



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2044 OF 2014

DENNIS MULLOW.....CLAIMANT

VERSUS

ASHNIL HOTELS LIMITED.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango)

JUDGMENT

The Claimant filed suit seeking damages for unfair termination arising out of an employment relationship with the Respondent. He avers that he was offered employment on 2nd June, 2010, as a sous chef at the Respondent's hotel with a starting salary of Kshs.40,000/= per month which was later increased to Kshs.48,840.

That he was promoted to the position of acting Head Chef where besides the salary, the Respondent was to pay him an allowance of Kshs.5,000/= for a period of 3 months. He alleges that after the 3 month period his salary was not adjusted to that of head chef which was Kshs.85,000/=.

Mr. Mallow avers that he worked with due diligence and faithfulness until on or about 31st July 2014, when he was declared redundant on grounds of low volume of business. He contends that he was not given any notice or letter to show cause why he should not be terminated contrary to principles of natural justice and section 41 of the Employment Act, 2007.

He claims for salary underpayments for 14 months when he acted as head chef, overtime, compensation for wrongful dismissal and certificate of service for being terminated without a valid reason and without following due process.

The Respondent filed an answer to the Memorandum of Claim wherein it admits the employment relationship with the Claimant but denies that he was ever appointed as the Head Chef or that the salary of the head chef was Kshs.85,000/=.

The Respondent avers that when the Claimant was transferred to Aruba from Samburu, his position was clearly stated in the transfer letter as a sous chef. At no time was the Claimant appointed as Head Chef.

It is the Respondent's contention that the Claimant was declared redundant due to low volume of business experienced in the tourism industry countrywide. That the Claimant's union was duly notified by a letter dated 25th October, 2013 and subsequently the Claimant was paid all his dues. The respondent denies the claim for underpayments, overtime and compensation for wrongful dismissal and urge the Court to dismiss the Claim with costs.

Evidence

The Claimant testified that he is challenging the redundancy as unfair for the reason that he did not receive any notice. He also stated that he acted as head chef for 16 months but was paid as a sous chef and that he worked overtime of 5 hours a day and was not paid for it. That at night he worked from 6 pm to 10 pm and rested in his house for 2 hours.

That he was terminated without notice whereas he was not prepared to leave and had to go within the same week of receiving the letter of termination. He stated that he has not been able to get alternative employment to date and works as a casual.

In cross examination he admitted that he was transferred to Samburu by a letter of 19th July, 2012, and acting allowance was withdrawn thereafter. He also admitted that work at Samburu camp depended on customers in the high or low seasons when numbers fluctuated. That

there was a 2 hour break in between shifts and that he accumulated off days and took time off every 2-3 months. That when he was terminated business was low as compared to earlier years. He also admitted to have been paid his terminal dues as set out in the letter of redundancy. The Claimant also admitted to receiving his Certificate of Service from the Respondent.

The Respondent put up two witnesses. RW1, WILKIE OMINDE stated that he was the Respondent's Human Resources Manager. He stated that the Claimant was the respondent's employee and was terminated on account of redundancy together with other staff which was made necessary due to fall in volume of business in the years 2013 and 2014. That among the Respondent's establishments the Aruba branch was worst hit by low business and the remaining staff were expected to manage the volume of work.

That the highest staffed departments at Aruba Branch included the Claimant's Kitchen department and where it was found that the head chef and the sous chef had similar responsibilities, that the head chef having worked for the Respondent longer, Mr. Ominde decided to recommend letting go of the Claimant.

Mr. Ominde stated that the claimant's union was informed of the redundancy and so was the Claimant as all units of the Respondent had been given notice and that all procedure was followed in declaring the Claimant redundant. That the sous chef's work was to act in the absence of the Head chef and as such the Claimant is not entitled to any underpayments since he was just performing his duties.

In cross examination he admitted that the respondent did not inform the Ministry of Labour of the redundancy.

RW2, THOMAS WERE led evidence to the effect that he was the Respondent's General Manager and that he was familiar with the Respondent's operations. He stated that he Respondent's lodges have rotating shifts: Breakfast shift is from 5 am to 10 am then reports back at 3 pm to 6 pm. The normal shift workers report at 8.30 am to 3 pm, take a break and then report back at 6 pm to 9.30 pm.

That all staff members were given one day off per week and when there is a public holiday during the week staff members get an extra day off. He testified that the head chef and the sous chef were supervisory staff and the sous chef is the deputy of the head chef. That they do not work on fixed shifts but coordinate their working hours to ensure that one of them is on duty when the other is off duty.

That during low season the normal staff members take their leave days and any pending off days. That the Claimant was laid off in 2014 together with several other employees as business was very bad. He urged the Court to dismiss the Claim.

Claimant's Submissions

It is submitted on behalf of the Claimant that the procedure followed in declaring the Claimant redundant is questionable as section 40(1) (a), (b) and (c) of the Employment Act, 2007, was not followed. That the Respondent did not issue a notice to the union as none was filed in Court. That the Claimant was issued a 9 day notice prior to the intended termination which he avers was not sufficient and was contrary to Section 40 of the Act.

Further that the selection criteria applied by the Respondent is unclear and the labour officer was not involved at all and as such the selection was unfair. The claimant cites the case of **Banking Insurance & Finance Union (Kenya) vs Murata Sacco Society Limited** where it was held:

“Redundancy involves the existence of genuine business reasons that require consultations, development of a pre-set criteria looking at seniority of affected staff; skill, ability, reliability and the class of each employee before arriving at the decision to terminate. Such a process must involve the union without disadvantaging employees not unionised and as of importance, the Labour Officer responsible for the area where the Respondent employer is situate must be informed and involved.

The Labour Officer is the government representative, neutral in the redundancy process to advice both the employer and employees on the applicable law and adherence to best practice especially as regards the set criteria. The inclusion of the union where applicable and the labour officer is not optional; the law is framed in mandatory terms. Any resultant redundancy process without compliance with the law is unprocedural and a breach to the employment contract. Such breach where pleaded is curable by payment of damages.”

It is submitted that the procedure was flawed and thus the termination unfair and as a result he is entitled to compensation in lieu thereof. It is also submitted that the Claimant is entitled to underpayment for the period he acted as head chef but was paid as a sous chef.

On the remedies sought it is submitted that the Claimant was grossly underpaid during the period he performed the duties of the Head Chef.

The claimant testified that he used to work from 6 am to 4 pm, break for two hours between 4 pm and 6 pm and thereafter report back on duty at 6 pm until 10 pm. That the claimant put in five (5) extra hours as overtime on a daily basis but was never compensated for the same. It is submitted that the Claimant is entitled to compensation in lieu thereof.

On behalf of the Respondent it is submitted that the Claimant was terminated regularly as there was a redundancy situation which prompted the respondent to carry out the redundancy. That the Claimant was paid all his dues and therefore the suit should fail as a whole.

Issues for Determination

1. Whether the Claimant's termination of employment was lawful

2. Whether the Claimant is entitled to the remedies sought

From the pleadings and the evidence on record it is apparent that the claimant's termination was on account of redundancy. Maraga J in **Civil Appeal 46 of 2013 Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others** (supra) in interpretation of section 2 (1) of the Labour Relations Act on the definition of redundancy had this to say:

“There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be by involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-volitional. I understand this to refer to a situation, in most cases an economic downturn, brought about by factors beyond the control of the employer, which leaves the employer with no option but to take an initiative the consequence of which will be inevitable loss of employment.

The second aspect is that the loss of employment in redundancy has to be at no fault of the employee and the termination of employment arises “where the services of an employee are superfluous” through “the practices commonly known as abolition of office, job or occupation and loss of employment.” In this case, what I understand as required to be determined in this aspect of the definition of redundancy is whether the appellant abolished the offices, jobs or occupations of the affected employees resulting in their services being superfluous hence their loss of employment. Corollary to that is the justification for that abolition, if the appellant indeed abolished their offices. Determination of these two aspects will, determine the first issue of whether or not the redundancy in this case was necessary.”

In the instant case the Respondent avers that it was experiencing low business volumes and it was therefore necessary to restructure its operations. The Respondent has annexed newspaper reports in support of the low tourist turn out in the country in general which also affected their businesses the negatively.

Section 40 of the Employment Act, 2007, provides:

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

c) 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;

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

e) 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

f) 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.

Section 2 of the Employment Act defines Redundancy 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;”

Notice

The Claimant has annexed the letter of redundancy by the Respondent dated 22nd July, 2014, which reads:

“Due to low volume of business being experienced especially at the Coast circuit, we have been forced to restructure the staff establishment in order to cut down on the operational as well as the overhead costs.

It is on this basis that we regret to inform you that you will be relieved of your duties with effect from 4th August, 2014...”

Section 40(1)(a) and (b) envisages where notice if not given to an affected employee in person it is done to the trade union where the

employee is a member. In the instant case the period between the date of the letter notifying the Claimant of the redundancy and the actual date of termination is approximately 13 days. This period is shorter than what is provided by statute. The purported notice to the Union is dated 23rd October, 2013, which reads:

“RE: RETRENCHMENT

Due to financial constraints that we are currently facing, brought about by the down turn in business especially in the Coast circuit and not to mention the salary obligations, we are forced to re-look into our current staff establishment with a view of downsizing.

We shall in the very near future be furnishing you with the names of those who will be affected by this downsizing...”

There is no further communication between the Respondent and the Union to prove that the names were ever sent to the Union or of any further discussions on the subject. The letter of 23rd October, 2013, therefore does not suffice as notice in terms of section 40(1)(a).

The Court of Appeal in the case of **Thomas De La Rue (K) Ltd -V- David Opundo Omutelema (2013)** determined that the notification period of one month provided for in Subsection 40(1)(a) applies to the notification under Subsection 40(a)(b) as well when the court stated –

“... in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”

From the pleadings, and the evidence by both the Claimant and the Respondent’s witnesses, it is apparent that indeed a redundancy situation existed within the Respondent which led to the laying off of staff. However, the procedure in carrying out the redundancy is flawed and thus the Claimant’s redundancy was unprocedural.

On Underpayments

From the evidence of the parties and the documents on record it is clear that the Claimant was appointed to act as Head Chef. RW2 stated that the work of a Sous Chef was to deputise the head chef.

The Respondent maintained that the Claimant acted as Head Chef for a specific period and that he was paid an acting allowance of 5,000/= which the respondent withdrew once he ceased to act in that capacity.

The letter appointing him as head chef dated 23rd February 2011 reads:

“23rd February 2011

Mr. Dennis O. Mullo

Ashnil Samburu

Dear Dennis

RE: POSITION OF ACTING HEAD CHEF

Following the various consultations and discussions by the management, we are pleased to leave you to the above mention position with effect from 1st February 2011.

The position is being offered to you on a three month trial basis after which a comprehensive appraisal of your work performance, personal conduct, quality of customer service delivery and team will be carried out to determine your suitability to this position.

You will be given an acting allowance of Kshs.5,000.00 during the three months trial period.

Other terms and conditions will remain as per your appointment letter.

Congratulations on this appointment and we trust that we can count you to meet and even surpass the challenges that come with this position.

Yours Sincerely

SIGNED

SIGNED

Rajab Bhandari

W. V. Ominde

Managing Director

Human Resources Manager

cc. FC”

There was no evidence led to show that an appraisal was done for the claimant to fill in the position of Head Chef.

It is clear from the letter that the Claimant was acting as head chef for the initial 3 months and continued to act in the capacity for over an year whereas the letter appointing him as such required him to so act for 3 months and thereafter his assumed duties would cease. The Respondent ought to have conducted the review as was required and offered him the position of head chef or withdrawn his acting allowance so as to be clear that he was serving as a sous chef. The Claimant having acted as Head Chef for longer than the three months in the letter appointing him as such is entitled to the acting allowance for the entire period that he acted as Head Chef. He is however not entitled to the salary for Head Chef as he was never appointed to the position.

Furthermore the letter transferring him to Aruba Camp dated 19th July 2012 reads –

“19th July 2012

Mr. Dennis O. Mallow

Ashnil Samburu Camp

Dear Dennis

In consultation with the management team at Head Office, we write to advise you that will be transfer to Ashnil Aruba in the position of Sous Chef.

Please liaise with the Unit Manager to enable you take a few days off but do ensure that you report at Aruba by latest Wednesday, 1st August 2012. Please wait at Jaihari Supermarket to Voi where you will be picked up by the staff transport. You are required to take with you all your uniforms.

Please also note that the acting allowance of Kshs.5,000 will be withdrawn effective 1st August 2012.

We look forward to your continued commitment and co-operation in the future.

Yours Sincerely

SIGNED

SIGNED

Rajab Bhandari

W. V. Ominde

Managing Director

Human Resources Manager”

cc. MD, FC, Unit Manager – Samburu, Unit Manager – Aruba”

Further, the Respondent denied that the Head Chef earned a salary of Kshs.85,000/= and the Claimant did not produce any document that would lead the Court to award under this head. This claim fails for want of proof.

On Overtime

In cross-examination the Claimant admitted that there was a 2 hour break in between shifts and that he accumulated off days and took time off every 2-3 months. RW2 led evidence to the effect that the Respondent’s lodges have rotating shifts: Breakfast shift from 5 am – 10 am then report back at 3 pm – 6 pm. The normal shift workers report at 8.30 am – 3 pm, take a break and then report back at 6 pm to 9.30 pm. That the head chef and the sous chef were supervisory staff and the sous chef is the deputy of the Head Chef.

The foregoing being the case, I find that the claimant has not proved that he worked overtime hours that were not paid.

The Claimant admitted in evidence to have been issued with a Certificate of Service and therefore the prayer for issuance of a Certificate of Service is redundant.

Conclusion

In conclusion I find the reasons for declaring the claimant redundant valid but the procedure wanting as the notice under Section 40(1)(a) as read with 40(1)(b) were not complied with in respect of notification of redundancy. The notification for redundancy relied upon by the respondent is dated almost a year before the redundancy that is 25th October 2013, while the claimant was declared redundant by letter dated 22nd July 2014. Further, there was no notification to the Labour Office. The letter of redundancy was also not copied to the local Labour Office.

The foregoing being the case I award the claimant three (3) months' salary as compensation for the unprocedural redundancy in the sum of Kshs.146,520.

The prayers for underpayments and overtime have however not been proved and are dismissed.

The respondent shall pay claimant's costs for this suit and decretal sum shall attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE