



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1435 OF 2015

BENSON OTIENO DACHO.....CLAIMANT

-VERSUS-

ELLAMS PRODUCTS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 17.08.2015 through Betty Rashid & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Kshs.375, 350.00.
- b) Certificate of service.
- c) Costs of the claim plus interest.
- d) Any other relief the honourable Court may deem just.

The Kshs.375, 350.00 included:

- a) 3 months' salary in lieu of termination notice Kshs.46,350.00.
- b) Leave due and accruing one month salary Kshs.15,450.00.
- c) Leave travel allowance Kshs.5,000.00.
- d) Overtime Kshs.10,000.00.
- e) Days worked Kshs.5,000.00.
- f) 7 years severance pay at one month salary per year $Kshs.15,450 \times 7 = Kshs.108,150.00$.
- g) General damages for unlawful termination 12 months x Kshs.15,450 = Kshs. 185,400.00.

The claimant's case is that he was employed by the respondent as a machine attendant from January 2007 to March 2015. In 2010 the claimant joined the trade union. The respondent allowed permanent staff to join the union but not the casual staff. In April 2011 the respondent introduced annual contracts and the claimant signed accordingly in April 2011, April 2012, April 2013 and April 2014.

The claimant's further case is that in October 2014 he raised a grievance that his union dues were not being deducted and remitted. Further in November 2014 the management representative summoned the claimant and questioned him about the issue of union dues. The claimant's case is that in January 2015 the management representative informed the claimant that the issue of recruiting members to join the union was with the top management and the claimant was threatened that if he did not withdraw from the union worse action would be taken against him. In February 2015 the management representative one Nduma told the claimant the matter was hot and might cut off his legs or neck depending with the management decision. Further the claimant took the view that it was his constitutional right to be in the union. Further on

02.04.2015 at 6.40pm the Human Resource Manager and his assistant summoned the claimant and handed him the letter dated 27.02.2015 being a release from the service. The letter stated that the respondent had resolved to downsize due to reduced work in the department the claimant was serving. The release was effective 01.03.2015. The claimant's case was that the respondent failed to follow the redundancy procedures. The dispute was reported to the labour office but there was no amicable resolution.

The respondent filed the reply to the memorandum of claim on 15.12.2015 and through Muchui & Company Advocates. The respondent denied the claimant's claims and prayed that the claim herein be dismissed with costs. The amended reply to the memorandum of claim was filed on 05.05.2017 and the respondent's case was as follows:

- a) The claimant was employed on a one year contract effective 01.04.2011. That prior to that date the claimant had been engaged intermittently as a casual employee.
- b) The redundancy was lawful as per correspondence exchanged between the respondent and the claimant's trade union Kenya Union of Printing, Publishing, Paper Manufactures, Pulp and Packaging Industries (KUPRIPUPA) and several employees were affected.
- c) The claimant's terminal dues were Kshs.86, 716.00 per letter dated 13.04.2015 and the net pay was Kshs.34, 907.00 after deduction of tax and other liabilities. The certificate of payment was duly issued.
- d) The contractual notice pay was one month and not 3 months as claimed for the claimant.
- e) The claimant had 10 days leave computed at Kshs. 6, 424.00.
- f) Leave traveling allowance lacked contractual basis.
- g) Overtime due was Kshs.2, 012.00 as at redundancy and not Kshs.10, 000.00 as claimed.
- h) Termination was on 01.03.2015 meaning the claimant was entitled to one day worked in March Kshs.515.00.
- i) 7 years' severance pay works out at Kshs.62, 395.00 as per the respondent's letter of 23.02.3015.
- j) The termination was not unlawful and claims for unfair termination and compensation should fail.
- k) The trade union reported a trade dispute but the respondent replied by the letter of 23.04.2015 stating it had fully settled the claim.

The Court has considered the evidence on record, the pleadings and the submissions. The Court makes findings as follows:

- 1) The claimant testified that the respondent employed him on 25.06.2007 as a machine operator. The respondent's witness (RW) testified that the claimant worked for the respondent since 2007. The certificate of service also shows that the claimant worked for the respondent from 25.06.2007 to 02.03.2015 in the perforation department as a machine attendant. The Court returns that the respondent employed the claimant on 25.06.2007. The termination was by the letter dated 27.02.2015 effective 01.03.2015 and delivered to the claimant on 02.03.2015. The Court finds that the claimant worked for the respondent for 7 complete years. The annual contracts subsequently introduced by the respondent did not impair the claimant's unbroken service and as acknowledged by the respondent in the certificate of service.
- 2) The letter dated 27.02.2015 shows that the reason for redundancy was downsizing. While the claimant urged a case that he was terminated on account of lawful trade union membership and activities, there was no evidence of such grievance prior to the termination. By his own pleading he had been a member of the trade union for a long time. The claimant raised the issue of victimization on account of union membership after he had been terminated. RW testified that more efficient machines were introduced leading to the claimant's redundancy. RW further testified that since 1998 the respondent had recognised the union. The Court returns that the reason for termination was redundancy.
- 3) The respondent has admitted that the claimant was a member of a union. Under section 40(1) the respondent was required to notify the trade union and the area labour officer reasons for and the extent of the intended redundancy not less than a month prior to the intended date of termination on account of redundancy. The claimant's termination was effective 01.03.2015 so that the contemplated notice had to be served on or before 01.02.2015. The notice to the labour officer is dated 15.01.2015 and received on 20.01.2015. The Court finds the notice was sufficient but the reason for redundancy was stated as work reduction in the respondent's business resulting into reduction of work in some sections including Simmex, Printing, Punching and Personalization Sections. There is no evidence that the requisite notice was served upon the claimant or the claimant's trade union. The Court finds that the reason for redundancy in the notice to the labour officer was at variance with the reason given in Court by RW and such contradiction by the respondent cannot be believed at all. The Court finds that while RW testified that 15 employees were affected in the redundancy, the notice to the labour officer did not specify that extent and no evidence of such termination of 15 employees was exhibited. In such circumstances, the Court finds that the termination was abrupt, the claimant was not prepared at all, the notice did not specify the extent of the redundancy, and the respondent did not exhibit or offer relevant evidence to show how the claimant was selected and targeted for the redundancy and as provided for in section 40. The redundancy and termination was unfair because it was in contravention of sections 40, 43 and 45 of the Employment Act, 2007.
- 4) The Court has considered the factors in section 49 of the Act. The claimant had a clean record of service and he desired to continue in employment. He had served the respondent for over 7 years with due dedication and loyalty. The aggravating factor is

that the respondent terminated the claimant abruptly without paying the terminal dues per section 40 of the Act. The Court returns 12 months' salaries in compensation for the unfair termination will meet the ends of justice being Kshs.15, 450.00 x 12 making **Kshs.185, 400.00** as prayed for. Section 40 of the Act prescribed a month's notice which was not given to the union or the claimant and then one other month pay in lieu of the contractual notice. The Claimant is therefore awarded 2 months' pay in that regard making Kshs. 15, 450 x 2 thus **Kshs.30, 900.00**. The claimant worked one day in March 2015 and is awarded **Kshs. 515.00** as admitted by the respondent. The claimant offered no evidence to justify the amount claimed for overtime and is awarded **Kshs. 2, 012.00** admitted for the respondent. The claimant also gave no evidence on the claim for leave and is awarded **Kshs. 6, 424.00** admitted for the respondent. As urged for the respondent, the claimant gave no evidence to justify the contractual basis for leave travel allowance and the claim will fail. Severance pay under section 40 of the Act is awarded at 15 days for each year worked and the claimant is awarded **Kshs.62, 395.00** as computed by the respondent and admitted accordingly. Thus the claimant is awarded a sum of Kshs.287, 646.00 less Kshs. 34, 907.00 the claimant acknowledged receipt on 24.04.2014 making **Kshs.252, 739.00** payable less PAYE . The certificate of service is on record and is superfluous to grant the prayer in that regard.

5) The claimant has succeeded in his claim and is awarded costs of the suit.

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

- 1) Payment of **Kshs.252, 739.00** by 31.12.2019 failing interest to be payable thereon from the date of this judgment till full payment.
- 2) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 29th November, 2019**.

BYRAM ONGAYA

JUDGE