



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.96 OF 2018

DANIEL MUCHIRI NDUNGU.....CLAIMANT

VERSUS

COMPLY INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

On 25th January, 2010 the claimant was employed by the respondent as supervisor in the security department at Njoro Branch on casual employment until 28th October, 2016 when employment terminated after he was issued with notice of redundancy on 28th September, 2016. At the time the claimant was earning Ksh.4, 098.00 per week.

The claim is that the notice issued was too short and resulted in unlawful termination. The terminal dues paid were wrongfully calculated as he was only paid ksh.134, 644.00. The respondent was paying for NSSF and for the unlawful termination of employment the claimant is seeking the payment of the following dues;

- a) Notice pay Ksh.16,392.00;
- b) House allowance;
- c) Leave earned Ksh.32,784.00;
- d) Compensation;
- e) Severance pay at 15 days x 16,392/30 x 2 years at ksh.16,392.00;
- f) Certificate of service.

The claimant testified that he worked for the respondent for 7 years and sometimes in October, 2016 he was called by the personnel officer who issued him with letter of redundancy. There was no meeting held to address the employees about the redundancy and stoppage of work. He was waited for a month for the processing of his terminal dues which were paid at Ksh.131, 200 less what he had expected. The payment made to KRA deducted from his dues was wrongful. During employment he was not paid house allowance which is due. He had not taken annual leave or paid for it.

The claimant also testified that he was paid a daily rate of Ksh.820.00 all paid weekly. The respondent said that they had installed CCTV cameras and thus reduced its security employees.

The defence is that the claimant was employed as a supervisor on 1st January, 2010 to 9th October, 2016 at a daily wage of ksh.820.00 and was issued with letter of redundancy after installation of CCTV camera and which resulted in reduction of manpower on 21st September, 2016. The claimant was invited and an explanation done and he accepted the letter of redundancy and which stated employment would terminate after a month. The claimant was paid all his terminal dues at Ksh.131, 200.00 which included work for days worked, leave days and severance pay less statutory deductions.

Nicodemus Musyoka testified that as the personnel officer for the respondent he called the claimant through his supervisor and explained to him about the redundancy and issued him with letter to this effect on 9th September, 2016.

The redundancy affected 10 other employees in the security department following the installation of CCTV cameras. All terminal dues were

paid. The respondent is required to deduct all statutory dues and a total of ksh.131, 200.00 was paid.

At the close of the hearing both parties filed written submissions.

Termination of employment for operational reasons is accepted as a lawful mode of ending employment as such results from a business decision and does not relate to the a disciplinary matter on the employee. Section 45(2) (b) therefore provides that it is a fair reason to terminate employment due to operational reasons;

(b) *That the reason for the termination is a fair reason—*

(i) *Related to the employee's conduct, capacity or compatibility; or*

(ii) *Based on the operational requirements of the employer; and*

(c) *That the employment was terminated in accordance with fair procedure.*

In the case of **Kenfreight (E.A) Limited versus Benson K. Nguti [2019] eKLR** the Court of Appeal held that is it a fair reason to terminate employment for operational reasons. In **National Bank of Kenya versus Samuel Nguru Mutonya [2019] eKLR** and in the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** that;

*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. As section 43(2) provides, the test of what is a fair reason is subjective. 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.*

In this case the claimant testified that he was called by the personnel officer and informed that there was a redundancy and he was issued with a one month notice which he accepted and signed for. He was later called and his terminal dues calculated and which included notice pay.

From the pleadings, the evidence and the written submissions, the court finds the respondent followed the due process of the law under section 40 of the Employment Act, 2007 in declaring a reduce and issued notices and paid an amount equivalent to one month pay. Such addressed the subsisting situation where following CCTV installation there was an operational need to reduce the number of security personnel and this affected 10 employees in the security department including the claimant.

The claimant at paragraph 3 of the Memorandum of Claim defines himself as *casual* employee and that he was paid a daily rate all paid weekly. The respondent also asserted this position that the claimant was paid a daily rate of Ksh.820.00.

Even where the claimant was defined as a casual employee, he worked from 1st January, 2010 to 9th September, 2016 when he was issued with a one month redundancy notice terminating his employment. Effectively by serving the respondent under casual terms he converted to a full time employee with benefits under the provisions of section 37 of the Employment Act, 2007.

In addressing the remedies sought, the claimant was being paid a daily rate of ksh.820.00 which rate well addressed is more than the minimum wage for the position held and where he was plead at Njoro. To apply the minimum wage due in assessing the terminal dues would be to the great disadvantage of the claimant and he would end up refunding to the respondent a substantial position of what he was paid.

Of the Ksh.131,200 paid to the claimant this included pay for;

- a) Accrued leave Ksh.92,660;
- b) Notice pay Ksh.24,600;
- c) Severance pays Ksh.61,500.
- d) Less statutory deductions ksh.47,500 Total ksh.131,200.00

The payment of ksh.820.00 per day is found to be generous and inclusive of the due house allowance.

The claimant has been paid the due leave days earned, notice pay and redundancy pay. In the court assessment of these dues; the only error is the payment of ksh.61,500 in severance pay. For work from 1st January, to October, 2016 the claimant had worked for 6 full years and on the daily wage of ksh.820 x 15 days x 6 year all is ksh.73,800 less what was paid 61,500 what is due is ksh.12,300.00 in severance pay.

Accordingly, the court finds termination of employment was lawful and followed the due process of section 40 of the Employment Act, 2007; the claimant was paid all owing terminal dues save for the wrongly calculation of severance pay and balance due is ksh.12,300.00 which is due. The claimant shall also be issued with a Certificate of Service. Each party shall bear own costs.

Delivered at Nakuru this 28th day of November, 2019.

M. MBAR?

JUDGE

In the presence of: