



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 192 OF 2018

ZACHARY OTIENO MADJWECK.....CLAIMANT

VS

BOLLORE TRANSPORT & LOGISTICS KENYA LIMITED....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 22nd March 2018 and filed in court on 29th March 2018, the Claimant has sued the Respondent for unlawful termination of employment and non-payment of terminal dues. The Respondent filed a Response on 26th April 2018.

2. The matter proceeded to full trial with the Claimant testifying on his own behalf and the Respondent calling its Human Resource Manager, Supply Chain, Corridor and Shipping Business, Jane Wairimu.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent in November 2005 in the position of Clerk, Allocations. He earned a monthly salary of Kshs. 48,700.

4. The Claimant worked for the Respondent for 13 years until 9th February 2018, when his employment was terminated on account of redundancy.

5. The Claimant claims that in terminating his employment, the Respondent did not adhere to the provisions of Section 40 of the Employment Act. He states that on 9th February 2018, he was called by the Human Resource Manager, Ms Wairimu and served with a letter dated 28th December 2017 with reference ‘*notice of intended redundancy.*’

6. The Claimant states that he was told by Ms Wairimu that the redundancy was to take effect immediately upon service of the subject letter. He adds that he was not given any reason or explanation as required under Section 40(a) of the Employment Act.

7. The Claimant therefore claims the following from the Respondent:

- a) Notice pay.....Kshs. 48,700
- b) Severance pay for 13 years.....316,550
- c) 12 months’ salary in compensation.....548,400
- d) Salary for 19 days worked in March 2018.....16,857
- e) Loss of future earnings for 16 years left to retirement.....8,774,400
- f) Travelling allowance 2017.....13,500
- g) Service pay for period before joining pension scheme.....206,038
- h) Certificate of service

- i) Costs

The Respondent's Case

8. In its Response dated 25th April 2018 and filed in court on 26th April 2018, the Respondent admits having employed the Claimant as Clerk, Allocations at a monthly salary of Kshs. 48,700.

9. The Respondent however states that pursuant to a letter of appointment dated 29th December 2008, the Claimant's employment took effect from 1st January 2009 and not November 2005 as alleged by the Claimant. The Respondent therefore denies that the Claimant worked for a period of 13 years.

10. The Respondent admits that the Claimant's services were terminated on account of redundancy and states that the procedure set out in Section 40 of the Employment Act was adhered to as follows:

a) In compliance with Section 40(1)(a) of the Employment Act and Clause 43 of the Collective Bargaining Agreement, the Respondent notified the Claimant's Union, Aviation and Airports Services Workers Union (AASWU), the Ministry of Labour and the County Labour Officer of the intended redundancy;

b) The notice to the above parties resulted in meetings held on 15th December 2017 and 19th December 2017, to discuss the impact of the intended redundancy hence appreciating the participatory, consultative and informative nature of the redundancy process;

c) The reasons for the redundancy being mainly loss of business and re-organization of the Respondent Company, were not only discussed in the said meetings but were also confirmed in a letter dated 28th December 2017;

d) After a period of one month, extensively discussing the intended redundancy, a notice of termination on account of redundancy dated 2nd February 2018 was issued to the Claimant and other employees affected by the redundancy. The termination was to take effect from 9th February 2018. However, in compliance with Section 40(1)(f) of the Employment Act and Clause 43(iii) of the Collective Bargaining Agreement, the Respondent offered to pay 2 months' salary in lieu of notice;

e) In further compliance with Section 40 of the Employment Act, the Respondent tabulated the Claimant's terminal dues.

11. The Respondent maintains that the Claimant was informed of the termination of his employment by letter dated 2nd February 2018 after extensive discussion with the Claimant's Union and the Labour Officer regarding the intended redundancy.

12. The Respondent avers that the Claimant is yet to clear with the Company's departments as required by the termination notice dated 2nd February 2018. The Respondent adds that the letter dated 28th December 2017 referred to by the Claimant was served upon the Claimant and his Union prior to the redundancy.

13. The Respondent further avers that the notice of redundancy which was served upon the Claimant, his Union, the Ministry of Labour and the County Labour Officer was for the purposes of extending discussions regarding the intended redundancy.

14. The Respondent maintains that the said notice contained detailed reasons for the intended redundancy and did not, at any given time, serve as a termination notice to the Claimant as alleged.

15. The Respondent therefore denies the Claimant's entire claim and asks the Court to dismiss it with costs.

Findings and Determination

16. 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

17. On 2nd February 2018, the Respondent wrote to the Claimant as follows:

"Dear Mr. Zachary

RE: NOTICE OF TERMINATION ON ACCOUNT OF REDUNDANCY

Pursuant to the provisions of section 40 of the Employment Act 2007, we hereby wish to regrettably notify you that you have been terminated on account of Redundancy with effect from Friday, February 9, 2018.

The redundancy has been occasioned by the need to optimize efficiency and effectiveness of our processes and improve service as discussed with Aviation & Airports Services Workers Union (Kenya) representatives on 15th December 2017, 19th December 2017 and 25th January 2018 and as noted on the letter of Notice of Intended Redundancy dated Thursday, December 28, 2017.

During the evaluation process for the employees to be declared redundant, due regard has been given to the Sea Exports Department's employees personal skill, ability, reliability and seniority in time as discussed with Aviation & Airports Services Workers Union (Kenya) representatives on 15th December 2017, 19th December 2017 and 25th January 2018. The date of termination is with effect (sic) Friday, February 9, 2018 with payment of your emoluments as follows:

- All Leave accrued as at Friday, February 9, 2018
- Two (2) month pay paid in lieu of notice
- Salary Earned as at Friday, February 9, 2018
- Severance Pay-paid for each completed year of service as stipulated in the CBA
- Service pay at the rate of 22 days for each completed year of service prior to joining the pension scheme where applicable as stipulated in the CBA
- Less any Moneys owed to the company

Your pension cheque will be available for collection at least one month from the date of this letter, subject to you submitting the attached claim form. This will be paid in accordance with the governing law.

Attached is a clearance form which you are required to have signed by the listed offices before presenting it to the Human Resources Department who will facilitate payment of your final dues.

We thank you for the service to date and we wish you all the best in your future endeavors.

Yours faithfully,

BOLLORE TRANSPORT AND LOGISTICS KENYA LTD

(signed)

(signed)

JEAN-PASCAL NAUD

MARY CHEMAS

MANAGING DIRECTOR KENYA

HUMAN RESOURCES MANAGER KENYA

18. On the face of it, the termination letter discloses the reason for the Claimant's exit from the Respondent's employment as redundancy.

19. 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.”

20. In principle, the law allows employers to declare redundancies 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.*

21. In sum, the foregoing conditions require the employer to issue both a redundancy notice and a termination notice. The redundancy notice is to the affected employee or their trade union (where one exists) and the local Labour Officer, setting out the reasons for, and the extent of, the intended redundancy while the termination notice is specific to the departing employee. This was affirmed by the Court of Appeal 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*.

22. In addition, the employer is required to establish an objective selection criterion and settle all outstanding statutory dues.

23. From the evidence on record, the Respondent held at least two meetings with the Claimant's Union, the Aviation and Airports Services Workers Union in December 2017, following which the Respondent issued a notice of intended redundancy on 28th December 2017. The Claimant was then issued with a notice of termination on account of redundancy on 2nd February 2018.

24. In the course of trial, it emerged that the meetings between the Respondent and the Claimant's Union did not conclusively agree on the need for and extent of the redundancy.

25. The Respondent's Human Resource Manager, Supply Chain, Corridor and Shipping Business, Jane Wairimu told the Court that the Union was uncooperative. On its part, the Union accused the Respondent of non-disclosure of material information. It also emerged that the Union officials were not in one accord regarding this particular redundancy.

26. The Claimant, though a shop steward, was not a party to the consultations between his Union and the Respondent. He could therefore not authoritatively comment on any disagreements that may have occurred at the consultation table. He could also not testify on any *mala fides* on the part of the Respondent.

27. If the Claimant wanted the Court to believe that there was no genuine engagement between his Union and the Respondent prior to the redundancy, he ought to have called a union official who was present at the consultation table. Having failed to do so, any adverse comment against the Respondent remained unverified and unproved.

28. In the result, I find and hold that the Respondent complied with the notice requirements of Section 40 of the Employment Act.

29. As regards, the selection criterion, the Court had no reason to fault the explanation given by the Respondent in the notice of intended redundancy issued to the Claimant's Union on 28th December 2017.

30. Further, it is evident that the Claimant was paid his accrued statutory dues in full.

31. Overall, I find no fault in the subject redundancy. This finding dispenses with the claims for notice pay, severance pay, compensation, salary for days worked in March 2018 and loss of future earnings.

32. No evidence was led to support the claims for traveling allowance and service pay which are consequently disallowed.

33. In the end, the Claimant's entire claim fails and is dismissed.

34. Each party will bear their own costs.

35. It is so ordered.

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. Anaya for the Claimant

Mr. Adhoch for the Respondent