



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1681 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS KIRAGU WAWERU.....CLAIMANTS

VERSUS

RIVERCROSS TECHNOLOGIES LIMITED.....RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant’s memorandum of claim dated 16th October 2013 and filed on 18th October 2013. It is the claimant’s averment in the memorandum of claim that he was employed by the respondent’s a limited liability company engaged in the business of information technology and car tracking services in Nairobi and elsewhere within the Republic of Kenya, as a Software Engineer on or about 29th January, 2007 earning a gross monthly salary of Kshs.40,000.

The Claimant avers that during the subsistence of his employment with the Respondent, he worked diligently and to the Respondent’s satisfaction leading to his salary being increased to Kshs.80,000 payable monthly in arrears.

The Claimant contends that his woes with the Respondent began when he demanded for payment of salary arrears that had accumulated to a figure of Kshs.78,214 for the period between March and June 2012 from one of the directors. The Claimant stated that the amount was later paid as evidenced by the Respondent’s letter dated 3rd October 2013.

The Claimant further contends that the Respondent terminated his employment on 11th October 2013 on account of “*loss of employment due to restructuring of the business*”. He contended that the said termination was unfair and unlawful and was precipitated by his demand for payment of salary arrears. Further, that Respondent failed to adhere to the mandatory provisions as provided under Section 40 of the Employment Act, 2007.

Aggrieved by the Respondent’s decision to terminate his services the Claimant filed the instant Claim seeking the following reliefs:-

- a) A declaration that the Claimant’s services with the Respondent were terminated wrongfully and unfairly.
- b) Damages for twelve (12) months’ salary
 (80,000 x 12).....Kshs.960,000
- c) Severance Pay at the rate of 15 days wage for each completed
 year of service(15 x 40,000 x 4)..... Kshs.160,000
- d) The Claimant prays for costs of this Claim
- e) Any other relief that the Court may deem fit and just to grant.

The Respondent filed a Memorandum of Defence dated 15th November, 2013 and filed in Court on 18th November 2013 in which it admits entering into an employment relationship with the claimant. It is the Respondent’s averment that the Claimant resigned from his position on 30th April 2010 but was re-employed five months later and issued a fresh contract of employment with new terms.

The Respondent further averred that over the years technology had been evolving fast both locally and internationally thus creating the need to restructure. It is contended that in the process of restructuring the Claimant's position became superfluous and/or redundant and as such it had no choice but to release the Claimant.

The Respondent contended that it did pay the Claimant all his terminal dues at the time of separation as evidenced by the termination letter. It is further contended that the Respondent had no ill intention or malice against the Claimant as alleged as evidenced by the fact that the Respondent did allow the Claimant back to its work force even after resignation.

The Respondent urged the Court to dismiss the instant Claim with costs to the Respondent.

The suit proceeded for hearing on 21st January 2019 with both the Claimant and the Respondent's witness testifying. Both parties filed written submissions after the close of the hearing.

The claimant reiterated the averments made in his Memorandum of Claim in evidence. He testified that he was an employee of the Respondent from 29th January 2007 to 11th October 2013 when his services were terminated.

The claimant stated that he worked for about 2 years then resigned in April 2010 but was later recalled by the Respondent on 30th April 2010, that it was agreed that the period of his absence would be treated as annual leave. He testified that upon his re-employment he was issued with another contract under which his salary was increased by 100% to Kshs.80,000. The date of commencement was still maintained as 29th January 2007.

The claimant further stated that the decision to terminate his services on account of redundancy was unfair as the Respondent re-advertised the same position in the year 2014. He testified that he worked for the Respondent for a total period of 6 years and 6 months during which period he adopted to all changes in technology.

The claimant confirmed having received payments of Kshs.61,607.60 being payment in lieu of notice. He further confirmed receiving payment in lieu of accrued leave as well as severance pay.

The claimant urged the Court to allow his Claim as drawn.

On cross-examination, the claimant stated that no notice was given to him on the impending redundancy that he just received a letter for termination.

The claimant further stated that he had a problem with the tabulation of severance pay as the same was done from 2011 instead of 2007.

On re-examination, the claimant confirmed that when he resumed duties following his re-appointment it was agreed with the Respondent that the period of his absence was to be treated as leave and that a new contract was signed which maintained a commencement date of 29th January 2007.

The Respondent on the other hand called NANCY WAMBUI NGETHE (RW1), its General Manager, who reiterated the averments made in the Memorandum of Response to the Claim filed by the respondent. She adopted her witness statement dated 15th May 2018 as her evidence in chief.

RW1 further testified that the Claimant was paid his terminal dues at the time of separation. She testified that he was paid a total of Kshs.215,626 as terminal dues as itemised in his letter of termination. RW1 contended that the Claimant has no claim against the Respondent.

