



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 711 OF 2015

BETWEEN

NAZIR MOHAMMEDALI KASSAM.....CLAIMANT

VERSUS

BAHARI [T] COMPANY LIMITEDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kinyua, Kiriimi & Company Advocates for the Claimant

Mogaka Omwenga & Mabeya Advocates for the Respondent

JUDGMENT

1. This Claim was initiated at the Employment and Labour Relations Court Nairobi, as Cause Number 1453 of 2015. It is not clear from the record when an order for transfer was issued by a Judge sitting in Nairobi. There is only a letter from the Deputy Registrar, Nairobi, dated 11th September 2015, forwarding the file to the Court in Mombasa. The file was received at Mombasa and assigned the current registration.

2. The Claimant avers he was employed by the Respondent Company as an Office Administrator, on 15th June 2009. He earned a monthly salary of Kshs. 55,890. His contract was terminated under the guise of restructuring, on 12th February 2015. He avers termination was unfair, unlawful, discriminatory and ill-intended. He was not paid terminal benefits. His prayers against the Respondent are:-

- a) Kshs. 6,448 for 3 days worked in March 2015.
- b) Kshs. 34,393 being the balance of annual leave of 16 days.
- c) Kshs. 55,890 as notice pay.
- d) Kshs. 167,670 as service pay, at 15 days' salary for every year worked.
- e) Kshs. 55,890 being the salary for February 2015.
- f) Kshs. 670,680 in damages for unfair and unlawful termination.
- g) Any other suitable remedy.
- h) Costs and interest.

3. The Respondent filed its Statement of Response, on 11th November 2016. It is conceded that the Claimant was employed by the Respondent as an Office Administrator, and had his contract terminated by the Respondent on account of restructuring. He was given requisite notice. The additional reason for termination was that the Claimant had reached the age of retirement. He lacked computer skills and was no longer useful to Respondent's business. He was paid what terminal dues he was lawfully entitled to. This included all leave entitlement, notice, and service. His prayers are meritless. The Respondent asks the Court to dismiss the Claim, with costs to the Respondent.

4. The Claimant testified and rested his case on 10th July 2017. The Respondent's case was closed in the absence of the Respondent, on 13th December 2017. It was reopened through a consent order recorded by the Parties, on 26th February 2018. Respondent's Witness, Shareholder and Director, Mahmud Jagani, gave evidence on 20th November 2018, bringing the hearing to a close. The dispute was last mentioned on 4th February 2019, when Parties confirmed filing of their Closing Submissions.

5. The Claimant confirmed in his oral evidence, the contents of his Statement of Claim and his Witness Statement on record. He was sent on compulsory leave. He had applied for annual leave. While still on leave, he was advised there was a letter dated 12th February 2015 from Respondent's Office, waiting to be collected. The Claimant collected the letter, which informed him that the Company was restructuring, and Claimant's position had fallen redundant. Another Employee took Claimant's position. The Claimant told the Court he was 66 years old, at the time of giving evidence. He was not counseled. His record was clean. The Respondent deposited about Kshs. 132,000 in Claimant's Bank Account, after the Claimant filed the Claim. Cross-examined, the Claimant told the Court he did not have computer skills. He was not notified about redundancy. The money received in his Bank Account did not satisfy the Claim.

6. Mahmud Jagani similarly adopted the contents of Pleadings, Witness Statement and Documents in his evidence before the Court. He confirmed that the Claimant was employed by the Respondent from the year 2009. The Claimant had already retired from a previous job, by the time he joined the Respondent. He was around 57 years at the time. He was already retired, and had personal commitments. He even took a break of 5 months from the Respondent, at one time. In January 2015, Jagani gave a letter to all staff, requesting that they list what roles they discharged daily. This was to assist the Respondent in its work plan. There were about 17 Employees. The Claimant was not conversant with computer. Jagani sent him on leave. The Claimant was past 60 years. The Claimant sent e-mail to the Respondent asking to be paid Kshs. 320,000 as terminal benefits. There was further e-mail with a demand for Kshs. 238,000. The Respondent went through the claims and paid February 2015 salary, notice, leave and service totaling approximately Kshs. 133,000 upon deductions.

7. It is Jagani's evidence on cross-examination, that he was aware about Claimant's advanced age, when he employed him. He was aware that the Claimant was computer-challenged. Jagani sent the Claimant on leave. He did not call the Claimant for a meeting to advise him, about restructuring. The Witness did not know if there was notice issued to the Labour Office. The Claimant was the only Employee who left on redundancy. The Respondent did not recruit an Employee called Naheem, immediately the Claimant left. The Claimant had Bank Accounts in his own name, used to transact Respondent's business. It is not true that the Claimant was Jagani's deputy. It is true that the Claimant collected rents for the Respondent on properties in Nyalı and Kilifi. Termination was not on account of Claimant's lack of computer skills. It is not true that Respondent paid terminal dues only after the Claim was filed. The Claimant did not sign discharge voucher. He was paid terminal dues computed with the assistance of the Labour Office. He was paid notice of 30 days, while his contract gave him 7 days' notice of termination. The business is still running. The Claimant had confidential information about Jagani. Jagani did not send Police Officers to harass the Claimant, on account of this confidentiality. Redirected, Jagani told the Court that the Claimant asked to be paid terminal benefits. He was paid terminal benefits.

The Court Finds:-

8. The Claimant may have been an old man, at the time he was issued redundancy notice dated 12th February 2015. The Respondent states the Claimant was over 60 years old as of 12th February 2015.

9. There is no law or contractual clause cited by the Respondent, establishing that the Claimant's advanced years, would lead to declaration of his position as redundant.

10. The Respondent appears to have had mandatory retirement on account of age in mind, rather than redundancy, in terminating Claimant's contract. The letter to the Claimant from the Respondent, dated 12th February 2015, specifically informed the Claimant that his position had become redundant. The Respondent had decided to restructure, making it necessary to declare Claimant's position redundant.

11. The evidence given by both Parties however, does not support the position that the Claimant's position became redundant. There is evidence that the Claimant acted like a Personal Assistant to Jagani, Respondent's Director. He collected rents on behalf of Jagani, while Jagani was mostly in Canada. The Claimant even opened Bank Accounts in his own name, where he deposited money collected on behalf of the Respondent. Immediately the Claimant was asked to go on imposed leave, Jagani employed Naheem, to replace the Claimant. This was not a redundancy situation. Redundancy as described under Section 2 of the Employment Act, involves termination of employment at the initiative of the Employer, where the services of an Employee are superfluous. It includes practices commonly known as abolition of office, job or occupation, or loss of employment.

12. The role discharged by the Claimant did not change on account of his being 66 years old. He was the only Employee out of 17, whose contract was terminated on the ground of the alleged redundancy. There was a replacement for him, as soon as he had been pushed out. Although allusion is made to redundancy, the Respondent did not observe the requirements of Section 40 of the Employment Act with respect to involvement of the Labour Office.

13. The Respondent states the Claimant was not only old, but was also computer-challenged. He was unfamiliar with computer use. The Respondent did not show in what way this affected the Claimant's work. He was mainly entrusted the duty of collecting and banking money in form of rents for Jagani, from Respondent's properties in Kilifi and Mombasa. There is merit in any event, with the Claimant's argument, that the Respondent was aware about the level of the Claimant's computer skills, at the time the Respondent employed the Claimant.

14. The second plausible reason, which can be examined separate from redundancy, is that the Claimant had reached the age of retirement. Jagani told the Court he employed the Claimant while the Claimant was already 57 years. This was in 2009. Jagani testified that the Claimant retired from a previous job, and had personal commitments, at the time of employment in 2009. The relationship between, the Parties was therefore somewhat fluid, and unconventional, which included grant of 7 days' notice of termination in the contract concluded by the Parties, instead of the conventional one month notice for an Employee paid a monthly salary, required under the Employment Act. 7 days' notice applies to probationary contracts. The Claimant cannot have been on probation for 5 years worked.

15. The Respondent employed the Claimant with warts and all. The Claimant continued working, and running Respondent's business in the absence of Jagani, from 2009 to 2015. The contract concluded between the Parties did not have a mandatory retirement age. Attainment by the Claimant, of the age of 66 years, had no effect on the contract concluded by the Parties. There is no law which set a mandatory retirement age for the Claimant.

16. The Claimant was advised to take compulsory leave. He was not called back and given clear advice on the reason or reasons justifying termination of his contract. It was not shown to him that there was a genuine redundancy situation. It was not established that there was a clause in his contract or a provision in any law governing the Parties, setting mandatory retirement age of the Claimant at 66 years, or at any other age. A letter from the Respondent to the Claimant dated 27th January 2015, confirms that the reason or reasons given, in justifying termination did not have validity. Jagani indicates he had written to all Employees asking them to list down what they did at work, and how long it took Employees to complete what they did. He alleged that the Claimant did not comply, and instead sought a meeting with Jagani and all Employees. It is stated in the letter that the Claimant assumed the role of Employees' spokesperson. Jagani states this behaviour by the Claimant, amounted to insubordination over which the Respondent reserved its right of taking disciplinary action which could include summary dismissal. The Claimant was placed under compulsory leave through this letter. Shortly afterwards, on 12th February 2015, the Respondent wrote to the Claimant informing him about restructuring and that the Claimant's position had become redundant. The Respondent therefore succeeded in getting rid of the Claimant, without having to go the intimated disciplinary route. The so-called restructuring was a colourable exercise, whose real objective was to get rid of the Claimant for daring to question Jagani, and for assuming the role of Employees' spokesperson.

17. The Court would agree with the Claimant that termination was faulty, both on account of validity of reason/reasons, and fairness of procedure. It did not meet the minimum statutory standards of fairness under Sections 41, 43 and 45 of the Employment Act 2007.

18. The Claimant nonetheless, and perhaps keenly aware of the personal relationship he shared with Jagani, and perhaps also accepting that a large portion of his productive years was well behind him, appears to have accepted termination, and set out to negotiate terminal package.

19. He wrote e-mails to the Respondent, asking for notice pay, service pay, leave pay, and unpaid salary. At first he asked for settlement of his Claim, at a sum of Kshs. 238,504. He revised the amount to Kshs. 320,292. The Respondent offered net sum of Kshs. 132,000 which included February 2015 salary, notice pay of 27 days, leave balance at 6.5 days and service based on 5 years completed in service. The offer was made before the Claim was filed, but deposited in Claimant's bank, after he filed the Claim. It cannot be contested however, whether the Claimant has received this sum. His prayers for notice pay, service pay, leave pay and unpaid salary were satisfied upon deposit made by the Respondent to his bank. The only question that the Court should consider is what remedy should be availed to the Claimant, to compensate him for unfair termination.

20. Section 49 [4] and 50 of the Employment Act 2007, require that in considering remedies, the Court is guided by factors listed under these provisions. The wish of the Claimant was that he is paid certain terminal benefits, as captured in the correspondence between the Parties. A sizable portion has been paid, meeting the wish of the Employee. The circumstances of termination disclose that there was no mandatory retirement age, but in the view of the Respondent, the Claimant had reached an age at which he was of limited productivity to the Respondent. The Claimant worked for 5 years, and was approaching 70 at the time he left. Although no law or contract required him to retire, he was close to that scriptural, natural, or commonly accepted age, when physical human productivity is no longer at a premium. He would not have been expected to continue in productive work for long. He was paid service pay, although his contract would suggest he was actively subscribed to the N.S.S.F. There was a personal relationship between the Claimant and Jagani. The Court does not lose sight, in taking stock of this, of the fact that termination was unfair both on account of substantive justification and fairness of procedure.

21. The Claimant is granted 4 months' salary in compensation for unfair termination, at Kshs. 223,560.

22. No order on the costs.

23. Interest allowed at 14% per annum from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Claimant equivalent of 4 months' salary in compensation for unfair termination, total Kshs. 223,560.

b) No order on the costs.

c) Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 28th day of March 2019.

James Rika

Judge