REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.240 OF 2017

STEPHEN KATHENYA.....CLAIMANT

VERSUS

KEROCHE BREWERIES LIMITED.....RESPONDENT

JUDGEMENT

On 2nd June, 2017 the claimant filed the Memorandum of Claim. The respondent entered appearance through the firm of Ndungu Karanja & Co. Advocates on 20th July, 2017 and also filled a defence.

On 23rd April, 2019 the respondent appointed Achieng Owour & Co. Advocates to attend.

On 11th June, 2019 the respondent filed a memorandum of Appearance through the firm of Kilukumi & Co. Advocates and also filed a Memorandum of Defence.

On 11th September, 2019 the firm of Achieng Owour & Co. Advocates filed a Memorandum of Defence.

The matter came up in court on several occasions for taking hearing direction and where the respondent remained absent but on 19th February, 2019 the claimant's advocate noted the respondents advocate and proprietor of Ndungu Karanja & Co. Advocates was deceased. With abundance of caution and to ensure the respondent was represented in the proceedings the court allocated a hearing date and directed all the advocates on record be served with hearing notice for the 26th September, 2019.

On 18th June, 2019 there was service of Hearing Notice upon the firm of Achieng Owour & Co. Advocates and there same is acknowledged and there are returns to confirm service.

On 4th March, 2019 the respondent was served directly with the Hearing notice and which was acknowledged and there are returns to this effect through the Affidavit of Service filed by Morris Ajwang' Akuku.

On the scheduled hearing date the respondent failed to attend. The court satisfied with the efforts taken to invite the respondent for the hearing heard the claimant's case.

Claim

The facts of the claim are that in June, 2011 the claimant was employed by the respondent as the Technical Manager. On 1st June, 2014 the claimant was issued with letter of appointment. On 3rd May, 2016 the claimant was advised by the respondent that his employment would be terminated on account of restructuring and therefore declared redundant. He was then issued with termination letter without notice.

The claim is that at the time the claimant was earning Ksh.50, 000.00 per month.

In the letter terminating employment the respondent had indicated there would be payment of owing salary and for days worked in May, and one month notice together with severance pay. These dues were paid.

Severance pay was paid at 60 days for 4 years leaving out payment of 15 days for 5 years the claimant had worked for the respondent. The owing leave days were not encashed at 6 days; overtime pay due for 2848 hours were not paid.

The claimant had worked for 5 years for the respondent before the redundancy. His department was engineering from January, 2016 and worked in shifts on a schedule which was issue monthly and claimant was at work from 7am to 7pm for day or night interchangeably without

taking a break.

Upon termination of employment the claimant made a report to the labour officer and the respondent submitted a schedule of payments for 3 years proposing to pay ksh.938, 461.54 and ksh.10, 000 for unpaid leave days. The respondent also pleaded for more tie to pay the owing dues.

The claim is that the redundancy was without valid reasons and thus unfair. The terminal dues under section 40 of the Employment Act were not paid in full. The claimant is seeking the following dues;

a) Outstanding leave day 6 at ksh.10,000.00

b) Overtime pay 2848 hours ksh.938,461.54

c) 15 days severance pay Ksh.25,000.00

d) Compensation Ksh.600, 000.00.

The claimant testified in support of his claims.

As noted above, the claimant has on record 3 sets of defences filed by the 3 firms of advocates.

The initial defence filed on 20th July, 2017 comprise mere denials save that the claimant was advised in the letter of termination that his dues would be paid for notice, severance, leave days not taken and that the claim should be dismissed.

No work records were attached.

The second defence filed on 11th June, 2019 and deny the claims made on the grounds that the claimant was initially employed on 2nd January, 2014 as a mechanical engineer as claimed. The claimant was notified of the restructuring and reorganisation in advance and was then paid his terminal dues and he has admitted to payments and thus not entitled to any further payments as claimed.

The defence is also that the claimant worked for the respondent for a period of 2 years vide contract dated 1st June, 2014 and the severance paid to him was sufficient. Under the contract of employment the claimant had a work schedule of 48 hours per week and in the event he worked for extra hours this was recorded by his supervisor and paid monthly. The leave days owing at the time of termination were encashed and paid in full.

The defence is also that upon the respondent undertaking a review of the overtime claims it found all extra hours put in work were computed and remitted together with his monthly salary as provided for under his contract of service.

The claimant was informed of the reasons leading to termination of employment, the respondent was experiencing financial pressure and could not afford his services of a number of employees and had to scale down. The claims made are without basis and should be dismissed.

No work records were filed.

The third defence filled on 11th September, 2019 is made of mere denial and without material substance.

No evidence was called by the respondent. There was no attendance.

The claimant filed his written submissions and the issues which arise for determination are;

Whether there was unfair declaration of redundancy; and Whether the remedies sought are due.

A few instances where the employer is allowed by statute to terminate employment for lawful cause is outlined under section 40 of the Employment Act, 2007 for operational reasons defined as redundancy. Under section 40 of the Act, the employer is required to give notice to the employees and another notice to the affected employees whose employment is to be terminated following the redundancy. In the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** it was held as follows;

> **…** *When an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees … It does not have to be a calendar months' notice …. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.*

This position is reaffirmed in the case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR.** in the case of **Africa Nazarene University versus David Mutevu & 103 others [2017] eKLR** the Court of Appeal held that once the

employee is made aware, whether in writing or orally that there will be work stoppage due to operational reasons, such notification is sufficient. This position is reiterated by the Court of Appeal in the case of **Heritage Insurance Company Limited versus Christopher Onyango & 23 others [2018] eKLR.**

The claimant was serving under a written contract of employment with the respondent dated 1st June, 2014. Where there was subsisting employment before such date, with the new appointment and giving specific terms separate and different from any other employment, such is removed by the new contract.

In paragraph 2.3 of the Memorandum of Claim, the claimant pleaded that on 3rd May, 2016 he was advice that his employment would be terminated on account of restructuring and therefore would be declared redundant.

Section 45(1) of Employment Act, 2007 prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides;

"(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

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

(i)

(ii) based on the operational requirements of the employer; and

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

The claimant thus advised of the reasons leading to termination of employment and such relating to operational reasons and requirements cannot claim there was unfair termination of employment.

Notice was issued and the reasons given. Such addressed the provisions of section 40(1) of the Employment Act. there is no claim that the claimant was singled out and set apart for termination of his employment.

Under paragraph 2.8 of the Memorandum of Claim the claimant pleaded that he was paid severance pay at *60 days for 4 years worked leaving out payment for 15 days more for 5 years the claimant worked for the respondent.*

Section 40(1) (g) of the Employment Act, 2007 provides as follows;

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

upon declaration of redundancy, the employer in tabulating the severance pay should pay at the rate *of not less than 15 days for each completed year of service.*

Under the contract of service running from 2nd June, 2014 and which terminated on 3rd May, 2016 the claimant had worked for 1.9 years. two (2) years less. The payment of severance pay for 60 days worked for 4 years was a generous pay in severance as the minimum due as at 3rd May, 2016 was ksh.25, 000.00 only based on the gross salary.

There are no work records filed by the respondent to confirm the payment of overtime due to the claimant. His evidence was that as he worked in the engineering department and machines were required to run he worked in a shift from 7am to 7pm and vice versa for the night shift. This created an overtime work of 3 hour each day.

The defence is that the claimant was paid his dues overtime worked upon approval by the supervisor and at the end of each month. There is no evidence of such payment.

Without work records to challenge the claims made in this regard, where the claimant worked for the respondent continually from 2nd June, 2014 and for 21 months continued to work overtime for 3 hours, all remaining constant and taking into account the annual leave taken in each year for 21 working days, the remainder is 18 months of overtime work.

Under the contract of employment the claimant had a weekly hour's rate of 48 hours translating to 6 days of work for 8 hours each. To thus work for 3 hours for 6 days each week to 18 months this translates to 1,296 hours. On the salary paid this amounts to Ksh.135, 000.00 due in overtime pay.

For the outstanding 6 leave days, on the gross salary the claimant is entitled to ksh.10, 000.00.

Accordingly, judgement is hereby entered for the claimant against the respondent with the award of overtime pay at ksh.135, 000.00; 6 leave days not taken ksh.10, 000.00; and costs of the suit. The dues payable 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: …….. ……