



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 239 OF 2018

MTISYA KALANZU KAMANGA.....CLAIMANT

VS

KALU WORKS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Mtisya Kalanzu Kamanga and Kalu

Works Limited. The Claimant's case is captured in a Memorandum of Claim dated 5th April 2018 and filed in court on 17th April 2018.

2. The Respondent filed a Response on 13th July 2018 to which the Claimant responded on 10th September 2018.

3. When the matter came up for trial, the Claimant testified on his own behalf and the Respondent called Hezrone Rachilo and James Mutua Musyoka.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent in 2001, earning a monthly salary of Kshs. 2,760 which was progressively increased to Kshs. 9,088.

5. The Claimant claims that he worked for the Respondent for a period of 16 years until 6th November 2017, when his employment was terminated without valid reason and in violation of his right to be heard. He further claims that he was underpaid.

6. The Claimant now claims the following:

- a) One month's pay in lieu of notice.....Kshs. 10,954.70
- b) Unpaid annual leave for 16 years.....122,692.64
- c) 12 months' salary in compensation.....131,456.40
- d) Salary arrears arising from underpayment.....753,939.57
- e) Costs plus interest

The Respondent's Case

7. In its Response dated and filed in court on 13th July 2018, the Respondent admits having employed the Claimant as a Gardener in the GRI Department for a term of 6 months from 1st July 2017 at an initial consolidated salary of Kshs. 7,702 which was later reviewed to Kshs. 9,088.36

8. The Respondent avers that it lawfully terminated the Claimant's employment vide its letter dated 6th November 2017.

9. The Respondent further avers that on 10th November 2017, it notified the County Labour Officer of the termination of the Claimant's employment as required by Section 78 of the Employment Act, 2007.

10. The Respondent states that according to Clause 7 of the employment contract, the continuity of the Claimant's employment was subject to anticipation of work operational programmes running as planned and any unforeseen interruption to such programmes would have corresponding interruption on the contract, which would be deemed to terminate automatically without notice.

11. The Respondent adds that under Clause 8 of the employment contract, either party could terminate the contract by giving one month's written notice or paying one month's salary in lieu of such notice.

12. Further, the Respondent avers that the Human Resource Representative of the Respondent, Ms. Emma Maina held a meeting with the Claimant and the Respondent extensively explained to the Claimant, in a language he understood, that there was low demand and production hence the need to invoke Clauses 7 and 8 of the contract, resulting to termination. The Claimant acknowledged his understanding of the discussions by appending his signature on the termination letter.

13. The Respondent further avers that at the time of the termination, it informed the Claimant that it would effect payment of the Claimant's terminal dues upon the Claimant clearing with the Company.

14. The Respondent claims that the Claimant accepted and acknowledged the termination and the terms thereof by signing a copy of the termination notice and confirmed receiving the terminal dues lawfully payable to him.

15. The Respondent maintains that at all material times, it fairly and lawfully remunerated the Claimant as required by law.

16. The Respondent submits that it duly informed the Claimant of the reasons for termination.

17. The Respondent further submits that it was experiencing operational work challenges which resulted in reduced production capacity, leading to interruption of its programme.

Findings and Determination

18. There are two (2) 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.

The Termination

19. The termination of the Claimant's employment was communicated by letter dated 6th November 2017 stating the following:

"Dear Mutisya

RE: TERMINATION OF CONTRACT

This is to notify you that due to reduced production capacity in the plant that has been caused by low demand, your employment contract is hereby terminated with effect from 6th November 2017.

Your terminal dues will be made payable as computed below:

- a) Salary up to 6th November 2017*
- b) 1 Month Notice*
- c) Leave days due (4.74 days)*
- d) Overtime due (if any)*
- e) Less any other deductions under section 19 of the Employment Act, 2007*

Take note that as per the Company's policy, you shall be required to clear with the company before any amount payable is made.

We do wish you all the best in your future endeavors and thank you for the services provided to the company.

Yours sincerely,

For Kaluworks Limited,

(signed)

Emma K Maina

SENIOR HUMAN RESOURCE OFFICER

20. According to this letter, the Claimant's employment was terminated on account of redundancy.

21. Section 2 of the Employment Act, 2007 defines 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.”

22. The law recognises redundancy as a legitimate mode of termination of employment subject to the following conditions set out under 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.

23. The first 2 conditions under Section 40 require every employer declaring redundancy to issue a one-month notice of intention to the affected employee, their union (where applicable) and the local Labour Officer. By definition, this notice, should set out the reasons for and the extent of the intended redundancy.

24. One more thing, the redundancy notice is separate and distinct from the termination notice provided under Section 40(1)(f). This was settled by the Court of Appeal in its decisions in *Thomas De La Rue v David Opondo Omutelelma [2013] eKLR* and *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR*.

25. In the *Kenya Airways Case* (supra) **Maraga JA** (as he then was) rendered himself as follows:

“The notices under this provision are not merely for information. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in....ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider ‘measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.’ The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable.”

26. Then there is the requirement for an objective selection criterion set out under Section 40(1)(c) and finally, the instruction to settle all outstanding statutory dues.

27. Apart from the letter of termination dated 6th November 2017, by which the Claimant was to be paid one month’s salary in lieu of notice, the Respondent made no attempt to comply with any of the other conditions set under Section 40 of the Employment Act.

28. As held by this Court in its decision in ***Fatma Ali Dabaso v First Community Bank Limited [2018] eKLR***, a redundancy that ignores any of the foregoing conditions amounts to an unfair termination of employment as defined in Section 45 of the Act.

29. It follows therefore that the termination of the Claimant’s employment as communicated by letter dated 6th November 2017 was substantively and procedurally unfair and he is entitled to compensation.

Remedies

30. Consequently, I award the Claimant twelve (12) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s cumulative service period, reckoned from the year 2001 as confirmed by the Respondent’s witnesses in their live testimony.

31. From the evidence on record, the Claimant was paid one (1) month’s salary in lieu of notice. The claim thereon is therefore without basis and is disallowed.

32. Regarding the claim for leave pay, the Claimant confirmed to the Court that all his accrued dues were settled upon expiry of each successive contract. It seems to me therefore that apart from the leave days encashed together with his terminal dues paid by the Respondent, the Claimant had no other legitimate claim on this limb. The claim for leave pay is thus disallowed.

33. The claim for underpayment was not proved and therefore falls.

34. In the final analysis, I enter judgment in favour of the Claimant in the sum of **Kshs. 109,056** being 12 months’ salary in compensation for unlawful and unfair termination of employment.

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

36. The Claimant will have the costs of the case

37. 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:

Mr. Otieno for the Claimant

Mr. Gathu for the Respondent