



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.239 OF 2017

NICHOLUS MUCHIRI MATHAI..... CLAIMANT

VERSUS

KEROCHE BREWERIES LIMITED.....v..... RESPONDENT

JUDGEMENT

The background to the matter herein is that the claimant was heard *ex parte* after the respondent, represented by several advocates were served with mention and hearing notice but failed to attend. The court satisfied that the respondent was properly served and opted not to attend at the hearing and there were sufficient returns to confirm service and Affidavits filed by Benson Mutida heard the claimant in his case.

Claim

The claimant was employed by the respondent on 27th January, 2014 as an electrical engineer in the engineering department and issued with letter of employment.

On 3rd May, 2016 the respondent advised the claimant that his employment would be terminated on account of restructuring and would be declared redundant. The claimant was then issued with letter terminating his employment.

At the time the claimant was earning Ksh.35, 000.00 per month. In the letter terminating employment the respondent offered to pay for days worked, one month notice pay, severance pay for 30 days, 21 leave days.

The respondent had 15 people working in the engineering department as at January, 2016 working in shifts and on a schedule which was reviewed on a monthly basis. The claimant was in the shift running from 7am to 7pm on day shift and vice versa in the night shift. In the payment of terminal dues the claimant as not paid for his owing leave days, overtime all being 800 hours as was computed by the respondent.

The claimant made a report to the labour officer and the respondent submitted a schedule of owing dues proposing to pay ksh.220, 308.00 for 3 years of overtime and Ksh.28, 000 for unpaid leave days. The claimant accepted this proposal so as to settle the matter but the respondent failed to pay.

The claim is that the declaration of redundancy was unfair and compensation is due. that the procedure attendant under section 40 of the Employment Act was not followed. The claimant is seeking the following dues;

- a) 21 unpaid leave days ksh.28,000
- b) Overtime 800 hours Kh.220,000
- c) Compensation.

The claimant testified to support his claims.

In defence the respondent denies all the claims made and without filing any records of employment as required under section 10(6) and (7) of the Employment Act, 2007.

The defence is that the claimant was an employee of the respondent as pleaded. He was notified of the redundancy and termination of his employment and his terminal dues paid in full.

Under the claimant's contract he was required to work for 48 hours per week only. When he worked overtime this was approved by the supervisor and paid with the monthly salary and nothing owes. Upon a review of the overtime schedules it was noted that the claimant was paid in full.

The defence is also that the claimant was informed of the reasons leading to termination of his employment and which related to the respondent undergoing financial pressures and could not afford his services together with several other employees.

The claimant was under a 2 years contract which ended in January, 2016 and subsequently he continued to work on a monthly contract governed under the Employment Act. the claims made are without justification and should be dismissed.

No evidence was called. The respondent did not attend at the hearing. The claimant filed written submissions.

By letter of employment dated 27th January, 2014 the claimant was employed by the respondent with effect from equal date and for a period of 2 years. effectively the term ended as of 26th January, 2016.

In defence the respondent asserts that the claimant remained under a monthly and renewable contract until 3rd may, 2016 when due to financial pressures the claimant's position was declared redundant.

On the basis of the letter of appointment dated 27th January, 2014 and without any further letter of renewal of employment or extension of the contract term, where the claimant remained in the service of the respondent from 27th January, 2016 to 3rd May, 2016 and where he continuously remained in such service, his employment became protected under the provisions of section 37 of the Employment Act.

The rights and benefits due to an employee under the Employment Act, 2007 became due to the claimant by virtue of his service to the respondent. The claims made largely relates to the payment of leave days, overtime and compensation over alleged unfair termination of employment.

With regard to the claimant for unfair termination of employment, the claimant pleaded that on 3rd May, 2016 he was advised by the respondent that there was restructuring and his position would be rendered redundant and was therefore issued with letter terminating his employment.

Section 40 of the Employment Act, 2007 allow an employer to terminate employment for operational reason. Following restructuring, reorganisation or following a business decision to down-size operations, the employer is allowed to issue notice to employee and then issue personal notices to affected employees. See **Africa Nazarene University versus David Mutevu & 103 others [2017] eKLR** that once the employee is made aware by the employer of the need to declare a redundancy due to an operational reason(s), whether in writing or orally, such notification is sufficient in law. the rationale is that a redundancy does not arise due to the fault of the employee and does not apply as a disciplinary

measure but it follows the need to re-organise or restructure the business. This is defined under section 45(2) as *operational reasons* and is a valid reason for terminating employment.

In this case, the claimant confirmed he was advised on the restructuring and then issued with a letter terminating his employment. The reasons given were thus valid and procedural as required under section 40 of the Employment Act, 2007 and part of his terminal dues were paid save for leave days owing and overtime pay.

With regard to owing leave days, the claimant is seeking 21 days. From January to 3rd May, 2016 the claimant worked for 4 months. Under the provisions of section 28(1) (b) of the Employment act, 2007 he was entitled to 1 $\frac{3}{4}$ leave days each month all at Ksh.6, 125.00;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.

on the claim for overtime worked, the respondent failed to attend or file the work records setting out the earned overtime and the monthly payment in compensation. The claimant testified that he was in a shift running 12 hours each day and for the 3 months of work, the work days under his contract being 6, the overtime hours for the 78 days at the salary of Ksh.35, 000.00 all is Ksh.102, 375.00.

accordingly, judgement is hereby entered for the claimant against the respondent for leave pay at ksh.6, 125.00; overtime pay Ksh.102, 375.00; and costs of the suit. Dues paid shall be subject to the provisions of section 49(2) of the Employment Act, 2007.

Delivered at Nakuru this 21st day of November, 2019.

M. MBARU JUDGE

In the presence of: