



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 952 OF 2017

JUMA ONYANGO WILLIAM.....CLAIMANT

VERSUS

KIPEPEO GROUP OF HOTELS.....2ND RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 6.7.2016 stating that he was employed by the respondent as a Cook on 25.7.2012 earning gross salary of Kshs. 14,000 per month and worked until 14.2.2014 when his employment was terminated on account of redundancy. He averred that the termination was unlawful because it was done abruptly without following the mandatory procedure set out in section 40 of the Employment Act and without any justification. He also averred that he not paid for his accrued leave days, severance pay, salary for March 2016 and salary in lieu of notice. He therefore seeks the following reliefs: -

- | | |
|-------------------------------------------------------|----------------|
| a) salary for March 2016 | kshs. 14,000 |
| b) and salary in lieu of notice | Kshs. 14,000 |
| c) Compensation for unfair termination Kshs 14000 x12 | Kshs. 168,000. |
| d) Severance pay for 4 years | Kshs. 32,300 |
| e) Leave for the years worked | Kshs. 33894 |
| f) Costs and interest. | |

2. The Respondent never entered appearance after being served with summons and the Pleadings and such the suit proceeded by formal proof on 8.10.2019 when the claimant testified as Cw1 and thereafter filed written submissions.

3. In brief, the claimant's case is that he was employed as stated in the summary of pleadings above and his written statement annexed to the Statement of Claim. He further produced a Copy of the letter by the respondent dated 2.4.2016 by which his Contract of Employment was terminated with immediate effect because the employer had decided to close the hotel with effect from 2.4.2016 due to loss of business. He prayed for compensation for unfair termination plus terminal benefits which were promised through the termination letter but the employer failed to pay.

4. In his written submissions, he contended that facts of his case have not been contested by the respondent and relied on the termination letter as the proof that he was employed by the respondent until 2.4.2016 when his services were suddenly terminated without prior notice or compliance with the mandatory process set out under section 40 of the Employment Act. He further contended that the redundancy was not justified because the respondent is still operating other branches/hotels including one along River Road in Nairobi. Accordingly, he contended that he is entitled to one-month salary in lieu of notice plus 12 months' salary compensation for unfair termination under section 49 (1) the Employment Act.

5. He further submitted that during his employment, the employer never remitted any NSSF Contributions for him and as such he is entitled to severance pay. He relied on **Abisalom Ajusa Mogomere v Kenya Nut Company Limited Cause No 2525 of 2012** where the court awarded maximum compensation for unfair termination plus service pay for the years worked.

6. He also submitted that he is entitled to accrued annual leave for 3 years and 9 months served contending that he never went for any leave due to busy schedule that forced him to work 16 hours every day. He prayed for 30 days leave per year.

Issues for determination and analysis

7. There is no dispute from the pleadings and evidence that the claimant was employed by the respondent from 25.7.2013 to 2.4.2016 when the employment was terminated by the employer on account of redundancy. The issues for determination are:

- a) Whether the termination was unfair.
- b) Whether the claimant is entitled to the reliefs sought.

whether the summary dismissal unfair and wrongful.

8. Under section 47(5) of the Employment Act, the burden of proving unfair termination rests on the employee. The claimant produced termination letter dated 2.4.2016 stating that his employment effective the same day because the employer had decided to close the hotel following reduction of business. He contended that the termination was not justified and fair procedure as set out under section 40 of the Employment Act was not followed. The foregoing facts were not contested by pleadings or evidence.

9. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

- (1) No employer shall terminate the employment of an employee unfairly.**
- (2) A termination of employment by an employer is unfair if the employer fails to prove—**
 - (a) that the reason for the termination is valid;**
 - (b) that the reason for the termination is a fair reason—**
 - (i) related to the employee’s conduct, capacity or compatibility; or**
 - (ii) based on the operational requirements of the employer; and**
 - (iii) that the employment was terminated in accordance with fair procedure.**

In **Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** the Court of Appeal held: -

“... redundancy is a legitimate ground for terminating of a contract of employment provided there is a valid reason based on operational requirements of the employer and the termination is in accordance with a fair procedure.”

As regards procedural fairness, Section 40 of the Employment Act provides that: -

- “(1) an employer shall not terminate a contract of employment of service on account 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 reason 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 employer 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 the employee 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) ...”**

12. Having found that the facts and the evidence by the claimant herein has not been rebutted by the respondent with respect to lack of justification for the redundancy and non-compliance with the statutory procedure, I now hold that the claimant has proved on a balance of probability that termination of his employment contract was unfair within the meaning of section 45 of the Employment Act. I gather support from **Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** above.

Reliefs

13. In view of the foregoing holding, I am satisfied that the claimant is entitled to salary in lieu of notice and compensatory damages under section 49 of the said Act. I award him Kshs. 14,000 being one-month salary in lieu of notice plus Kshs. 84,000 being 6 months’ salary compensation for the unfair dismissal. In awarding the said compensation, I have considered the fact that he served for almost 4 years and he did not contribute to the termination through misconduct.

14. The claim for leave has not been controverted and as such I grant it at the rate of 1.75 days per month on prorata basis under section 28 of the Employment Act equalling to 78.75 leave days. The sum due is Kshs. 42,403.85 but I award what is pleaded being Kshs. 33,894.

15. I further award the claim for unpaid salary for March 2016 equalling to Kshs. 14,000.

16. The claim for severance pay is declined because the redundancy has been treated as unfair termination and adequately compensated under section 49 of the Act.

17. In conclusion, I enter judgment for the claimant against the respondents as follows: -

Notice	Kshs. 14,000
Compensation	kshs 84,000
Unpaid salary	kshs. 14,000
Leave earned	<u>kshs. 33,894</u>
Total	<u>kshs 145,894</u>

The said award is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated and delivered at Nairobi this 23rd November, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule *28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE