



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1389 OF 2014

GODFREY ANDABWA ASHIONO.....CLAIMANT

VERSUS

COCONUT (K) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed the Statement of Claim herein on 18th August, 2014 alleging that he was unlawfully terminated and/or declared redundant by the Respondent vide the letter dated 18.1.2014 and his benefits withheld. He therefore prayed for the following remedies:

- i. A declaration that the Claimant's dismissal from his employment was unfair and unlawful.
- ii. The Claimant be paid his terminal benefits as set out in paragraph 8 of the Statement of Claim totalling to Kshs. 395,998/-.
- iii. The Respondent be ordered to compensate the Claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary.
- iv. The Respondent be ordered to issue the Claimant with a certificate of service as required by the provisions of Section 51 of the Employment Act, 2007.
- v. The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
- vi. The Respondent to pay costs of this claim.
- vii. Interest on the above at Court rates.

2. The Respondent filed its Response on the 21st day of October, 2014 denying all the allegations in the Claimant's Statement of Claim and averred that the claimant was lawfully discharged after being served with notice dated 18.1.2014. It further averred that the said notice letter cited redundancy as the reason for the termination but the claimant failed to collect his dues which were computed on 29.1.2014. It further averred that it is still ready and willing to pay the claimant one month salary in lieu of notice, days worked in January, severance pay@ 15 day pay per year of service, outstanding leave days and issue certificate of service. It therefore contended that it complied with section 40 of the Employment Act and prayed for suit to be dismissed with costs.

3. The suit was heard on 24.9.2018 and 7.11.2018 when the claimant testified as Cw1 and the respondent called its CEO/ MD who testified as Rw1. Thereafter both parties filed submissions.

Claimant's Case

4. CW1 adopted his written statement dated 13th September, 2017 as his evidence in chief. He stated that he was employed by the Respondent herein on 15th November 2010 as a Storekeeper at the respondent's restaurant earning a monthly salary of Kshs.12,000/-. That his employment contract was oral but he was issued with identity cards to be used at all times while on duty. That he was not housed by the Respondent or paid house allowance as provided by the law. He also never went on leave in the year 2012 and 2013 or paid cash in lieu.

5. CW1 further stated that he worked faithfully and diligently from 15th November, 2010 until 6th February, 2014, when the Managing

Director issued him with a letter dated 18th January, 2014 terminating his services on account of redundancy. That prior to him receiving this letter he was not notified of any pending termination or redundancy exercise that was scheduled to take place. That after receiving separation letter he was asked to clear and come back for his dues in February.

6. CW1 further stated that there was no valid reason to terminate his services and that the procedure as set in the Employment Act was not followed. That on 18th January, 2014, the Respondent herein instructed him to do stock taking and prepare a report on the same, which he did and after presenting his report to the manager he was verbally asked to proceed on compulsory leave for 2 weeks. That upon reporting back on 4th February, 2014 as required, he was given a letter of redundancy dated 18th January, 2014. That the letter indicating that his dues would be paid on 6th February, 2014 he did not receive any payment of the same including his salary for January 2014. He therefore urged the Court to allow his Claim as drawn.

7. On Cross examination CW1 admitted that he signed a contract of employment with the Respondent which provided for a monthly salary of Kshs.12,000/= but a copy of the same was never given to him. He further stated that he did not complain about his salary, as he was afraid of losing his job and only opted to raise the issue of underpayment with the auditors. That it was after the Auditors raised the issue of house allowance with the respondent when it proceeded to make changes on his the payslip effective December 2013 to indicate basic salary as Kshs.11,934/= and Kshs.1,962/= as house allowance.

8. On further cross examination CW1 maintained that the redundancy letter dated 18th January, 2014 was issued to him on 4th February, 2014 and he refused to sign to acknowledge receipt of the same because it was backdated. He admitted that he did proceed on the compulsory leave on 20th January, 2014 and reported back on 4th February, 2014 when he was shown a tabulation of Kshs.44,315/= as the terminal dues owing to him by the Respondent and which described as incorrect.

9. The Claimant maintained that he was not issued with any notice prior to his termination/redundancy and that he was seeing the letter to the county labour officer dated 1st November, 2013 in Court for the first time. He also denied ever being served with the redundancy letter dated 1st November, 2013.

10. On re-examination CW1 confirmed that the Respondent herein never called him at any time prior to his termination to discuss redundancy at the Labour Office. That the tabulation of dues owed prepared by the Respondent failed to include the 2 years leave that he did not take.

The Respondent's Case

11. RW1 similarly adopted his witness statement dated 5/9/2017 as evidence in chief whereby he admitted that the Claimant was employed by the Respondent on 15th November, 2010 in the position of Assistant Storekeeper earning a monthly salary of KShs. 12,000/=.

12. RW1 avers that the business model around which the Respondent Company was built failed, forcing the Respondent to shut down the division and as a result five employees were declared redundant. He further contended that the Company tried to absorb the Claimant within the other divisions within the Company but his skills did not match with any position available.

13. RW1 contends that all employees including the Claimant herein who would be affected by the redundancy were duly informed vide a letter dated 1st November, 2013 and a copy of the letter was forwarded to the Labour Office. That the Respondent retained the said employees in employment as the company conducted stock taking, reconciliation and disposal of the relevant stock awaiting closure of the business. That the process was eventually concluded on 18th January, 2014 when the Claimant was issued with his formal notice advising him to proceed on paid leave and resume work on 6th February, 2014 to collect his terminal dues.

14. RW1 further stated that the Claimant's terminal dues were tabulated and subsequently communicated to the Claimant vide the Respondent's letter dated 29th January, 2014 however, the Claimant declined to receive the payment as indicated therein. He denied that the Respondent Company failed and/or declined to pay the Claimant his terminal dues.

15. On cross examination RW1 stated that he could not recall the date he employed the Claimant and that he was not the one who discussed the employment contract with the Claimant. That the brains behind the wines business in the department where the claimant was working left the country for Italy due to cancer, after which he met the claimant and his colleagues in the wines department on 1.11.2013.

16. RW1 contended that he did serve the Claimant with the redundancy notice dated 18th January, 2014, which letter also informed the Claimant to proceed on compulsory leave. He admitted that the notice for redundancy was shorter than one month. He however contended that that he did serve the Claimant with the letter dated 1st November, 2013 but produced no proof of the service of the alleged letter.

17. On further cross examination RW1 stated that the Claimant's salary of Kshs.12,000/= was all inclusive of house allowance and that following direction from the labour office they split the salary to include house allowance as evidenced by the payslips produced in evidence. He however admitted that he never secured written consent from the claimant before beginning to split the payment but he contended that the Claimant never complained of the splitting of his salary to reflect house allowance.

18. On further cross examination RW1 confirmed that the Respondent offered to pay the Claimant his dues as tabulated in the Statement of Response but the Claimant failed to return on 6th February, 2014, to collect such dues as directed. He further contended that the Claimant disappeared after a supplier demanded payment of Kshs.58,000/= for gas cylinders allegedly supplied and received by the Claimant herein.

19. RW1 maintained that there was a reason for declaring the Claimant redundant since the Respondent closed down the wine importation department of the business. He further admitted that the respondent's business is still on-going save for the wine importation department where the Claimant was based. He also maintained that due procedure was followed in declaring the Claimant redundant.

Claimant's submissions

20. In his written submissions, the Claimant stated that his dismissal was unfair and contrary to the provisions of the Employment Act. It is further submitted that the Respondent terminated the Claimant's services on or about 18th January, 2014 by the Respondent's Managing Director, who verbally informed the Claimant that his services were no longer required by the Respondent.

21. The Claimant further submitted that his services were terminated without any justification and/or valid reason and/or given notice of the intended redundancy hence his termination /redundancy was unfair and unlawful and urged the Court to allow his prayer for compensation for unfair dismissal.

22. It is further submitted that there was no genuine redundancy by the Respondent and that further the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act, 2007 while allegedly declaring the Claimant redundant. The Claimant relied on the case of **Thomas De La Rue (K) Limited Vs David Opondo Omutelema (2013) eKLR** for emphasis.

23. The Claimant further avers that the Respondent failed to issue the Statutory one month's redundancy notice and that the two letters allegedly written to the labour office and the Claimant both dated 1st November, 2013 were never served upon the Claimant as required by law.

24. The Claimant contends that his termination/redundancy from his employment by the Respondent failed to pass the fairness test as provided by Section 45(4) of the Employment Act, 2007 that provides:

"...that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee."

25. The Claimant avers that at the time of separation with the Respondent he was never paid his terminal dues and urged the Court to allow his Claim as drawn.

26. The Claimant submitted that he is entitled to one month's salary in lieu of redundancy/termination notice as the Respondent failed to adduce evidence in Court to indicate issuance of such notice or payment in lieu thereof.

27. The Claimant further submitted that he was never paid his salary for days worked in January totalling to Kshs.15,065/= and urged the Court to award the same. He further submitted that the Respondent failed to produce any documentary evidence to controvert the Claimant's assertion of unpaid salary for the month of January, 2014.

28. The Claimant avers that the Respondent under the provisions of Section 31 of the Employment Act, 2007 had a mandatory obligation to the employee to provide housing or pay the employee such sums as house allowance. The Claimant therefore submitted that he is entitled to his Claim of house allowance on this basis and urged the Court to allow the same as tabulated at 15% of the basic salary.

29. It is further submitted on behalf of the Claimant that he did not go on annual leave as required by the provisions of Section 28 of the Employment Act, 2007 and therefore urged the Court to allow his prayer for judgment under this head as itemised in the Statement of Claim.

30. It is further submitted that the Claimant's salary of Kshs.12,000/= was below the scale as provided for by the General Wage Order, 2012 that provides for the minimum wage for employees serving in the same capacity as the Claimant is Kshs.13,214.60/=. The Claimant therefore urged the Court to allow his claim under this head totalling to Kshs.39,615/=.

31. It is further submitted that the Claimant is entitled to severance pay as provided by Section 40 (g) of the Employment Act, 2007. The Claimant urged the Court to award him Kshs.25,875/= as prayed under this head.

32. The Claimant further submitted that he is entitled to be issued with a certificate of service as provided for under the provisions of Section 51 of the Employment Act, 2007. He therefore urged the Court to order that he be issued with a certificate of service in full compliance with the law.

33. In conclusion the Claimant urged the Court to allow the Claim as drawn as he has proved his case on a balance of probability. He further urged the Court to also award him costs of the suit as well as interest.

Respondent's submissions

34. In her written submissions the Respondent submitted that she is ready and willing to pay the Claimant's terminal dues consisting of the following:

- One (1) month's salary in lieu of notice.
- Days worked in the Month of January 2014.
- House allowance for the month of January 2014.
- Outstanding leave days.

· Certificate of Service.

35. It is further submitted that there were no deductions made on the Claimant's salary as submitted by the Claimant but rather the Respondent upon advice by the labour officer resorted to separate basic salary and house allowance which position was confirmed by the Claimant herein. It is further submitted that the Claimant failed to lodge any complaint after the changes were effected on his payslip.

36. The Respondent further submitted that the Claimant's salary of Kshs.12,000/- was inclusive of house allowance and therefore the Claimant is not entitled to claim the same. The Respondent urged the Honourable Court to dismiss this prayer.

37. It was the Respondent's submission that she followed due process as set out in Section 40 of the Employment Act, 2007 while declaring the Claimant herein redundant. She further submitted that the Claimant is therefore not entitled to compensation as the termination was lawful, procedural and within the confines of the Employment Act.

38. With regards to the Claimant's prayer for service pay, the Respondent submitted that the same ought not to be awarded as evidenced by the payslips produced in Court the Claimant was a member of NSSF and she made the necessary deductions as required by law. The Respondent for emphasis relied on the case of **John Ngowah vs East Africa Safari Air Express Limited (2015) eKLR** where the Court held that:

“Service pay is claimed on the ground that the Claimant was in employment for 8 years and should be awarded 15 days’ pay for each year in service. Service pay is regulated under Section 35 of the Employment Act and due to an employee whose employer does not make the requisite remittances to the NSSF and NHIF as statutory dues in pension and provident funds as schemes regulated by the Retirement Benefits Act. From the annexed pay slips of the Claimant, the Respondent made deductions and remittances as required under Section 35(6) of the Employment Act and thus service pay is not due in this case. This is declined.”

39. In conclusion the Respondent urged the Court to dismiss the Claim with costs to the Respondent herein save for the admitted Claims.

Analysis and determination

40. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties hereto there is no dispute that the claimant was employed by the Respondent herein effective 15th November 2010 to 6th February, 2014. the issues for determination are:

- a) Whether the termination of the Claimant by way of redundancy was unjustified and unfair.
- b) Whether the Claimant is entitled to the reliefs sought

Whether the redundancy was unjustified and unfair.

41. Redundancy is defined under Section 2 of the Employment Act as –

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;

42. While the law recognises redundancy as a legitimate mode of separation, it must not only be justifiable but must also be carried out in accordance with the mandatory procedure set out under Section 40 of the Employment Act, 2007. The Claimant contended in his pleadings, evidence and submissions that the Respondent's did not follow due process while declaring his position redundant. In particular, it is submitted that the Respondent failed to issue the statutory one (1) month redundancy notice as required by the provisions of Section 40 of the Employment Act. He therefore urged the Court to find that his redundancy was unfair and placed reliance on the case of **Thomas De La Rue (K) Limited Vs David Opondo Omutelema (2013) eKLR** for emphasis.

43. It was the Claimant's submission that he was issued with the notice dated 18th January, 2014 and termination was to take effect on 6th February, 2014 which period is not one (1) month as required by law. He further submitted that his termination failed to pass the fairness test as provided under Section 45 (4) of the Employment Act.

44. The Respondent on the other hand contended that it followed due process while declaring the Claimant redundant and that it had a valid reason to do so. RW1 stated that he served the Claimant with the redundancy notice dated 1st November, 2013 but allowed him to continue working and do stocktaking before closing down the department. He however admitted that he had no evidence of service of the said letter.

45. Section 40 of the Employment Act 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 and the labour officer;

c) ...

d) ...

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) the employer has paid an employee declared redundant not less than one month's wages in lieu of notice; and

g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

46. After considering the evidence and submissions presented to the court, it is obvious that the termination of the claimant's contract of service on account redundancy was not done in compliance with the mandatory provisions of section 40 of the Act. There is no dispute that the termination was via the letter dated 18.1.2014. The letter did not give the claimant one-month redundancy notice and nothing was paid to him before the termination. Rw1 also failed to produce evidence to prove that the claimant was served with redundancy notice on 1.11.2013.

47. In view of the foregoing, I return that on preponderance of evidence, the Respondent terminated the claimant's services on account of redundancy without complying with the mandatory provisions of Section 40 of the Employment Act and as such the termination was rendered unfair. In **Paul Ngeno Vs Pyrethrum Board of Kenya Limited (2013) eKLR** it was held:

"... termination on account of redundancy would be unfair where the claimant was not accorded the redundancy procedure as provided for in section 40 of the Employment Act, 2007 or he was not given any notice or prepared for the redundancy and the selection criterion was not disclosed to the claimant. Where an employee is one of several employees holding a similar office or position, the Court holds that the employee is entitled to be informed the criteria used to select him for the redundancy or the fact that all offices similar to the one held by the claimant have been rendered redundant."

Whether the Claimant is entitled to the reliefs sought

48. The Claimant prayed for a declaration that his dismissal from employment was unfair and unlawful. I agree and proceed to a declaration that the redundancy was un-procedural and therefore unfair.

49. Flowing from the foregoing I award the claimant compensation for unfair termination being 9 months' gross salary under section 49 (1) of the Employment Act. In awarding the said sum, I have considered the fact that the termination was not through fault on the part of the claimant and also the fact that he served for over three years without any warning letter. Based on the consolidated salary which according to the payslips produced by the defence was Kshs.12,000/= the claimant will get Kshs.108,000.

50. In addition to the foregoing I award the claimant the dues offered by the respondent vide the termination letter and admitted under paragraph 10 of the defence including, one-month salary in lieu of notice, salary days worked in the Month of January 2014, severance pay at 15 days' pay for each completed year of service and outstanding leave days.

51. Under computation signed on 22.1.2014 the employer computed the claimant's salary for January and February 2014 as Kshs.16,638 but the claimant prayed for Kshs.15,065 being salary for January 2014 only and that is what he will get. He will further get severance pay at $3/2 \times 12000 = \text{Kshs.18,000}$. Finally, the claimant prayed for accrued leave of 2 years. Under the Hotel and Catering sector, the regulations provide for 24 leave days per year. I therefore award him $\text{Kshs.12,000} \times 48/26 = \text{Kshs.22153.85}$.

52. The claimant will also be issued with a Certificate of Service as required by section 51 of the Employment Act.

Conclusion and disposition

53. I found that the termination of the claimant's contract of service on account of redundancy was unfair and unlawful and awarded hi compensation plus terminal dues. Consequently, I enter judgment for him in the following terms:

Notice Kshs. 12,000.00

Compensation..... Kshs.108,000.00

Salary..... Kshs. 15,065.00

Severance pay..... Kshs. 18,000.00

Accrued leave..... Kshs. 22,153.85

Total Kshs. 175,218.85

The said award is subject to statutory deductions. The Claimant is also entitled to costs of this suit and interest from the date of judgment until payment in full.

Dated, Signed and Delivered in Open Court at Nairobi this 5th day of April, 2019

ONESMUS N. MAKAU

JUDGE