



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 104 OF 2017

MERCY MBITHE NDUNDA.....1ST CLAIMANT

AMOS AKUNGU.....2ND CLAIMANT

VS

HABO GROUP OF COMPANIES LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Mercy Mbithe Ndunda and Amos Akungu against Habo Group of Companies Limited. The claim is documented by a Memorandum of Claim dated 8th February 2017 and filed in court on the same date. The Respondent's defence is by way of a Memorandum of Response dated 30th June 2017 and filed in court on 3rd July 2017.

2. When Counsel for the parties appeared before me on 20th March 2019, they informed the Court that the parties had chosen to dispense with the matter by way of written submissions.

The Claimants' Case

3. The 1st Claimant, Mercy Mbithe Ndunda states that she was employed by the Respondent as a Shipping Secretary from 1st December 2011 until 26th July 2016, when her employment was terminated.

4. The 2nd Claimant, Amos Akungu states that he was employed by the Respondent in the position of Operations Manager from January 2014 until 8th September 2016, when his employment was terminated.

5. At the time of termination, the Claimants earned a monthly salary of Kshs. 50,000 each.

6. The Claimants claim that the termination of their employment was unlawful and unfair. The 1st Claimant further claims that he was not paid salary for the months of June and July 2016. The 2nd Claimant states that he was not paid salary for the month of August 2016.

7. The Claimants' claims are as follows:

1st Claimant: Mercy Mbithe Ndunda

- a) One month's salary in lieu of notice.....Kshs. 50,000
- b) Leave pay for 4 years.....200,000
- c) Prorata leave pay for 14 days in 2016.....23,333
- d) House allowance @ 15% of basic salary.....405,000
- e) Salary for the months of June & July 2016.....100,000
- f) Service pay @ ½ month per year.....100,000

- g) Pension Fund.....32,400
- h) SACCO Savings.....20,100
- i) Severance pay.....600,000
- j) Compensation for unlawful termination.....600,000

2nd Claimant: Amos Akungu

- a) One month's salary in lieu of notice.....Kshs. 50,000
- b) Leave pay for 2015.....50,000
- c) Prorata leave pay for 14 days in 2016.....29,999
- d) House allowance @ 15% of basic salary.....247,500
- e) Salary for the month of August 2016.....50,000
- f) Service pay @ ½ month per year.....50,000
- g) Pension Fund.....19,800
- h) SACCO Savings.....9,900
- i) Severance pay.....600,000
- j) Compensation for unlawful termination.....600,000

8. The Claimants also seek certificates of service and costs of the suit.

The Respondent's Case

9. In its Memorandum of Response dated 30th June 2017 and filed in court on 3rd July 2017, the Respondent denies ever employing the Claimants. The Respondent further denies terminating the Claimants' employment and adds that if any termination was effected, then it was proper and lawful.

10. The Respondent states that the documents relied upon by the Claimants confirm that they held meetings with their employer on 19th July 2016 and the employer notified them of the termination of employment, which was to take effect on 24th August 2016.

11. The Respondent maintains that due process was followed and the Claimants were given a proper hearing and a decision was arrived at between them and their employer. The Respondent claims that the Claimants were paid all their terminal dues and were issued with certificates of service.

12. The Respondent goes on to state that any termination of the Claimants' employment was done by their respective employers and not the Respondent.

Findings and Determination

13. There are two (2) issues for determination in this case:

- a) Whether the Claimants have proved a case of unlawful termination of employment against the Respondent;
- b) Whether the Claimants are entitled to the remedies sought.

Unlawful Termination?

14. The 1st Claimant filed a termination letter dated 26th July 2016, addressed to her by the Respondent as follows:

"TERMINATION OF EMPLOYMENT

Due to economic forces beyond our control, HGC has been forced to make some difficult decisions. To survive in this market the company will be undergoing re-organization and streamlining process.

It is with great regret that we must inform you that your employment at Habo Group of Companies is terminated. This layoff is due to low business and company restructuring. Your file shall be retained and you may be recalled back when the situation improves.

We will provide you with the appropriate amount of termination pay based on your time with the Company as per The Employment Act 2007, your employment letter and Labour Standards. You are advised to proceed and clear with all relevant departments to facilitate payment of your final dues.

Yours faithfully,

For & on Behalf of

Habo Group of Companies Ltd.

(Signed)

AUTHORISED SIGNATORY

15. The 2nd Claimant filed a similar letter dated 8th September 2016, according to which her employment was to be terminated immediately.
16. The Respondent did not contest the authenticity of these letters. The Court therefore took them as conclusive evidence of the mode of the Claimants' exit from the Respondent's employment. On the face of the said letters, the reason for termination of the Claimants' employment was by way of declaration of redundancy.
17. Section 2 of the Employment Act, 2007 defines redundancy as:

“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.”

18. While the law recognises redundancy as a legitimate mode of termination of employment, it sets stringent conditions to be observed by the employer. The conditions, which are codified by Section 40 of the Employment Act, 2007 may be categorised under three heads namely; redundancy and termination notices, objective selection criteria and prior payment of statutory dues.
19. As held by this Court in ***Cleophas Omuga v Habo Group of Companies [2019] eKLR***, the Conditions under Section 40 are mandatory and any termination that circumvents any of them is unfair under Section 45 of the Act. From the evidence on record, the Respondent did not comply with the conditions on declaration of redundancy and the ensuing termination was therefore substantively and procedurally unfair. Consequently, the Claimants are entitled to compensation.

Remedies

20. In light of the foregoing findings, I award the 1st Claimant six (6) months' salary and the 2nd Claimant four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' respective periods of service plus the Respondent's failure to observe the law in effecting the termination.
21. I further award each of the Claimants one (1) month's salary in lieu of notice.
22. Having been declared redundant, the Claimants were by law entitled to severance pay. The Respondent did not provide any evidence of having made this statutory payment to the Claimants. The claim thereon therefore succeeds and is allowed.
23. The Claimants also claim house allowance. However, the 1st Claimant's offer of employment dated 4th September 2013 and the 2nd Claimant's payslip for the month of March 2016 show that the Claimants were paid consolidated salaries. The Claimants payslips also show that they were contributing members of the National Social Security Fund (NSSF). The claim for house allowance and service pay are therefore misplaced and are dismissed.
24. The Claimants did not lead any evidence to prove their claims for leave pay, salary arrears, pension and SACCO savings. These claims therefore fail and are dismissed.
25. Finally, I enter judgment in favour of the Claimants as follows:

1st Claimant: Mercy Mbithe Ndunda

- a) 6 months' salary in compensation.....Kshs. 300,000
- b) 1 month's salary in lieu of notice.....50,000
- c) Severance pay for 4 complete years of service.....100,000

Total.....450,000

2nd Claimant: Amos Akungu

a) 4 months' salary in compensation.....Kshs. 200,000

b) 1 month's salary in lieu of notice.....50,000

c) Severance pay for 2 complete years of service.....50,000

Total.....300,000

26. These amounts will attract interest at court rates from the date of judgment until payment in full.

27. The Claimants will have the costs of the case.

28. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2019

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JUDGE

Appearance:

Mr. Nyange Sharia for the Claimants

Mr. Bosire for the Respondent