaim was thus unproved.

Final Orders

44. In the end, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....	Kshs. 1,500,000
b) Outstanding salary and leave pay arrears.....	1,718,200
c) Severance pay for 2 years(250,000/30*15*2).....	<u>250,000</u>
Total.....	3,468,200

45. This amount will attract interest at court rates from the date of judgment until payment in full.

46. The Claimant will have the costs of the case.

47. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Mbithe for the Claimant

No appearance for the Respondent