



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELAITONS COURT OF KENYA
AT NAKURU
CAUSE NO.411 OF 2014
WALTER MAINA OMWENGA.....CLAIMANT
VERSUS
EQUIP AGENCIES LTD.....RESPONDENT

Consolidated with

CAUSE NO.423 OF 2014 –REUBEN KOSGEI
CAUSE NO.424 OF 2014 – MOSES GITAU
CAUSE NO.425 OF 2014 – WASHINGTON MWONGELA
CAUSE NO.426 OF 2014 – EDWARD BIEKO
CAUSE NO.413 OF 2014 – CHARLES NYONGESA KWOVA
CAUSE NO.412 OF 2014 – SAMUEL NJUGUNA
CAUSE NO.410 OF 2014 – HARON NGUGI
CAUSE NO.409 OF 2014 –JAMES MURIUKI
CAUSE NO.408 OF 2014 - LEONARD ONSOMU
CAUSE NO.414 OF 2014 – JACKSON GACHAU
CAUSE NO.415 OF 2014 – JON SIMIYU
CAUSE NO.416 OF 2014 – SAMUEL ONYANGO
CAUSE NO.417 OF 2014 – IBRAHIM MOHAMED
CAUSE NO.418 OF 2014 – PAUL TALLAM
CAUSE NO.433 OF 2014 – JOHN KABUGI
CAUSE NO.432 OF 2014 – DUNCAN JUMA

CAUSE NO.431 OF 2014 – NYAMUMBO OMAYIO

CAUSE NO.429 OF 2014 – ELIAKIM OMARI GADAFI

CAUSE NO.428 OF 2014 – JOHN MUCHIRI

CAUSE NO.427 OF 2014 – JOSEPH NDWARU

CAUSE NO.430 OF 2014 – MARTIN ONYANGO

CAUSE NO.420 OF 2014 – POLYCAP NGAISI

CAUSE NO.419 OF 2014 – LUCAS KEMBOI

CAUSE NO.421 OF 2014 - JOSEPH MBITI MUNYI

CAUSE NO.434 OF 2014 – DAVID MAINA

CAUSE NO.440 OF 2014 – MOSES MWANIKI WANJAGI

CAUSE NO.439 OF 2014 – JEREMIAH NYAKUNDI

CAUSE NO.441 OF 2014 – URBANUS MUTUKU KANUNA

CAUSE NO.444 OF 2014 – JOHNSON MURAYA

JUDGEMENT

There was a consolidation of suits on 4th November, 2014 and Cause No.411 of 2014 was agreed to be the lead file. As the claims relates to the same cause of action and against the same respondent, findings herein shall apply to all suit.

The claimant was employed by the respondent as Plumber on 16th January, 2012 at a monthly wage of ksh.16, 259.00. the claimant worked until 2nd January, 2014 when he was terminated in his employment on account of redundancy.

The claim is there the respondent failed to follow due process in addressing the redundancy and termination of employment and thus it was unfair. There was no notice or hearing as to the reasons leading to redundancy and termination of employment.

The claimant is seeking for a declaration that the termination of employment due to redundancy was unfair, wrongful and illegal. That there was underpayment of due wage and this should be paid. The claims are for the payment of;

- (a) Leave due Ksh.15,175.00;
- (b) NHIF not remitted Ksh.7,680.00;
- (c) NSSf not remitted Ks.4,800.00;
- (d) Underpayments;
- (e) Severance pay Ksh.15,000.00;
- (f) Compensation; and

(g) Costs.

The claimant testified that upon his employment by the respondent he worked diligently until 2nd January, 2014 when he reported to work and the manager called for a meeting of all the employees and informed them that there was no work. That business was low, there was no work and had to lay off employees. This was the first time such information was shared. There was no notice or payment of the due benefits.

The claimant also testified that together with other employees he went to the labour officer at Naivasha and who wrote to the respondent calling for a meeting on 19th March, 2014 but the respondent did not attend. The labour officer tabulated all the terminal dues and sent the same to the respondent all at ksh.353, 351.00 but the respondent has failed to pay. Such pay included the due leave days and severance pay.

The defence is that the claimant was a general worker with the respondent from January, 2012 to January, 2014 when he was declared redundant due to decline in business of treated woods transmission which brought about stiff competition hence the respondent could not sustain its wage bill.

On 26th November, 2013 the respondent informed the claimant and the labour officer about the problems the company was facing and that to keep business, the work being performed by general workers would be earmarked for redundancy. The notice to the claimant and other employee were made aware that their positions were to be declared redundant with effect from 31st December, 2013. Upon the expiry of the notice the affected employees were therefore terminated.

On 17th February, 2014 the claimant and other employees filed a dispute with the Minister and on 26th February, 2014 the County labour Officer, Naivasha invited both parties for a joint conciliatory meeting which failed to take off and was postponed to 19th March, 2014. Another meeting was scheduled for 21st May, 2014 and when the respondent requested the labour officer to tabulate the owing dues to the claimant and other employees so as to make a comparison with what the human resource had tabulated and the claimant and others refused to accept. Such dues had included notice pay, severance pay, leave days and pay for days worked.

The defence is also that the respondent followed the due process of the law, consulted with the labour officer and the terminal dues tabulated are available for the collection of the claimant and the employees.

Kapadia Rashiminkumak the manager for the respondent testified that business went down after plastics came into the market and the treated wooden poles for electrification that were selling reduced. Other products of electrification poles using cement brought in competition and since the year 2013 the entire business for the respondent was affected and the tender with Kenya Power were lost.

In November, 2013 the employees were called and informed of the high costs in payment of wages due to lost business and the respondent also consulted with the labour officer to give advice and who advised that the employees should be given one month notice and pay for days worked. The notice was done and the labour officer accepted it as being in compliance with the law. There was a memo issued to the employees and posted in general areas where all could see. On the last day all employees were called and informed of the restricting and that they would be recalled back once business picked. Each employee was issued with a letter and the due severance pay was to be deposited with the labour officer as advised. The employees respected the payment and registered a dispute with the labour officer and upon several meetings, the labour officer made a tabulation of the dues which the claimant and other employees refused to accept.

The respondent is ready to pay severance pay and annual leave days due all tabulated at ksh.353, 351.00. Such amount has not been paid as the claimant and other employees filed suit and have to wait for the judgement.

Both parties filed written submissions with a summary of the proceedings.

Both parties are agreed that employment terminated following a redundancy. As cited by the claimant in the submissions in the case of **KUDHEIHA versus Aga Khan University [2015] eKLR** and confirmed by the Court of Appeal in **Aga Khan University versus KUDHEIHA [2016] eKLR**, a redundancy is regulated under the provisions of section 40 of the Employment Act, 2007.

In addressing the provisions of section 40 of the Employment Act, 2007 the Court of Appeal in the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** held as follows;

.....when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees ... It does not have to be a calendar months' notice.... The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.

The notices issued may be in writing or oral as held by the court of Appeal in the case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR**.

Mr Kapadia for the respondent testified that a general notice was issued to the employees on 26th November, 2013 and consultations were held with the labour officer to advice on the redundancy process. This is in compliance with sections 40(1) of the Employment Act, 2007 as the claimant was not unionised. On the day the notice lapsed, the claimant testified that they were all called by the respondent and informed of the termination of employment with an explanation that business had gone down.

In the payment statements submitted by the claimant, he was paid his full wage for December, 2013 all at Ksh.16,259.00 and the full wage for January, 2014 at Ksh.16,259.00 which includes overtime pay despite the fact of not rendering any work to the respondent as termination of employment was on 2nd January, 2014.

In this case, the court finds the respondent complied with the mandatory provisions of the law as set out under section 40 of the Employment Act, 2007. There was due process in the declaration of redundancy, a general notice issued to all employees and upon the lapse of such notice the employees affected by the redundancy were called and an explanation given with a payment of full month without work which translates to an appropriate notice pay.

On the claims made leave pay is due where not taken and the respondent has offered to make this payment. The Labour Officer had assessed the leave pay due and is hereby confirmed at ksh.2, 792.00.

The claimant is also entitled to severance pay following the redundancy and the respondent has confirmed willingness to pay. For the two (2) years of service when the claimant was earning a gross wage of ksh.13, 659.00 per month, the severance pay at 15 days' pay for each year worked amounts to ksh.13, 659.00 severance pay.

The claims made for NSSF and NHIF are statutory payment due to the statutory bodies and not payable to the employee. Such awards are declined.

The claim for underpayments is not particularised as to how this arose and this is declined. As a general employee the claimant was appropriately paid.

On the finding that the redundancy process and termination of employment was procedural, no compensation is due.

Accordingly, judgement is hereby entered for the claimant for the payment of the due leave days at kshs.2, 792.00 and severance pay at ksh.13, 659.00. Each party shall bear own costs.

Under the consolidation of suits, each claimant is entitled to pay for leave days due and severance pay for 15 days wage for each full year of service.

Delivered at Nakuru this 28th day of February, 2019.

M. MBARU JUDGE

In the presence of: