



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI

CAUSE NO. 1036 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 17th September, 2020)

GEORGE MABURI NYAUNDICLAIMANT

VERSUS

FILM CORPORATION OF KENYA.....RESPONDENT

JUDGEMENT

1. The Claimant filed a Memorandum of Claim on 17/6/2015 alleging that he was unfairly terminated by Respondent on account of redundancy. He avers that he proceeded on leave and upon reporting to work on 14/9/2014, he was issued with the termination letter dated 15/9/2014. He avers that the letter cited the lack of enough resources as the reason for his termination.

2. He seeks the following reliefs:-

a) A declaration that the Respondent's aforesaid actions to summarily dismiss the Claimant from employment amounted to unlawful and unfair dismissal.

b) A declaration that the Claimant is entitled to payment of their terminal dues and compensatory damages as pleaded.

c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages totalling to Kshs. 1,130,721.95/-.

d) Interest on (c) above from the date of filing suit till payment in full.

e) Costs of this suit plus interest thereon.

3. The Respondent filed a Memorandum of Response on 31/7/2015 denying the Respondent's allegations. The Respondent avers that if the Claimant was terminated then it complied with the provisions of Employment Act with regard to termination of account of redundancy. It further avers that the Claimant was paid all his dues but he failed to collect the same from it.

4. The Respondent did not appear during the hearing but it filed its submissions in respect of the claim.

Claimant' Case

5. The Claimant, Cw1, adopted his Witness Statement dated 26/6/2018 as his evidence-in-chief. He stated that he was employed by the Respondent in January 2007 as a Driver/Mechanic at a salary of Kshs. 13,204.30/-.

6. He stated that in August 2014 he was summoned by the Respondent's General Manager, Mrs. Ibha Shah and paid his salary for the month of July 2014. He was then ordered to proceed on leave. He stated that he reported back to work on 14/9/2014 and was issued with a termination notice dated 15/9/2014.

7. He averred that the notice stated that the reason for termination was lack of enough resources. He stated that due procedure was disregarded before terminating his services.

Claimant's submissions

8. The Claimant submitted that Section 43 of the Employment Act provides that an employer shall prove the reasons for termination. He submitted that no proof was availed to the Claimant to substantiate such reasons for termination.

9. He submitted that it is now a settled principle that where no witness is called on behalf of the defence, the evidence tendered on behalf of a Claimant remains uncontroverted. In support of this position, he relied on the case of **Stanley Mwangi Gachungu & another v Barclays Bank of Kenya Ltd [2019] eKLR**.

10. He submitted that there was no evidence in support of the Respondent's allegation that it complied with the provisions of the law. He relied on the case of **Hesbon Ngaruiya Waigi v Equitorial Commercial Bank Limited [2013] eKLR** where the Court held that where the procedure set out under section 40 of the Act is not followed, any termination as a result of the redundancy will be deemed unprocedural and unfair.

11. He averred that he is entitled to notice pay under Section 36 of the Act. He further averred that he did not proceed on leave in the year 2013 and did not receive payment in respect of the same. He relied on Section 27 (2) of the Act and submitted that no evidence was adduced to show that he utilised his leave days or rest day.

12. He argued that the claim for severance pay is payable by virtue of Section 40 (1) (g) of the Act. He submitted that the Respondent did not avail a driver's work ticket/schedule log in court to discharge its evidentiary burden to disprove that he worked for 4 extra hours. He therefore urged the Court to award overtime as prayed in the Claim.

13. He submitted that he is entitled to 12 months compensation under Section 49 of the Employment Act. He relied on the case of **Paul Ngeno v Pyrethrum Board of Kenya [2013] eKLR** where the Court awarded 12 months' salary compensation for unfair termination. Finally, he urged the Court to allow the claim as prayed.

Respondent's submissions

14. The Respondent submitted that the Claimant has not discharged the burden of proof set out under Section 47 (5) of the Employment Act. It submitted that the Claimant should establish that the procedure; aid out under Section 40 of the Employment Act was not followed. It relied on the case of **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR** where the Court held that Sections 43 (1) and Section 47 (5) of the Employment Act must be construed so as not to nullify the conventional and accepted law on the burden of proof. The Claimant must adduce prima facie evidence to show that his employment was not terminated for a valid reason and that employer did not follow fair procedure in terminating his employment then the burden shifts to the employer to rebut the Claimant's evidence.

15. It argued that from the Claimant's pleadings, evidentiary documents and submissions, he admits that he was notified of the termination in writing. It submitted that Section 40 (1) (b) of the Employment Act does not give the notification within a specified period of time prior to termination.

16. It submitted that the alleged redundancy did not arise as a means to restructure the Respondent rather it was done in view of the fact that the Respondent was no longer tenable as a going concern and it is now defunct. It submitted that taking into account the circumstances it found itself in, Section 40 (1) (c) of the Employment Act was not applicable.

17. It submitted that the Claimant's allegation of not going on leave makes reference to the year 2013 and not the entire period of employment. It argued that this remains as an allegation as the Claimant did not produce evidence indicating that his request for annual leave was denied.

18. It submitted that it deposited the Claimant's statutory deductions upon issuance of the termination letter. It submitted that since the Claimant has failed to discharge its burden of proof, as he is not entitled to terminal dues. In conclusion, it urged the Court to dismiss the claim and each party be ordered to bear its own costs.

19. I have examined the evidence and submissions of the Parties herein.

20. From the evidence of the Claimant, he was terminated on the 15.9.2014. The letter of termination of the Claimant is attached as Appendix IV and it indicates that he was terminated "due to lack of enough resources to continue keeping you".

21. This in effect refer to a redundancy. The process of termination under redundancy is provided for under Section 40 of the Employment Act 2007 which states as follows:-

(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 the 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 to

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”.

22. There is no indication that the above procedure was followed. Infact the termination of the Claimant was backdated to 1.9.2014 vide the letter of 15.9.2014. No notice was issued to him and there is no indication that he was paid his redundancy dues.

23. The Respondent insist they followed the correct process before the termination, which I found to be untrue.

24. I find that the Respondent actually declared the Claimant redundant unlawfully and unprocedually. I find the Claimant has proved his case against the Respondents and I find for him and order the Respondents to pay him as follows:-

1. 1 month salary in lieu of notice = 13,204.30/=

2. Severance pay equivalent to 15 days salary for each year worked = $\frac{1}{2} \times 13,204.30 \times 7 = 46,215.05$ /=

3. Leave pay for year 2013 = 13,204.30/=

4. Compensation equivalent to 10 months' salary for the unlawful and unfair redundancy = $10 \times 13,204.30 = 132,040.5$

TOTAL = 204,664.15/=

5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 17th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kagiri for Respondent – Present

Upendo holding brief Namada for Claimant – Present