



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.124 OF 2015

MUTAVI MUINDI.....CLAIMANT

VERSUS

VALLEY CONFECTIONARY LIMITED.....RESPONDENT

JUDGEMENT

The claim herein is that the claimant was employed by the respondent in December, 2009 then known as Valley Bakery. Sometime in March/April [year note stated] there was a change of business name from Valley Bakery Ltd to Valley Confectionary Ltd where the claimant was employed as a Mini Wrapper.

In February, 2012 the personnel manager called the claimant and informed him that his employment was terminated on account of redundancy. At the time the claimant was earning Ksh.8,280.00 per month.

The claim is that There was no notice issued prior to termination of employment or terminal dues paid. The due allowances for work for 14 years were not paid. The claimant was issued with a Certificate of Service.

The claimant is seeking the following;

- a) a declaration that employment terminated unfairly and he be reinstated with payment of all due salaries;
- b) in the alternative a payment of Ksh.99,360.00 compensation;
- c) 3 months' notice pay; and
- d) Leave earned for 3 years and not taken.

The claimant testified that he was employed by Valley Bakery Limited in the year 2009 until 2011 when there was a change of name to the respondent. the respondent bought machines to wrap bread and this necessitated dismissals. There was no notice.

The claimant also testified that he did not desert work as alleged in defence. He was issued with a certificate of service by the respondent. upon change of name there was no work stoppage and the claimant continued doing the same job as a wrapper. The manager gave the employees oral notice and there are suits filed by these employees over unfair termination of employment.

The defence is that the respondent has never operated under the name and style of Valley Bakery Limited and this is a distinct and separate entity and there was no change of name or continuity of employment of the claimant.

The claimant was compensated during his employment upon termination on 30th April, 2011 on account of redundancy and the claims made are without merit. Notice pay is not due and the claim for pay for 3 years leave days not taken does not arise as the claimant worked for under 2 years with the respondent.

Evelyn Maina the human resource officer for the respondent testified that the claimant was employed by the respondent from 1st May, 2011 to 17th July, 2012 as a wrapper. The claimant was dismissed on account of redundancy. At the time he was earning ksh.8,280.00 per month the terminal dues were paid at ksh.25,333.00 and following negotiations with the trade union and shop steward witnessed the final payments.

The paid dues included notice pay and the leave days earned.

There is no relationship between the respondent and Valley Bakery as the respondent was registered since 16th September, 2004. For the period the claimant worked with the respondent, he was issued with a certificate of service.

There is a business called Valley bakery but has different premises from the respondent. the premises are near each other but have different operations.

At the close of the hearing both parties agreed to file written submissions. No submissions were filed.

Determination

During the hearing, it was clear to the court that the respondent's witness Evelyn Gathoni Maina the alleged human resource officer is unreliable and recanted her evidence severally. She remained uncooperative and chose to forget what she found not favourable to her case. She stood out as dishonest and insincere.

The witness had been stepped down on 4th December, 2018 and recalled on 14th February, 2019 and under oath chose to forget what her evidence-in-chief was and continuously lied under oath. The resulting testimony shall be treated with abundance of caution on this basis.

The claim is premised on the facts that the claimant was employed by the respondent which was Valley Bakery Limited before in the year 2009. The respondent purchased machine for warping read and In February, 2012 the claimant was called and advised that his services were no longer required and was terminated in hi employment due to redundancy.

The claimant has attached the Certificate of Service issued by the Valley Bakery Limited for his employment period from 10th January, 2010 to 30th April, 2011.

The respondent filed the Certificate of Service with regard to the claimant's employment for the period of 1st may, 2011 to 17th July, 2012.

There is also the declaration of payments of terminal dues executed on 17th July, 2012 for the payment of ksh.23,333.00.

The Certificate of Service is the lawful record under the provisions of section 51 of the Employment Act, 2007 to confirm the period of employment. I take it that the respondent records being in tandem with section 10(6) of the Act the Certificate filed is the correct status of employment for the claimant.

The respondent has also attached the Certificate of Registration noting that the company was operational since the year 2004 and thus had capacity to employ the claimant as set out . where the claimant was under the employment of Valley Bakery Limited and such business issued him with the filed Certificate of Service and he was taken up by the respondent, such formed a different and separate employment.

Where in doubt of the resulting employment and terminal dues and or claims, the claimant should have enjoyed Valley Bakery herein so as to share the liability with regard to claim going back to the year 2011 and before hi employment with the respondent.

The claim herein relates to the entity of the respondent and since there is no change of name of business, the evidence that the claimant worked for 14 years with the respondent is without any legal basis.

Termination of employment on account of redundancy is allowed under section 40 of the Employment Act, 2007. Under section 40 of the Act, the employer is required to give notice to the employees and another notice to the affected employees whose employment is to be terminated following the redundancy. In the case of **Kenya**

Airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR it was 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.

This position is reaffirmed in the case of **Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] eKLR** that redundancy notices are not mechanical so as to satisfy the motions of the law, and that fair labour practice requires the employer to act in good faith.

In this case, the claimant testified that when the respondent purchased the bread wrapping machine the employees were informed that there would be dismissal from employment. He was then called and told his services were no longer required.

On that notification, the claimant was also paid for one month notice as part of his terminal dues amounting to ksh.25,333.00. such dues also included pay for leave days earned.

The respondent satisfied the procedural fairness stipulated under section 40 of the Employment Act, 2007.

On the claims made for reinstatement, there was no specific emphasis on this remedy. Even where this was the case, employment terminated in the year 2012 and in terms of section 12 (3) of the Employment and Labour Relations Court Act, 2011 read together with section 49 of the Employment Act, 2007 the remedy of reinstatement should only issue in exceptional cases and within 3 years since employment terminated unfairly.

This is not the case here. The remedy of reinstatement is not due.

The claims for notice pay for 3 months are not justified. The claimant has since received one month notice pay which is in accordance with section 40 read together with section 35 of the Employment Act, 2007.

The claim for leave earned for 3 years is not justified as work with the respondent is well set out under the Certificate of Service issued. Part of the terminal dues paid to the claimant included days earned for leave and not taken.

Accordingly, the claims made are without merit and are hereby dismissed.

Each party shall bear own costs.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU JUDGE

In the presence of: