



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.2 OF 2016

DENNIS ODHIAMBO OBARE.....CLAIMANT

VERSUS

CATHOLIC DIOCESE OF NAKURU.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent in June, 2007 as a Gardener. On 1st August, 2009 the claimant applied and was appointed Cleaner in the cafeteria.

In the year 2009 the claimant was retained under fixed term contracts.

The claimant was issued with a contract of service for the period of 1st January, 2011 to 31st December, 2013. There was also a contract for the period of January, 2011 to 31st December, 2016.

On 2nd January, 2014 the respondent introduced another contract for a year term.

On 15th July, 2015 the respondent terminated the claimant's employment and paid him Ksh.50, 000.00 which was in bad faith and contained underpayments. The reasons given for termination of employment were that there was a redundancy but this was not valid and thus malicious to remove the claimant from employment. The full term contract ending 31st December, 2016 was not pad for.

The claimant was entitled to terminal dues which were not paid and thus claims the following;

- (a) 3 months' notice pay which was not paid;
- (b) Underpayments running from June, 2007 to July, 2015 all being Ksh.209,968.90;
- (c) Annual leave;
- (d) Balance of contract term not served;
- (e) Gratuity payment;
- (f) Compensation and costs

The claimant also testified in support of his claims. upon employment tin June, 2007 he was issued with fixed term contracts, one ending in 2011, the other in 2013 and the last one ending on 31st December, 2016.

In July, 2015 the claimant was issued with a notice terminating his employment. The respondent called the employees and told them that there was a redundancy effective 1th June, 2015 and the last date was

14th July, 2015.

The claimant also testified that under his contract he had 17 months unspent. The respondent did not pay for such period.

During the course of employment, there were underpayments, gratuity not paid and following the unfair termination of employment, there was no compensation.

Defence

In response, the respondent admit having employed the claimant as a Cleaner at St. Mary's Pastoral Cafeteria and by letter dated 15th June, 2015 issued notice terminating employment following a redundancy. Such action resulted following consultations and upon the winding up of the Cafeteria, the claimant's continued employment was not tenable.

The defence is also that the claimant was paid for notice and also issued a written notice running from 15th June to 14th July, 2015 and on 1st July, 2015 the respondent decided to release the claimant on full pay. The claimant was paid all his terminal dues of Ksh.61, 176.00 vide cheque dated 15th July, 2015. Nothing owes and the suit should be dismissed with costs.

In evidence Jimnah Kimani Mwangi testified that as he human resource manager of the respondent he is aware that the claimant was serving under fixed term contracts and the reason leading to termination of employment was the winding up of the St. Mary's Cafeteria. Due to reduced business the respondent management decided to wind it up and then called all its employees and informed them of the same. This was followed with written notices and payment of terminal dues.

Mr Mwangi also testified that the claimant acknowledged the payment of Ksh.61, 176.00 being payment for notice, pending leave days, severance pay, underpayments, gratuity and nothing more owes.

From the pleadings, the evidence and written submissions the issues for determination can be summarised as to;

Whether termination of employment was fair; and

whether there are any remedies.

Section 40 of the Employment Act, 2007 allow an employer to terminate employment following a redundancy and subject to payment of terminal dues outlined under section 40(1) and upon meeting the mandatory requirements set out by the Court of Appeal in the case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR** as follows;

a. if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;

b. if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;

c. in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;

d. where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;

e. the employer must pay the employee any leave due in cash;

f. the employer must pay the employee at least one month's notice or one month's wages in lieu of notice; and

g. the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service. [Emphasis added].

In this case, the reasons given by the respondent there was the winding up of the business where the claimant was situated is not challenged in any material way. With such winding up, the claimant's position thus became untenable. He was issued with a notice running from 15th June, 2015 for one month but released on 1st July, 2015 and paid for the notice duration. Such was in compliance with the mandatory provisions of the law. there was a valid reason leading to termination of employment and the due notices were issued and where not served, there was payment.

On the remedies sought, the claimant admit he was on fixed term contracts. The last such contract was ending in December, 2016 but due to redundancy, hereinabove found to be valid, his employment terminated upon notice and payment of the redundancy notice.

The fixed term contract not fully spent and envisaged to end in December, 2016 was lawfully ended.

The previous term contracts ended on their terms. Such contracts and any claims therefrom and not urged before 3 years where due, are time barred.

On the claim for notice pay, termination of employment following a redundancy is regulated and in this case, the claimant was paid. Underpayments claimed from 2007 to 2015 are not due to time and what is applicable has since been settled. The claimant was paid a gratuity and a severance pay that is generous in the circumstances of his case noting the term contract he was serving.

Accordingly, the claims made are found without merit and are hereby dismissed. The claimant shall meet 50% of the respondent's costs.

Delivered at Nakuru this 31st day of January, 2019.

M. MBARU

JUDGE

In the presence of:

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