



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 130 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

THOMAS MBOYA OTONDO.....CLAIMANT

VERSUS

SPECIAL MINISTRIES.....RESPONDENT

JUDGMENT

The Claimant file his Memorandum of Claim dated 3rd February 2015 as amended on 25th January 2019 alleging that his employment was unfairly terminated by the Respondent on account of redundancy contrary to the provisions of section 40 of the Employment Act. He seeks the following remedies:

- a) A declaration that the termination of the Claimant by the Respondent was unfair.
- b) An order compelling the Respondent to pay the Claimant her terminal benefits amounting to Kshs.1,248,23.31.
- c) Costs of this suit.
- d) Interest on (b) and (c) above
- e) Certificate of Service
- f) Any other relief as the Court may deem just.

It is the Claimant's case that he was employed on 3rd January, 2000 as both a night and day watchman at a salary of Kshs.2,000. He avers that on 1st November, 2008 he was issued with a contract which provided that he was to work as a general labourer but he continued working as a night and day watchman and as a cleaner at a salary of Kshs.8,625 which rose to Kshs.13,546 in 2011.

He avers that in February 2012, his salary was reduced from Kshs,13,548 to Kshs.10,000 without notice or his consent. He further avers that on 11th August, 2012, he was issued with a letter of termination dated 8th August, 2012 indicating that his employment had been terminated due to financial constraints experienced by the Respondent. He avers that his termination was contrary to the rules of natural justice and the Employment Act.

Respondent's case

The Respondent filed a Statement of Defence on 11th May 2015 in which it avers that the Claimant absconded duty without due notice therefore resulting in the loss of his job. It submitted that the Claimant is not entitled to the reliefs sought as he was procedurally terminated because the Respondent is a non-profit organization that operates on donations. It further avers that it was facing financial

constraints.

It contends that it paid the Claimant a sum of Kshs.12,680 as his full and final dues but he refused to collect his cheque.

The suit was disposed of by way of written submissions with the consent of the parties.

Claimant's Submission

The Claimant submitted that the termination of his employment was unfair because the Respondent did not give him one month redundancy notice thus it violated the mandatory provisions of section 40 of the Employment Act. He further submitted that the Respondent never served the local labour office (as he was not a member of any union) with the notice of redundancy yet this is a mandatory provision under Section 40(1)(b) of the Act. He relied on the case of **Godfrey Andabwa Ashiono v Coconut (K) Limited [2019] eKLR**.

He submitted that no amount was paid to him before termination contrary to Section 40(1)(e), (f) and (g) of the Act.

On the Respondent's allegation that he absconded duty, he relied on the case of **David Nyanjui Mburu v Sunmatt Limited [2017] eKLR** where the Court cited the decision in **Godfrey Anjere v unique Suppliers Limited Nairobi ELRC Cause 65 of 2011** to the effect that in dismissal on account of absconding duty, an employer should show steps it took to inform the employee that his or her dismissal would result if they did not report back to work.

He argued that the respondent did not produce any evidence of the alleged abscondment or any attempt to reach him to have him explain his whereabouts. He submitted that Section 43 of the Employment Act was flouted as there was no valid reason to warrant his dismissal. He further submitted that his dismissal was unfair and unjustified as envisaged under section 45 of the Employment Act.

He further relied on the case of **Stephen Ouma Ludende v Radar Limited [2019] eKLR** and submitted that he was never given notice and hearing to warrant termination. He submitted that the Respondent violated Section 41, 42, 43, 44 and 45 of the Employment Act.

He argued that it is strange that the termination was in writing and he worked up to 31st October 2012, was issued with a clearance letter, paid Kshs.12,680 and yet is alleged to have absconded work. He therefore submitted that the Respondent's defence is a material contradiction.

He submitted that his contract dated 1st November, 2011 provided that notice period was 3 months thus he is entitled to Kshs.33,022.17. He submitted that he was underpaid between the years 2000 – 2012. With respect to annual leave, he submitted that for the 4 years, he was entitled to 21 leave days for each year. He further submitted that he is entitled to salary arrears for July-October 2012 and severance pay. He argued that he is entitled to compensation under Section 49(1)(c) of the Employment Act and relied on the case of **Judith Atieno Owuor v Sameer Agriculture and Livestock Limited [2020] eKLR**. He urged the Court to award him Kshs.679,289.81.

Respondent's Submissions

The Respondent submitted that the Claimant's allegation that he was employed on 1st January, 2000 are pure fabrications and that no evidence was tendered to support the allegations. It submitted that the Claimant's averments offend the provisions of Sections 107 – 109 of the Evidence Act.

It relied on the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** where it was held that the legal burden of proof lies upon the party that invokes the aid of the law and asserts the affirmative of the issue.

It submitted that no evidence was produced to support the allegation that it reviewed the Claimant's salary downwards. It relied on Section 31(1) and (2) of the Employment Act and submitted that the Claimants salary was consolidated. He relied on the case of **Stephen Edewa v Lavington Securities Limited ELRC Cause No. 891 of 2019** where the Court held that pursuant to Human Resource Policy Manual and the payslip the Claimant's salary was consolidated.

It submitted that it met the threshold set out under section 40 of the Employment Act. It argued that since the claimant was not a member of a Union, it duly informed him of the financial challenges. It submitted that it also offered to pay him compensation at the rate of one month's salary but he instead lodged a complaint for unfair dismissal.

It submitted that it did not terminate the Claimant's contract arbitrarily but did so in good faith. It relied on the case of **International Planned Federation v Pamela Ebot Arrey Effiom [2016] eKLR** and submitted that it was candid to the Claimant on its then financial situation.

It submitted that the Claimant is not entitled to service pay as the same offends the provisions of Section 35(6) of the Employment Act.

Analysis and Determination

The Claimant's termination letter dated 8th October 2012 is reproduced below –

“8th October 2012

Mr. Thomas Mboya

P. O. Box 76270-00508

Nairobi Kenya

Dear Thomas,

Reg: Termination of Services

This is to inform you that due to financial constraints being experienced by Special Ministries at the moment, your service as a security guard/cleaner at Special Ministries Offices will be terminated with effect from October 31, 2012.

You will be paid your dues accordingly. Please arrange to return any items that belong to Special Ministries that are in your possession.

Thank you for the work you have already done in Special Ministries, and we pray that God will lead you into a new place of service with His blessing. If our financial situation improves, we would be happy to reconsider your employment.

Faithfully,

SPECIAL MINISTRIES

SIGNED

Mr. James N. Ngugi

FOR the Kenya Board”

Section 2 of the Employment Act defines redundancy as the

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.

From the above provision and the reason given in the termination letter being financial constraints facing the Respondent, the Claimant's termination was as a result of redundancy and not absconding duty as stated by the Respondent. The Respondent in its defence acknowledged that it was facing financial constraints.

Section 40 of the Employment Act provides:

(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.

The Respondent did not adduce evidence that it complied with the procedure set out under Section 40(1) of the Employment Act. It did not prove that it issued the notices to the Claimant and the labour officer or that it paid salary in lieu of notice.

In **Francis Maina Kamau v Lee Construction [2014] eKLR** it was held that-

“Where an employer declares a redundancy, the conditions set

out in section 40 of the Employment Act must be observed and where the employer fails to do so, the termination becomes unfair within the meaning of section 45 of the Employment Act.”

It is my finding that the Respondent having failed to comply with the procedure set out under Section 40 or 41 and 43 of the Employment Act, the Claimant’s termination was unfair.

Remedies

The Claimant’s letter of contract dated 1st November, 2008 provided that the contract would be terminated by either party giving 3 months’ notice. The Claimant is therefore entitled to 3 months’ salary in lieu of notice which I accordingly award him in the sum of **Kshs.33,022.20** based on the stator minimum wage of Kshs.9,571.65 plus 15% house allowance making a gross monthly wage of Kshs.11,007.40

The Claimant submitted that between the year 2000 and 2012, he held the position of night watchman. This is despite him averring in his claim that he worked as a day and night watchman. His contract of employment dated 1st November 2008 stated that he was entitled to a salary of Kshs.8,625 per month and was employed as a security guard/cleaner but was also to assist in office jobs. He produced a payslip for December 2011 which shows that he was paid a gross salary of Kshs.10,500.

The Claimant did not produce any records indicating that he was employed between the year 2000 and 1st November, 2008 to enable the Court determine his pay and the alleged underpayment. Based on these documents, the Claimant has proved that he was underpaid for the period 2008 and 2011. I therefore find that the claim for underpayment fails.

With respect to house allowance, I have applied a consolidated wage in considering whether the claimant was underpaid. He is thus not entitled to house allowance as a separate head.

With respect to salary arrears for the period between July-October

2012, this claim succeeds as the Respondent did not prove that it paid the claimant his entire salary during this period.

I accordingly award the claimant **Kshs.44,029.60** as salary arrears.

The Claimant is entitled to compensation for the unfair termination under Section 49 of the Employment Act. Taking into account the circumstances under which the claimant left employment and that the Claimant worked for the Respondent for close to 4 years, I award him 6 months’ gross salary as compensation in the sum of **Kshs.66,044.40**.

Because I found that the termination of the claimant’s employment was unfair, I will not award him severance pay as this would amount to double compensation. The prayer for severance pay therefore fails and is dismissed.

With respect to the claim for annual leave, the Respondent did not adduce evidence that the claimant went on leave or was paid in lieu. I award him 21 days for each of the 4 years worked at **Kshs.35,562.40**.

In summary I award the claimant the following: -

1. Pay in lieu of 3 months’ notice Kshs.33,022.20
2. Salary arrears Kshs.44,029.60
3. Annual leave Kshs.35,562.40
4. Compensation Kshs.66,044.40

The total award is Kshs.178,658.60

The Claimant is entitled to a certificate of service as provided under Section 51 of the Employment Act.

The Claimant is awarded costs of the suit and interest shall accrue at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE