



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CASE NO. 34 OF 2018

FRANCIS KANGETHE MUCHIRI.....CLAIMANT

VERSUS

DIOCESE OF MERU TRUSTEES (REGISTERED)

t/a ST. THERESA MISSION HOSPITAL KIIRUA.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking resolution of the dispute he framed as the unlawful and unfair termination of employment. He averred that he was employed by the Respondent as a security guard on 1st July 2015 earning Kshs. 12,705/- a month. He was dismissed on 13th December 2017 on grounds of redundancy effective 13th January 2018. He averred that before the termination the Respondent did not prove any misconduct or issue him with a notice to show cause before his termination. He asserts that he was dismissed without cause and sought a declaration that his termination was unlawful and unfair, general damages for the unlawful and unfair dismissal costs of the suit and interest.

2. The defence the Respondent filed was to the effect that the dismissal was justified on account of redundancy. It was averred that the Claimant was given a notice of one month after the governing body of the Respondent decided to outsource security services instead of hiring its own guards. The Respondent avers that the Claimant was paid all his dues and that he signed a final dues agreement, a fact that the Claimant did not disclose to court. The Respondent averred that the Claimant was not summarily dismissed but was given notice of the intention to terminate his services. The Respondent asserted that it gave the Claimant all the reasons in the redundancy letter and thus urged the court to dismiss the suit with costs.

3. The Claimant testified and reiterated that the dismissal was unfair. He was emphatic that the Respondent did not accord him the safeguards he was entitled to in law. In cross-exam he stated that his contract of employment permitted termination upon issuance of one month notice or payment in lieu of notice. He stated that the letter gave the reason for the redundancy. He admitted receipt of the certificate of service and insisted that the Respondent could not say he never worked diligently. The Respondent called Janet Kitui the HR manager of the Respondent who stated that the Claimant was not summarily dismissed but was declared redundant and duly paid his dues. In cross-examination she stated that the Labour Officer was notified of the redundancy though the notice was not addressed to the Claimant. She stated that the Respondent followed the procedure in declaring the Claimant redundant. In re-exam she stated that the letter of 13th December 2017 was to the Claimant and copied to the Labour Officer.

4. The parties filed submissions in November and December and the file forwarded to me to pen my decision. The Claimant submitted that the redundancy did not comply with Section 40 of the Employment Act as there was no notice issued to the Labour Office prior to dismissal. The Claimant cited the case of **Felister Nduku Nzaku v Florence Wairimu Gitau [2018] eKLR** on the issue where the redundancy was not conducted in accordance with the law.

5. The Respondent submitted that the Claimant was bound by his pleadings and in his pleading had averred that he was summarily dismissed. The Respondent submitted that the Claimant was belatedly trying to mutate his claim from unlawful summary dismissal to the issue of notice of redundancy. The Respondent submitted that the Claimant was properly terminated from service.

6. Here is a case that was on summary dismissal but which now turns on the question as to whether there was a proper notice for the redundancy. The decision to outsource the services the Claimant hitherto rendered was made by the board of the Respondent and communication of the intent to do so made to him and to the Labour Officer. Section 40 of the Employment Act, in *pare materia* provides as follows:-

40.(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a).....

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

.....

(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

7. The Respondent duly notified the Labour Officer and the Claimant in line with the provisions of Section 40(b). The Respondent in addition to proper notification paid the Claimant his dues upon redundancy. The Claimant signed a discharge which was to the following effect in the material part:-

It is hereby mutually agreed that I will not demand any further payment from St. Theresa's Mission Hospital in relation to my employment either directly or otherwise. I also acknowledge by signing this agreement I have no further claim against the institution.

The Claimant signed the discharge which was a contract that he clearly sought to be bound by. He did not indicate any reservations on it or in court through his pleadings and testimony. He agreed to be bound by this agreement and therefore the bargain he took in accepting the payment was one he cannot resile from. He was bound by not only his pleadings but also his own contract and waiver. In my considered view, the suit was unmerited for the reason of the waiver. It is dismissed and each party will bear their own costs.

It is so ordered.

Dated and delivered at Meru this 5th day of February 2019

Nzioki wa Makau

JUDGE