



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 98 OF 2018

JOSEPH CHEGE NJERI.....CLAIMANT

VERSUS

BOLLORE TRANSPORT AND LOGISTICS

KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking relief for unlawful termination, discrimination and refusal to pay terminal dues. The Claimant averred that he was employed by the Respondent as a Health Safety Environment and Truck Inspector earning a basic salary of Kshs. 12,000/- per month. He averred that on 5th November 2012 he was promoted to the position of a compliance officer in the Quality Health Safety Environment (QHSE) earning a basic salary of Kshs. 30,000/-. The Claimant averred that the salary was reviewed upwards by 4% per annum and it eventually was enhanced to a basic salary of Kshs. 38,281/- per month. He averred that prior to the promotion, he was a member of the Kenya Aviation and Allied Workers Union (KAAWU), which membership he terminated as the Respondent required him to do that before promoting him to a compliance officer. The Claimant averred that on 29th December 2017 he was maliciously singled out by the Respondent who alleged that his role in the company had become obsolete and unfairly and unlawfully dismissed him from employment. The Claimant averred that he was not paid house allowance, leave allowances, terminal dues and he was also not issued with a certificate of service. The Respondent averred that the Respondent's actions are in contravention of Sections 5(3), 9, 31, 35, 36, 40, 43 and 45 of the Employment Act and Articles 27 (3), 28, 41 of the Constitution of Kenya. The Claimant thus sought compensation for wrongful termination, his terminal dues and benefits, house allowance of Kshs. 361,755/-, compensation for unlawful loss of employment – Kshs. 459,372/-, accrued annual leave Kshs. 133,984/-, general damages for unfair labour practices, general damages for discrimination, interest on the sums claimed plus costs of the suit.

2. The Respondent filed a defence and in the response averred that the redundancy exercise involved several departments and denied that the exercise targeted the Claimant. The Respondent contended that it undertook the process as stipulated under the law with regard to all employees who were to be affected by the exercise. It averred that for the employees who were members of the Union, it engaged the Union and the employees, but for the Claimant and the rest who were not members of any union, it engaged with them and the labour office prior to termination. The Respondent further averred that the Claimant was called to collect his certificate of service but declined to do so. It averred that his salary was inclusive of house allowance and that the Claimant had utilized all his leave days and therefore was not entitled to payment in lieu of leave days. The Respondent averred that the Claimant was duly paid all his dues and that it followed due process as provided by law which included engaging the Claimant from the onset culminating into the notice of redundancy. The Respondent averred it invited the Claimant to undergo a counseling session but he declined to and thus contended that the Claimant is not entitled to the sums claimed.

3. During the hearing of the case, the Claimant testified as well as the Respondent's witness Ms. Jen Wairimu. The Claimant testified that his termination was unfair as the redundancy notice states that his position was QHC officer and yet he was a compliance officer. He stated that QHC was the department he was working in as a compliance officer. He stated that he was not employed under Tullow Oil and that Tullow Oil was their client alongside many other clients. He testified that he was called to the Head of Department's office before termination and he was briefed of the intention to declare him redundant. He confirmed that he was invited to a counseling session but he chose not to attend because it was optional. He testified that he was paid some Kshs. 78,000/- and stated that it was severance pay for each completed year as per CBA. In cross-examination he testified that he used to go on leave as shown in the leave application forms from 2012-2017. He stated that however, he was not given leave travel allowance. In re-examination, he stated that he was promoted from the position of HSE and Trucks Inspector to Compliance Officer from 1st October 2012. He stated that the fleet of trucks that required inspection were decommissioned and the company did not secure contracts. He stated that this was under the transport department which he was not part of. He testified that he had the role of truck inspection but he was given other roles. He stated that the role of truck inspection was not in his job description and that his role was not obsolete.

4. The Respondent's witness Jen Wairimu stated that she was working in the Respondent's HR department. She adopted her statement and

testified that the Claimant was an HSE and Truck Inspector in the quality department and that he was promoted to compliance officer in October 2012. She testified that the Claimant was doing inspection in the oil and gas business and that he dealt with Tullow Oil and at the time, the company lost contract with Tullow as the business was not feasible. She stated that the Respondent then did away with the business and it affected several staff members and in the department where the Claimant worked with three other staff members who were affected. She stated that the Claimant was issued with notice of intention to terminate his services and the letter indicated the reason for termination. She testified that the Claimant's position had become obsolete due to the loss of oil and gas business and his job was therefore rendered redundant and the areas he could have been reassigned were being wound up. She stated that the Claimant had taken his leave days and the remaining 5 days of leave were paid alongside his terminal dues. She stated that his salary was inclusive of allowances and that the certificate of service was ready but the Claimant failed to collect it. She testified that all the perks that were itemized when the Claimant was unionisable were consolidated to the pay he got on promotion.

5. The parties filed submissions and the Claimant's submissions were to the effect that the issue in contention is the circumstances of his termination. He submitted that the Respondent's witness had testified that it had decommissioned trucks and therefore truck inspection was no longer a role within its structures and it had to shut down the transport department as a result. He submitted that however the defence witness could not tell how many trucks were decommissioned and also could not tell when the Respondent entered into a contract with Tullow Oil. The Claimant submitted that the witness had testified that the decommissioned trucks were for the wind power project which was totally different from Tullow Oil, the one that the claimant was supposedly engaged in. The Claimant submitted that the Respondent is an international company and to say that it no longer carries business is akin to saying that Kenya Airways no longer flies and it is therefore a clear demonstration of denial of justice to the Claimant by the Respondent. The Claimant submitted that upon receiving a promotion his role changed from HSE and Trucks Inspector to Compliance Officer and he therefore ought not to have suffered when the transportation department was allegedly shut down. He submitted that the Tullow Oil project began in 2013 and ran up to 2015 whereas the Claimant's contract of employment was from 1st September 2011 to 29th December 2018. He submitted that the timelines of the project and his employment do not match. He submitted that Tullow Oil was a client like any other and his contract had nothing to do with the contract between Tullow Oil and the Respondent. The Claimant submitted that his role still exists and that his termination was unfair. He submitted that the Respondent did not produce the job description and placed reliance on the case of **Carolyne L. Musonye v The Panari Hotel Limited [2017] eKLR** where the court stated that Section 10(2)(c) of the Employment Act requires that an employer while giving an employee an employment contract and details of such employment or the particulars thereof is to also set out the job description. The Claimant submitted that the failure to do so was a serious omission that legally has the implication that the Claimant was an employee at large who had no job description in terms of Section 10 of the Employment Act. The Claimant submitted that there was no evidence to support the Respondent's averment that the Claimant was employed for the sole purpose of serving under Tullow Oil. He submitted that his evidence in regards to his roles remained uncontroverted and contended that the defence witness did not know him and it was therefore not correct for her to state that the Claimant could not be reassigned anywhere as his skillset did not qualify him whereas she knew nothing about him or even the roles he performed prior to the alleged redundancy. The Claimant relied on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** and submitted that the termination was not procedurally fair or justified as he was not issued with a notice of the intended termination. He thus sought the awards as prayed in the memorandum of claim.

6. The Respondent submitted that the Claimant was a trucks inspection and safety officer. It submitted that it had previously been engaged by Tullow Oil to provide services but that the client had however scaled down its services resulting in the loss of the contract. The Respondent submitted that it was therefore not able to sustain the services of the Claimant as well as 53 other employees resulting in the redundancy. The Respondent submitted that the Claimant was called for a meeting on 22nd November 2017 and informed him of the decommissioning of trucks and that the company had not been able to secure some contracts that it previously had. It submitted that it informed him that as a result, his position would be declared redundant as it was no longer aligned to the needs of the organization. The Respondent submitted that it had not only lost the contract for the oil industry but had as a result opted to decommission the entire transport department within which the Claimant worked and all members of staff within the said department were therefore declared redundant. The Respondent submitted that Section 45(2)(b) of the Employment Act allows the employer to terminate the services of an employee based on operational needs and having re-evaluated its operations and business, it was clear that certain positions were no longer aligned to the needs of the Respondent. The Respondent submitted that the Claimant was offering his services within the transport departments and based on the decommissioning of the department and restructuring of the company there was a valid reason for the termination of the Claimant's services on account of redundancy. The Respondent submitted that the Claimant did not tender any evidence to support his claim on discrimination. It submitted that several other colleagues of his were laid off as well. The Respondent submitted that if followed due procedure as provided under Section 40 of the Employment Act as it invited the Claimant to a meeting and explained the position to him, issued him with a notice of redundancy and also invited him to a counseling session which the Claimant declined to attend. It submitted that the labour officer was also served with the said correspondences. The Respondent submitted that the Claimant was paid his dues and issued with a certificate of service. The Respondent submitted that there were valid reasons for the termination, that it adopted fair procedure and that the Claimant had failed to establish any malice or ill will on the part of the Respondent and his claim should be dismissed.

7. The issues that led themselves for determination are Whether or not redundancy was justified in this case

- i) Whether the respondent followed due process in declaring the claimant's position redundant.
- ii) Whether the claimant is entitled to the reliefs sought.

As to whether or not redundancy was justified in this case, both sections 2 of the Employment Act and Labour relations Act define redundancy thus:

“The loss of employment, occupation, job or career by involuntarily means through no fault of the 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.”

Section 43(1) of the Employment Act provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

“43.(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. In the case of **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR** Onyango J. the Principal Judge of this Court stated that:-

“The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment”.

The Claimant was undertaking inspection in the oil and gas business and he dealt with Tullow Oil and at the time. The Respondent lost the contract with Tullow and the business was not feasible. It then did away with the business and it affected several staff members including the Claimant. The Claimant confirmed that the oil and gas work was his additional assignment. The Claimant used to work in the Quality Health Safety and Environment which department was mandated with ensuring and maintaining safety of the work environment and therefore its services cut across the entire organization. However, with change in the client’s QHSE requirements the demand for the Claimant as a QHSE resource diminished since the QHSE standards were significantly shifted leaving the Respondent with little option but to terminate the Claimant’s services on account of redundancy since that line of business was no longer viable. The Claimant as a compliance officer had a role of inspection of trucks and containers before sending them to various clients for loading. The fleet of trucks that required his inspection were decommissioned and the company did not secure fresh contracts and this indeed shows that the Claimant’s job had become obsolete and the Respondent had a valid reason to terminate his services on account of redundancy.

8. As to whether the Respondent followed due process in declaring the Claimant’s position redundant, justification is but one aspect of redundancy, the other considerations are the mode and manner of selection of the employees whose services will be rendered obsolete. The Respondent was required to notify the Claimant that he was to be declared redundant alongside the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect. In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees. Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union and the employer must pay the employee any leave due in cash. The Respondent was required to pay the Claimant at least one month’s notice or one month’s wages in lieu of notice and severance pay at the rate of not less than 15 days for each completed year of service. It is common ground in this case that the Claimant was not a member of a union and therefore the notice he was entitled to ought to have been issued in accordance with section 40(1)(b). The period of one month is intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under Section 40(1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the Labour Officer to ensure that the redundancy will be carried out in accordance with the Act. For a termination of employment on account redundancy to be legal, the employer must prove that both the Labour Officer and the employee or the employee’s union, where there is one, have been notified at least one month before the redundancy takes place. In this case, the Claimant was summoned to a meeting on 22nd November 2017 where the Claimant’s Manager and Human Resource Manager were present. The Claimant was informed of the intended redundancy and at the said meeting the Respondent issued the Claimant with the notice of intended redundancy. The Respondent invited the Claimant to attend a counseling session prior to his termination but the Claimant opted not to attend. The Respondent thereafter, in line with the notice, by letter dated 29th December 2017 issued the formal notice of redundancy which was to take effect on 2nd January 2018 and proceeded to stipulate the payments to be paid to the Claimant, and this included severance pay. The Respondent stated that it served all correspondences upon the labour officer. However, the letter to the labour officer is dated 1st March 2018, two months after termination of the Claimant which was effected on 2nd January 2018. There is no proof that the labour officer was served a month earlier before the termination was effected. This therefore flouted the process that was followed before terminating the Claimant on account of redundancy. The other issue contested by the Claimant is the selection criteria and he alleges that he was discriminated against in selection while the Respondent avers that the Claimant was one among the 54 employees declared redundant. The notice to the Labour Officer states that the extent of the redundancy affected 54 employees in various cadres including 22 unionisable and 32 being management cadre. The issue of discrimination does not therefore arise since indeed the Claimant has not provided any evidence to show that he was the only one singled out and his position declared redundant. In my view therefore, since no proper notice was given to the labour officer and since the actual letter of termination of the Claimant did not give him sufficient notice and despite the fact that the redundancy itself was justified, the Claimant’s termination amounted to unfair termination of employment. That being my view of the matter, I now wish to turn to the remedies that the Claimant was entitled to. The Claimant sought general damages for discrimination. However, the Claimant has not demonstrated that he was discriminated against and this aspect of the claim fails. The Claimant prayed for one month’s salary in lieu of notice. The Respondent produced a pay slip showing that the Claimant was indeed paid for two months in lieu of notice, leave dues and severance pay. The termination on account of redundancy was improperly carried out and based on the findings above, I hold that the Claimant is entitled to compensation for unfair termination which is three months’ salary – Kshs. 114,963/-. He will also be entitled to costs of the suit. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. Kshs. 114,963/- being compensation for the irregular redundancy
- ii. Costs of the suit
- iii. Interest at court rates on the sum in i) above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 18th day of June 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar