



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1868 OF 2013

MOSES NGUMO.....CLAIMANT

- VERSUS -

EAST AFRICAN BREWERIES LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 22.11.2013 through Kamotho Njomo & Company Advocates. The amended memorandum of claim was filed on 22.11.2015 and the claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from the respondent's employment was unprocedural, unfair, and unlawful and unconstitutional.
- b) Damages equivalent to 12 months' salaries being Kshs.6, 000, 000.00.
- c) Exemplary damages.
- d) Compensation for violation of the claimant's constitutional rights.
- e) Certificate of service.
- f) A fine of Kshs. 100, 000.00 against the respondent for failure to comply with mandatory provisions of section 51(3) of the Employment Act, 2007.
- g) Interest on (b), (c) and (d) above.
- h) Costs of the suit.

The respondent filed the memorandum of reply on 30.03.2017 and through Oraro & Company Advocates.

It is not in dispute that the respondent employed the claimant by the letter of appointment dated 09.04.2002 as a Service Delivery Manager, IT and the claimant worked with the respondent since then and was promoted to hold various senior positions and seconded to various countries. The claimant served until in 2013 when his employment was terminated. The respondent has admitted paragraphs 6 and 7 of the amended memorandum of claim thus:

“6. Prior to the unfair termination of the claimant as a Service Delivery Manager, ARM Other Markets was, at all material times relevant to this claim, being managed by one Mr. Sammy Abordo (hereinafter referred to as the Line Manager). As the claimant's then Manager, the said line Manager was expected to conduct half yearly performance review of the claimant and present in a calibration meeting of Senior Global Diageo Business Services (GDBS) Managers and Global Diageo Business Services Director Africa (who constitute the performance calibration panel) of the respondent for further deliberations and decisions on the claimant's performance.

7. The Africa GDBS team half year performance calibrations were completed in January 2013 for all staff for the period ending December 2012.”

The parties are in agreement that sometimes in 2013 the claimant's performance was rated as below expectation (BE). The claimant made a

grievance in that regard, a panel was appointed to review the rating and by the letter dated 09.10.2013 the decision on the rating BE was upheld. The decision upholding the BE rating was conveyed to the claimant by the respondent's letter dated 16.12.2013. The letter addressed to the claimant and signed by the Legal Counsel one Alison Kariuki-Mbuthia stated,

“Reference is made to your email dated 20th November 2013 to the EABL Group MD requesting a detailed review of the handling of the complaint raised by yourself to the business in August 2013 touching on your performance rating, while you were in the employ of the company.

The company appointed an independent panel to review the specific complaints that you raised. The independent panel did not find any evidence to support the allegations raised by yourself and we therefore wish to confirm that the process adopted in relation to your performance rating for F13 was in conformity with the company's internal policies and the law.”

By the letter dated 22.10.2013 the claimant had received a one month notice of intended redundancy on account of restructuring of the company's business in the process, affecting the office held by the claimant. The claimant's employment was subsequently terminated on account of redundancy with effect from 22.11.2013 as per the letter of the same date. The redundancy letter set out the applicable redundancy package including:

- a) Salary and allowances earned up to and including 22.11.2013 of Kshs.361, 732.82.
- b) Three (3) months' gross pay in lieu of notice Kshs.1, 590, 932.54.
- c) Pay for accrued leave of 22.3 days Kshs. 367, 158.81 based on claimant's current base salary.
- d) Severance pay at the rate of 21 days' base pay for each completed year of service being 11 years, 5 months and 12 days making Kshs.4, 008, 326.16.
- e) The accumulated benefits in the retirement benefits scheme 2003 up to and including November 2013.

The letter stated that the amounts tabulated were based on the claimant's F14 consolidated base salary of Kshs.500, 123.02 per month plus his monthly mortgage of Kshs.30, 187.83 as applicable. The letter further stated that the claimant would be entitled to access medical care for any currently ongoing treatment through the Employee Medical Scheme for the next six months up to including 21.05.2014 and the cover extended to the claimant's dependents then, on the scheme. The letter required the claimant to sign in duplicate and retain the original and return the other copy with duly completed clearance forms. The claimant's certificate of service was enclosed.

The claimant's case is that the appraisal case, as per his complaint to the respondent, was to be completed prior to the redundancy decision and that the rating had a bearing on the redundancy decision. If the rating had been varied in his favour, the claimant testified that a new salary would have been confirmed so that he would have earned more in redundancy package. He relied on Ifeoma's correspondence at page 14 of the respondent's documents thus, **“As Moses acknowledges, the re-organisation and Victimisation case are 2 separate cases but agree that we need to conclude the victimisation case to progress to the re-organisation decision. I find the victimisation claim unsubstantiated.”**

The claimant testified that his line manager was Sammy and his grandparent (line manager's manager) was Alex and they both appraised him as below expectation (BE). The claimant further testified as follows:

- a) It was clear to him that there was reorganisation within the respondent's company.
- b) When he received redundancy notice he wrote to the Managing Director stating that he had been victimised and targeted.
- c) He wanted issue of victimisation handled prior to the issue of redundancy. It was his case that he had not been accorded opportunity on the issue of victimisation prior to the redundancy but subsequently, a panel reviewed the matter and found he had not been victimised and decision was conveyed to him as per the letter of 16.12.2013.
- d) After receiving the redundancy notice the matter of redundancy was not discussed but the claimant applied for a role outside the respondent's establishment but got no feedback.
- e) If the rating of BE had been reviewed in his favour he did not know the amount of more money he would be paid under the redundancy package.
- f) He had received the redundancy package as promised in the redundancy letter.
- g) The role of project manager was available and he would take it up if he was given chance and in view of the looming redundancy.

The respondent's witness (RW) was Evans Mutai. His evidence was that the claimant was terminated after due notice of 22.10.2013 and he left on 22.11.2013. The reason for restructuring was reorganisation in the African Regional markets and the claimant's role and 3 others were abolished. RW testified that there was a new role of Project Manager but it did not last because the whole of Africa Regional markets collapsed. RW did not exhibit a notice to the labour officer as per section 40 of the Employment Act, 2007 but stated that it had been issued in August 2013. Further, RW stated that the redundancy notice informed the claimant to seek any clarification as he may have wished from Paul Kasimu, Group HR Director or the HR Business Partner as he deemed necessary.

To answer the **1st issue** for determination, the Court returns that it has been established that the respondent did not serve the relevant notice to the labour officer and the claimant as provided under section 40 of the Employment Act, 2007. In view of that failure, the Court returns that the procedure for redundancy was not followed and therefore the redundancy amounted to unfair termination. The Court returns that the claimant testified that he was aware of the restructuring as conveyed to him by the respondent and the Court returns that the reason for termination was therefore genuine or valid as at the time of termination. The Claimant has prayed for 12 months compensation. The Court has considered the factors in section 49 of the Act. Whereas the termination was founded upon valid ground, it is clear that the respondent failed to consider the pending claimant's complaint against the BE rating which aggravated the unfairness in the termination. The Court finds that nevertheless the respondent mitigated the aggravating factor by belatedly concluding and determining the appeal against the BE rating but long after the termination. The Court finds that the termination letter gave clear channels for clarifications and therefore avenues for consultations had been provided. The Court has considered the mitigating factor that the claimant was retained on the medical cover for 6 months after the termination. To balance justice for the parties the claimant is awarded 2 months' salaries at Kshs.530, 310.85 gross monthly pay making **Kshs.1, 060, 621.70**.

To answer the **2nd issue** for determination the Court finds as follows on the other remedies as prayed for:

- a) The claimant confirmed he was paid redundancy package per letter of redundancy dated 22.11.2013 including salary and allowances earned up to and including 22.11.2013 of Kshs.361, 732.82, three (3) months' gross pay in lieu of notice Kshs.1, 590, 932.54, pay for accrued leave of 22.3 days Kshs. 367, 158.81 based on claimant's current base salary, and severance pay at the rate of 21 days' base pay for each completed year of service being 11 years, 5 months and 12 days making Kshs.4, 008, 326.16. The prayers will therefore fail as already satisfied.
- b) The claimant has not established violation of rights as prayed for and the Court further finds that the claimant's concerns about redundancy decision coming prior to the determination of his grievance on BE rating has already been considered in awarding 2 months compensation. In any event the grievance was belatedly determined. There is no evidence and submissions on record to justify exemplary damages.
- c) The certificate of service was attached on the redundancy letter of 22.11.2013. It appears the claimant declined to accept it in view of the emerging dispute. The same may be delivered to the claimant. However, there shall be no finding of criminal liability and imposition of a fine as prayed for because the present case was obviously not a criminal proceeding whose rules and standards of proof are higher and in any event, the respondent was willing to give the certificate of service.
- d) Considering the parties' margins of success, the respondent to pay 50% of the claimant's costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the termination by the letter of redundancy dated 22.11.2013 was unfair.
- 2) The respondent to pay the claimant **Kshs.1, 060, 621.70** by 01.09.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 3) The respondent to pay the claimant's 50% costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 19th July, 2019.

BYRAM ONGAYA

JUDGE