



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 2 OF 2018**

**LUKE KINYUA KAMUNTI.....CLAIMANT**

**VERSUS**

**AMIGOS NUTS AND COMMODITIES LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant has sued the Respondent for termination of the Claimant's employment on account of redundancy. The Claimant avers that he was employed by the Respondent on 28<sup>th</sup> June 2017 as an accountant earning a monthly salary of Kshs. 37,000/-. He averred that he was terminated without prior notice on account of redundancy on 3<sup>rd</sup> October 2017. The Claimant avers that the said termination was unfair and unlawful and cited the following reasons;

- a. failure by the Respondent to inform him of the impending termination,
- b. failure to inform the labour officer of the termination, and
- c. failure to pay the requisite salary in lieu of notice.

He therefore prays for judgment against the Respondent for a declaration that termination was unfair/unlawful and seeks one month's salary in lieu of notice – Kshs. 37,000/-, house allowance for the three months – Kshs. 16,650/-, 12 months compensation – Kshs. 444,000/- all totalling to Kshs. 597,650/- as well as the costs of the suit.

2. The Respondent in its response to the statement of claim denied terminating the Claimant on account of redundancy. It averred that the Claimant was employed as a clerical officer. The Respondent further avers that it gave the Claimant notice of termination on 3<sup>rd</sup> September 2017 since it was going through a difficult time and averred that it informed the Claimant of its status by serving the Claimant with a notice a month earlier and since the Claimant was still on probation it informed him that it would not be able to confirm him. Further the Respondent avers that the Claimant is not entitled to the claim for house allowance since his salary was inclusive of the house allowance. The Respondent contends that the termination was lawful and that it did not have to inform the labour officer of the termination. The Respondent thus sought the dismissal of the claim with costs.

3. At the hearing, the Claimant testified on his own behalf and the Respondent called one witness. The Claimant testified that he was issued with a termination letter on 3<sup>rd</sup> October 2017 and was required not to report to work the following day. He stated that he was not informed of the intention to declare him redundant and that he was also not informed of the process used to choose the person who was to be declared redundant. On cross-examination he denied being on probation. He asserted that he was an accountant and that he was confirmed on the date of appointment. He also averred that he was not given the letter of employment and neither was he served with a notice. He confirmed that the Respondent's reasons for termination were politically related and that the economy was on its knees at the time.

4. The Respondent's witness Mr. John Ndirangu Nyorothe one of the directors of the Respondent testified that in the notice of termination they gave a reason of the economy being on its knees. He stated that the Respondent had terminated more than 20 employees and all of them were issued with notice just like the Claimant. He stated that the company was new and that the political atmosphere of 2017 affected the company. He testified that the Claimant was one of the first people the company had employed and he was on probation. He stated that the people who were affected were the ones on probation and it was indicated on the general notice of 3<sup>rd</sup> September, 2017. In cross-examination he confirmed that the salary was inclusive of house allowance though he did not have any tabulation of the salary in court.

5. The Claimant submitted that his contract was terminated while he was on probation. He submitted that Section 42 of the Employment Act only excludes the application of Section 41, that is notification and hearing before termination on grounds of misconduct when terminating such a probationary contract. He submitted that the provisions of Section 40 which make provision for the conditions an employer should

fulfil before terminating an employment contract on account of redundancy re not excluded when a probationary contract is in issue. He submitted that the employer is enjoined to observe the checks provided under Section 41 of the Act before terminating the contract. He submitted that the termination of contract was involuntary through no fault on his part and was at the initiative of the Respondent. He submitted that it fit snugly in the definition of redundancy in the Act. He relied on the case of **Ignas Karingo Mghona & 4 Others v Star of Hope International Foundation [2016] eKLR** where the court held that where an employer fails to observe the elements in Section 40 when terminating the employment contract such termination was flawed and unlawful. He submitted that he was entitled to the reliefs sought in the claim.

6. The Respondent filed submissions and it submitted that the Claimant was on probation according to the appointment letter and that he was dismissed under Section 42 of the Employment Act. The Respondent submitted that it gave the Claimant a one month notice instead of 7 days notice as required by law. It contended that the Claimant conveniently failed to file the letter of appointment and the notice because he was well aware that would be detrimental to his case. It denied dismissing the Claimant on account of redundancy and averred that the company was experiencing financial difficulties due to the political environment as a result of which their business was not doing well and the Respondent was therefore forced to reduce its work force. The Respondent submitted that the provisions of Section 40 of the Employment Act do not apply and that Claimant had failed to prove that he was terminated on account of redundancy. The Respondent further submitted that the Claimant is not entitled to any payment in relation to the claim. The Respondent conceded that it did not inform the labour officer stated that by virtue of the Claimant being on probation, it had a right to terminate his services under Section 42(4) of the Employment Act. The Respondent submitted that the Claimant failed to produce evidence to confirm that he was a member of a union. The Respondent submitted that the Claimant who was on probation and having worked for only 3 months cannot make a claim of 12 month's salary compensation. The Respondent submitted that the suit should be dismissed with costs.

7. The issues that fall for determination are:-

- a. Whether the Claimant was on probation and whether he was terminated on account of redundancy.
- b. Whether the Claimant is entitled to the remedies sought.
- c. Whether the Claimant was on probation and whether he was terminated on account of redundancy.

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;*

Probationary contracts of employment are regulated under section 42 of the Employment Act thus:-

42. (1) *The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.*
- (2) *A probationary period shall not be more than six months but may be extended for a further period of not more than six months with it the agreement of the employee.*
- (3) *No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).*
- (4) *A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.*

8. In the instant suit and according to the letter of employment produced in court by the Respondent, the Claimant was under probation for a period of six months. From the reading of Section 42 of the Employment Act, the Respondent was only required to issue a notice of 7 days prior to termination. As has been stated before in pronouncements of this court, the probationary period serves the purpose of giving an employer the opportunity to evaluate an employee and if satisfied confirm the employee into employment or extend the probation if not satisfied or even terminate the contract if the employee's performance is below expectation. The notice sent out to the Claimant on 3<sup>rd</sup> September 2017 was clear in its content and context. The termination of employment was stated to be due to political temperatures making it difficult for the company to access raw materials. This took the termination out of the ordinary purview of a termination of a probationary contract as the employer ascribed a reason for the termination that was grounds for declaration of a redundancy. Since the termination was on account of redundancy, the question that arises is whether the right procedure was followed. Section 40 of the Employment Act states 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) *Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*

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

*(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

*(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

*(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 notice or one month's wages in lieu of notice; and*

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

9. The law is now settled that in declaring redundancy, an employer is required to issue two separate notices of at least one month each. The first is a general communication to employees generally notifying them of the impending redundancy. The second is a specific notice to the affected employee. The employer is further required to issue a one month's notice to the local Labour Officer. In the instant case even though the Respondent issued a general notice to the employees one month before issuing termination notice to the Claimant, the Respondent never issued a notice to the labour officer. Failure to issue a notice to the labour officer violated the provisions of Section 40 of the Employment Act with the result that that redundancy of the Claimant was unprocedural and therefore unfair. The Claimant is therefore entitled to payment of 3 month's salary as compensation for the unprocedural declaration of redundancy. The sum is subject to deduction as per Section 49 of the Employment Act. Each party is to bear their own costs. In the final analysis there is judgment for the Claimant against the Respondent for:-

- a. 3 month's salary compensation – Kshs. 111,000/-
- b. Each party to bear their own costs.
- c. Sum in a) above subject to statutory deductions per Section 49 of the Employment Act.

It is so ordered.

**Dated and delivered at Nyeri this 24<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**