



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 57 OF 2017

(Before Hon. Justice Mathews N. Nduma)

BENSON SAMBA GWARO.....CLAIMANT

VERSUS

KIAMOKAMA TEA FACTORY CO. LTDRESPONDENT

JUDGMENT

1. The suit was filed on 17th February 2017, by the Claimant praying for the following reliefs: -
 - a. A declaration that the claimant's termination is illegal, unconstitutional, discriminative, null and void abinitio.
 - b. Special damages in the sum of Kshs. 9,085,263 being the anticipated income for the unserved 26 years to retirement date.
 - c. General damages.
 - d. Cost of the suit.
2. The claimant testified as CW1 and adopted a witness statement dated 17th February 2017 as his evidence in chief. CW1 stated that he was employed by the respondent as a storekeeper from 1st July 2010 and worked continuously for six (6) years until July 2016.
3. By the time he left employment the claimant worked as a storekeeper and supervisor. The claimant earned a gross monthly salary of Kshs. 38,353 and was registered with NSSF and NHIF and statutory deductions were made and remitted. This is illustrated by the pay slip produced by the claimant.
4. The claimant received a letter dated 25th March 2016, giving him a sixty (60) days mandatory redundancy notice. The respondent gave the reason for declaring the claimant redundant to be:
5. " Restructuring of operations and staff harmonization."
6. The claimant was offered terminal benefits including: -
 - i. Salary for days worked.
 - ii. Salary in lieu of leave days not taken.
 - iii. Two months' salary in lieu of notice having worked for more than 3 years.
 - iv. Severance pay at the rate of 25 days' salary for each completed year of service.
 - v. Gratuity at the rate of 30 days' salary for each completed year of service having served over 5 years.
7. The claimant wrote a demand letter dated 17th May 2016 to the respondent protesting the intended termination on grounds of redundancy.

CW1 told the court that he was paid Kshs. 261,807.30 as terminal benefits.

8. CW1 stated that the declaration of redundancy was malicious in that the claimant had been earlier threatened with termination by one Mr. C. Moindi director of the company on account of farming activities in his father's land.

9. CW1 stated that he was a Union member and had no record of misconduct. That the Union got a copy of the termination notice. CW1 also stated that copy of the letter was sent to the county Labour Office Kisii.

10. CW1 stated that he signed a clearance letter in which he acknowledged payment of the terminal benefits. CW1 admitted that he is not owed any further terminal benefits. CW1 stated he was 34 years at the time of termination and was to serve 26 years to the retirement age of 60 years CW1 insisted that the issue of his parents was related to his termination.

11. CW1 stated that he was sent on terminal leave and was paid the benefits in July 2016.

12. CW1 admitted that he had received several letters from the employer questioning various aspects of his work but denied that these matters were related to the eventual termination.

13. CW1 prays that the suit be allowed as prayed.

14. RW1 Silvester Maticha Onseno testified for the respondent. He stated that he was a supervisor at the defendant's factory. That he was employed in the year 2003 and the claimant was employed in the year 2010.

15. RW1 adopted a written statement filed on 12/2/2013 as his evidence in chief. RW1 produced exhibits '1' to '8' in support of the defence case.

16. RW1 testified that the claimant was declared redundant by a letter dated 25th March 2016. That the letter was copied to the Union and the County Labour Office. That the claimant was paid all terminal benefits in the sum of Kshs. 261,807.80.

17. RW1 stated that he did not know the specific reason why CW1 was declared redundant.

18. RW2, Jeremiah Getembe testified that he was assistant Manager. That the claimant was a store clerk. That the claimant was paid Kshs. 72,932.25 as net terminal benefits though his total dues were Kshs. 26,807.89.

19. That CW1 had a loan at KCB of Kshs. 147,523.40 and this was paid on his behalf and Kshs. 60,953.45 was paid to Greenland Feed Co. Ltd. RW2 stated that he did not know why the claimant was declared redundant.

Determination

20. The issues for determination are: -

a. Whether the declaration or redundancy of CW1 was for a valid reason and was effected in compliance with section 40 of the Employment Act, 2007.

b. Whether CW1 is entitled to the reliefs sought.

21. In answer to issue (a) above, the court is aware that redundancy is defined under section 2 of the Employment Act 2007 as follows: -

22. *“ Means 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.”*

23. For a redundancy declaration to be lawful it must therefore be demonstrated to have been effected for reasons stated in the aforesaid definition by the employer in terms of section 43(1) of the Employment Act, read with section 2 aforesaid.

24. Secondly, the employer must demonstrate that if followed the procedural and substantive requirements set out under section 40(1) (a) to (g) to the letter for the declaration of redundancy to be adjudged lawful.

25. This was well stated by court in **Hesbon Ngariya Waigi – VS- Equitorial Commercial Bank Limited (2013) eKLR** as follows: -

26. *“ Where redundancy is declared by an employer, the procedure to follow is as set out under the provisions of section 40 of the Employment Act and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law the same becomes unfair.”*

27. The court of Appeal, in **Kenya Airways Limited –VERSUS- Aviation & Allied workers Union & others (2013) EKL**R retreated the Criteria as follows: -

28. “Redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is fair reason is subjective. The phrase based on operational requirements of employer must be construed in the context of the statutory definition of redundancy. What the phrase means in my view is that while there may be underlying causes leading to a true redundancy situation, such as re-organization, the employer must nevertheless show that the termination is as a result of the redundancy – that is that the services of the of the employee have been rendered redundant or that redundancy has resulted in abolition of office, job or loss of employment”

29. In the present case, the claimant worked as a stores clerk in the Tea Factory of the respondent. The claimant received a letter of separation on account of redundancy dated 25/3/2016 in which is stated:

30. “your functions at Kiamokama Tea Factory Company Ltd has been rendered redundant on account of restructuring of operations and staff harmonization.”

31. The claimant challenged the reason for intended separation in a demand letter by his advocate dated 17th May 2016 stating that the termination was actuated by malice since he had been previously threatened by one Mr. C. Moindi, a director of the Company for reasons attributed to farming activities in his father’s land.

32. CW1 stated that he was the only one affected by the redundancy.

33. The respondent called RW1 and RW2 and both testified that they did not know the reason why CW1 was targeted for termination. All RW1 and RW2 knew was that the claimant was declared redundant.

34. It is the Court,s considered view and finding that the respondent did not endeavor to produce any evidence to discharge the onus placed on an employer in terms of section 43(1) and (2) of the Employment Act, to demonstrate on a balance of probabilities that it had a valid reason to declare CW1 redundant.

35. The court finds that the respondent has failed in this respect and therefore, the declaration of redundancy though followed the procedure set out under section 40(1) of the Employment Act, in terms of the notices given to the claimant and County Labour Office and in terms of the payment of terminal benefits the respondent failed to demonstrate that it had a valid reason to declare the claimant and not any other employee redundant in violation of section 40(1) (c) and 45 of the Act.

36. The claimant is entitled to compensation in terms of section 49(1) (c) and 4 of the Act. In this respect the claimant had served for a period of six years. The claimant did not contribute to the termination. The claimant was paid all terminal benefits upon termination. The claimant lost prospects of serving 26 years till retirement and has suffered loss and damage following the decision.

37. In the case of **Kenya Airways Limited –VS- Aviation & Allied workers Union and others (20130 EKLR** and all factors above, the court award the claimant the equivalent of six (6) months’ salary in compensation for the unlawful and unfair termination on grounds of unjustified declaration of redundancy in the sum of Kshs. $(38, 352 \times 6) = 230,112$.

38. The claim for payment of anticipated salary for the unserved term of 26 years to retirement lack merit and is dismissed.

39. This is a purely statutory claim and the court finds that the claimant did not prove violation of his constitutional rights regarding discrimination. The claim for award of damages in this regard is also dismissed for want of proof.

40. In the final analysis Judgment is entered in favour of the claimant against the respondent as follows: -

- a. **Kshs. 230,112** being the equivalent of six (6) months’ salary in compensation.
- b. Interest at Court rates from date of filling suit till payment in full.
- c. Costs of the suit.

Dated, Signed and Delivered at Nairobi this 17th Day of September 2020

Mathews N. Nduma

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, this ruling has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearance

M/s Gogi for Claimant

Mr. Nyachiro for Respondent

Chrispo: Court clerk.