She testified that when the Respondent advertised for the Claimant's job in 2014 and 2015, the main requirement was persons who were conversant with web based solutions.

On cross examination RW1 confirmed that the advertisement for the Claimant's job was for a software engineer which was the same task that was being done by the Claimant.

Submissions by the parties

It is submitted on behalf of the Claimant that his termination on account of redundancy was unfair and wrongful as the Respondent failed to follow the mandatory requirements as provided under Section 40 of the Employment Act, 2007. The Claimant relied on several authorities among them *Margaret Mumbi Mwago Vs Intrahealth International (2017) eKLR*; *Barclays Bank of Kenya Ltd Vs Gladys Muthoni & 20 Others (2018) eKLR*; *Angela Shiukuru Iondanga Vs Airtel Networks Kenya Limited (2018) eKLR*; *Thomas De La Rue Vs David Opondo Omutelema (2013) eKLR* and *Kenya Airways Limited Vs Aviation and Allied Workers Union & 3 Others (2014) eKLR*.

The Claimant submitted that he is entitled to the reliefs sought in his Memorandum of Claim.

On the Claim for compensatory damages for unfair termination, the Claimant submitted that he is entitled to maximum compensation of 12 months' salary having shown that his termination was unfair. To buttress his argument the Claimant cited and relied on the Authority of *Maureen Atieno Ouma Vs Njuca Consolidated Company Limited (2018) eKLR*.

In conclusion, the Claimant urged the Court to allow his Claim as drawn.

Respondent's Submissions

The Respondent on the other hand submitted that the Claimant's termination on account of redundancy was fair as it did have a valid and fair reason for terminating the Claimant and it did follow the mandatory provisions of Section 40 of the Employment Act, 2007

The Respondent further submitted that it did pay the Claimant all his terminal dues at the time of separation as required under the provisions of Section 40 of the Employment Act, 2007. To fortify this argument the Respondent relied and cited on the cases of **Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** and **Gerrishom Mukhutsi Obayo Vs DSV Air and Sea Limited (2018)**.

It is further submitted that the Claimant's contract be construed as binding and enforceable as from 18th October 2010 and not 29th January 2007 as the Claimant admits having signed a new contract on 18th October, 2012.

The Respondent further submitted that the Claimant is not entitled to any of the reliefs sought in his Memorandum of Claim and therefore urged the Court to dismiss the same with costs to the Respondent.

Analysis and Determination

Having considered the facts of this cause, evidence, submissions and authorities cited, the following are the issues for determination:

1. Date of employment of claimant.
2. Whether the Claimant's redundancy was lawful and fair
3. Whether the Claimant is entitled to the reliefs sought

The claimant's contract dated 18th October 2012 gives the commencement date as 29th January 2007. The respondent states the claimant resigned on 30th April 2010 and was re-employed five months later. The claimant states that the period of absence was agreed to be treated as leave.

The respondent does not contest the authenticity of the claimant's contract dated 18th October 2012. I therefore agree with the claimant that the months he was away were treated as leave and that the date of his appointment is 29th January 2007. He thus worked for the respondent for 6 years and 10 months.

Redundancy is defined under Section 2 of the Employment Act as –

“redundancy” means 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.”

Section 40 sets out the procedure for redundancy. Section 40(1)(b) require that the employee and the Labour Officer be notified of the intended redundancy at least one month prior thereto where the employee is not a member of the union.

The Claimant in his pleadings, evidence and submissions contends that the Respondent did not follow due process while declaring his position redundant. The Claimant further contends that the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act, 2007.

The Respondent on the other hand contended that it followed due process in declaring the Claimant redundant as set out in Section 40 of the Employment Act, 2007.

It was further contended that the Claimant was duly paid all his dues at the time of separation and therefore has no claim as against it.

Was procedure followed?

The Respondent issued a letter dated 30th September 2015 to the Claimant reading as follows:

“Dear Francis Kiragu,

RE: LOSS OF EMPLOYMENT DUE TO RESTRUCTURING OF THE BUSINESS

I regret to inform you that your position as a software Engineer at Rivercross Technologies Limited will be terminated as of today, 11th October 2013. The Company is undergoing restructuring of our products offering and consequent resources allocated.

I have been happy with your performance over the past years that you have worked with us. This termination does not reflect on your job record and performance here at Rivercross Technologies Ltd. I personally have been happy to watch you grow your technical and professional ability over the years and I trust your skillset will enable you to successfully pursue other opportunities.

In recognition of your services and in accordance with the law and you shall receive the following benefits amounting to Kshs.215,626/- broken down as follows:

- *One month's pay in lieu of notice amounting to Kshs.61,607.60*
- *All unused leave days in the last 18 months which includes 11 unused leave days in 2012 and 21 unused leave days in 2013 amounting to Kshs.92,411.40*
- *Severance pay for the years 2011 and 2012 amounting to Kshs.61,607.60*

You will be required to immediately hand over all company property back to your immediate supervisor including those provided to you for your daily work and those developed to you in the course of your duties, including:

- *All source code for Blue Trax, All Blue Trax Web, mobile, server components, OpMan, payroll, Eduweb and all source code, compiled executables.*
- *Laptop computer, storage devices, username and passwords to RiverCross systems including computers, laptop, servers, email accounts.*

Sincerely

Signed

David Gachuche

MD, Rivercross Technologies Ltd”

There is no evidence of any communication to the claimant and the Labour Office of the intended redundancy. I thus find that the Claimant's redundancy was precipitated by the fact that the claimant demanded payment of salary arrears owing to him on 3rd October 2013, which was 7 days prior to him being issued with a letter of termination.

In the absence of the notice to the Labour Officer, I find that the redundancy amounted to an unfair termination of employment. In the case of ***Bernard Misawo Obora vs Coca Cola Juices Kenya Limited [2015] eKLR***, it was held that the notice to the Labour Officer is meant to elicit advice to the employer on the modalities to be employed in the redundancy process. This is an important process which not only ensures proper preparation for the affected employees but also acts as a control measure to curb against unlawful termination clothed as redundancy.

In view of the foregoing I find that the Respondent failed to comply with the mandatory requirements as provided under Section 40 of the Employment Act, 2007. There is no evidence adduced to indicate that the Claimant was served with a notice of intention to declare his position redundant prior to her termination. In the case of ***Margaret Mumbi Mwago Vs Intrahealth International (2017) eKLR*** it was held:

“My understanding of the sequence in the issuance of notices under Section 40 (a) and (b) is that the first, which is the redundancy notice, goes out simultaneously to the employee or their trade union and to the Labour Officer and the second which is the termination notice, goes out to the employee in accordance with the subsisting employment contract”

I therefore find that the respondent failed to comply with the redundancy procedure set out under Section 40(a) of the Employment Act with the result that the redundancy of the claimant was un-procedural and therefore unfair.

Whether the Claimant is entitled to the reliefs sought

The Claimant prayed for a declaration that his services were wrongfully and unfairly terminated. I would agree with him. The respondent has not established that it was carrying out restructuring. RW1 further admitted that the claimant was dismissed only 7 days after demanding payment of arrears of his salary. No notification was issued to the Ministry of Labour to report any intended redundancy as provided in Section 40(1)(a) and (b) of the Employment Act.

The Claimant also prayed for damages for unlawful termination from employment.

Having found the redundancy unfair, the Claimant is entitled to compensation for unfair and unlawful termination of his employment. I consider compensation equivalent to four (4) months' salary to be reasonable in the circumstances taking into account his length of service and the manner he was discharged. This is computed using his last salary of Kshs.80,000 x 4 months totalling to Kshs.320,000.00. This amount shall be subject to statutory deductions.

I find that this was an unfair termination disguised as a redundancy which redundancy was also unprocedural. In the case of **Francis Maina Kamau Vs Lee Construction (2014) eKLR**, the Court having found that the Respondent failed to adhere to the provisions of Section 40 of the Act proceeded to award compensation as follows:-

“There is no evidence that the Respondent complied with any of the conditions set in Section 40 of the Employment Act, 2007 and I therefore find the termination of the Claimant’s employment to have been unfair within the meaning of Section 45 of the Act. Consequently, I award the Claimant the equivalent of 3 months’ pay in compensation. I also award him one month’s salary in lieu of notice.”

The Claimant further prayed for payment of severance pay of Kshs.160,000 for the 4 years of service not paid by the Respondent. The Contract of employment signed by the Claimant and the Respondent dated 18th October 2012 indicated that the commencement date for the contract was 29th January 2007. The Claimant in evidence and submissions contended that when he was recalled by the Respondent it was agreed that the time he was away will be treated as leave and thus the contract indicated his commencement date as 29th January, 2007.

It is clear that the intention of the parties was to assume the employment did not terminate after the claimant’s resignation as it was agreed that the time he was away be taken as leave a fact which the Respondent did not dispute. Thus, the claimant’s contract commenced on 29th January 2007 and did not break after his resignation. Therefore, the severance paid to the Claimant is less 4 years as pleaded. I find that the Claimant is entitled to the same.

I therefore vary the prayer by the claimant and award severance pay at the rate of 15 days per year worked for the 6 complete years of service as provided in Section 40(1)(g) being the sum of (80,000 x x 6) Kshs.240,000. From this I recover the amount paid to the claimant being Kshs.61,607.60. I thus award him the sum of Kshs.178,392.40.

Total Award

1. Four (4) months’ compensation	Kshs.320,000.00
2. Severance pay	<u>Kshs.178,392.40</u>
Total	<u>Kshs.498,392.40</u>

The respondent shall further pay claimant’s costs of the suit. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE