



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT NAIROBI

ELRC CASE NO. 2291 OF 2016

WALTER ONJIRO WINAM.....CLAIMANTS

VERSUS

MOSES MUNYUI NDUNG’U.....1ST RESPONDENT

RACHAEL MUNYUI.....2ND RESPONDENT

JUDGMENT

1. The claim by the claimant is contained in his Amended Statement of claim filed on 24.1.2016 by which the claimant seeks the following relief:

2. The brief facts of the case according to the claimant are that he was employed the respondent s an Accountant from 6.1.2012 earing Kshs. 20000 per month which was later increased to Kshs. 30000. He served diligently until 6.7.2016 when he was terminated on account of redundancy without compliance with statutory requirement. He therefore averred that the termination was unfair and prayed for 12 months compensation for unfair termination.

3. He further averred that after the termination he reported the matter to the labour office and the respondent was directed to pay him terminal dues but she declined to do so.

4. The respondent filed defence admitting that the position of Accountant held by the claimant was declared redundant, abolished and the claimant laid off. She admitted that the claimant reported the matter to the labour office and the labour officer directed her to pay the claimant terminal dues totalling to Kshs. 146000 which she paid and the matter was fully settled.

5. She averred that the redundancy herein was justified and contended that the claimant is estopped from filing this suit. According to her the suit is an afterthought and an abuse of the court process. She therefore prayed that suit to be dismissed with costs.

6. The main issues for determination arising from the pleadings are whether termination of the claimants employment contract was unfair and whether he is estopped from instituting this suit. To answer the said questions, both parties tendered evidence and filed written submissions.

CLAIMANT’S CASE

7. The claimant testified as Cw1. In brief he stated that he was employed by the respondent as Assistant Accountant on 6.1.2012 and worked well until 6.7.2016 when he was told to see the Director before going home at 5.30 p.m. Upon going to the Director’s office, he found him holding his personal file and his wife was also present. The Director then told him that his services had been terminated.

8. Cw1 further testified that he pleaded for his job considering that he had married just 3 months before the termination but all in vain. In the end the employer gave him a cheque of Ksh. 36000 to cover one month notice and the 6 days worked in that month. He requested for a certificate of service but again it was declined.

9. As a result he filed a complaint at the labour office and the respondent was served with a letter. He further testified that the labour office sent him to serve a second letter to the respondent and upon delivery of the letter, he was paid a cheque of Kshs. 110000 and issued with a certificate of service.

10. However he testified that he was not told the reason for his termination or served with any prior notice nor was any hearing accorded to him before the termination. He contended that he only learned the reason for the termination when the respondent filed defence herein

indicating that his position was declared redundant. He contended that the procedure for redundancy was not followed because he and the labour officer were not served with prior notice of one month. He therefore prayed for compensation under Section 49 of the Employment Act. He contended that his position was not abolished because the school is still in operation and his roles are still required. He contended that he was discriminated on ground of ethnicity.

11. He further testified that throughout his service he never went for any annual leave and that he used to work overtime. He therefore prayed for cash in lieu of leave plus overtime pay. He further prayed for salary for 6 days worked before the termination.

12. In cross-examination, he denied that the school was making losses and contended that in fact the school had grown from nursery school when he joined to primary school and their secondary school as at the time he exited. He contended that the letter by the labour officer dated 29.7.2016 required the respondent to pay him Kshs. 146,000 for salary in lieu of notice. Salary for 6 days worked, severance pay for 4 years and accrued leave.

13. He admitted that on the day he was dismissed he was paid Kshs. 36000 and upon service of the second letter by the labour officer, the respondent paid him Kshs. 110000. He admitted that the Kshs. 36000 cheque was for the 6 days worked plus one month salary in lieu of notice. He further admitted that the labour officer assessed his leave at Kshs. 34650. He also admitted that he signed petty cash voucher for the cheque of Kshs. 36000 but denied signing any petty cash voucher for the cheque of Kshs. 110000. Finally, he admitted that he was issued with certificate of service on 29.7.2016. He however, denied sitting in any meeting the respondent at the labour office to discuss his dues

14. He maintained that he was dismissed after the respondent discovered that his ethnicity was Luo. He however admitted that redundancy was a lawful ground from terminating employment.

DEFENCE CASE

15. Mr. Moses Ndungu, a Director of the respondent testified as Rw1. He stated that the claimant was employed by the respondent on 6.1.2012 as an Assistant Accountant earning Kshs. 20000 per month. On 6.7.2016 he called the claimant and explained to him that the company was not doing well financially and as such his services had been terminated. He was therefore paid one month salary in lieu of notice plus salary for the days worked and he accepted the arrangements in the presence of the manager and the secretary by signing a voucher for Kshs. 36000.

16. Rw1 further testified that on 8.7.2016 he received letter from the labour office summoning him to a meeting with the claimant at the labour office on 27.7.2016. He contended that he attended the meeting with the claimant and labour officer one Ajuma. After the discussion the labour officer told him to pay the claimant Kshs. 6000 salary for the days worked Kshs. 30000 one month salary in lieu of notice, Kshs. 34615 accrued leave and Kshs. 60000 severance pay. He produced copies of cheques dated 6.7.2016 and 29.7.2016 for Kshs. 36000 and Kshs. 110000 respectively to prove that the respondent paid the claimant all the dues as assessed.

17. In cross-examination, RW1 admitted that the letter by the labour officer dated 29.7.2016 never stated that the assessed terminal dues were full and final. He further admitted that the letter directed him to deposit the money in the labour office but he agreed with the claimant that he should instead collect the cheque and provide proof of payment to the labour office. He however admitted that he never verified whether the claimant had used the known signature when he collected the cheque.

18. RW1 further admitted that he never served the claimant and the labour officer with redundancy notice before the termination. He further admitted that he never served any notice under Section 77 of the Employer Act to inform the labour office that the claimant's position had been abolished. He further admitted that the claimant had not disciplinary issues or warning letters before the termination. Finally he contended that the claimant has not pleaded the accrued leave days and the specific Sundays when he was called to work.

19. M/s. Rachael Nancy Wangechi Munyeri, a Director and the Manager of the Respondent testified as Cw2. She confirmed that the claimant was employed by the respondent from 6.1.2012 but later he was laid off after his position of Assistant Accountant was abolished due to reduction of work in the company. She further stated that the terminal dues for the claimant was discussed and agreed during a meeting at the labour office after which the labour officer wrote the letter dated 29.7.2016 confirming the agreed sum and it was fully paid by cheque. She therefore contended and prayed for the suit to be dismissed with costs for being an afterthought and abuse of court process.

ISSUES FOR DETERMINATION

20. There is no dispute that the claimant was employed by the respondent from 6.1.2012 to 6.7.2016 when his services were terminated on account of redundancy. The issues for determination arising from the pleadings, evidence and submissions are:

- (a) Whether the claimant is estopped from instituting this suit.
- (b) Whether the termination of his employment contract was unfair and unlawful.
- (c) Whether the reliefs sought should be granted.

ANALYSIS AND DETERMINATION

(a) Whether the claimant is estopped from instituting this suit.

21. The respondent objected to the suit on ground that the dispute had been resolved at the labour office and all the agreed dues paid to the

claimant. The claimant denied ever sitting in any meeting with the respondent at the labour office. He further denied entering into any agreement with the respondent on the quantum of terminal dues payable to him. He also denied signing any petty cash voucher to acknowledge the cheques for Kshs. 110000 after delivering the labour officer's letter dated 27.7.2016. Finally he denied that the said letter indicated the dues assessed therein were full and final.

22. The relevant law in respect of this issue is Section 47 of the Employment Act which provided as follows;

“(i) Where an employee has been summarily dismissed or employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under Section 71.

(ii) A labour officer who is presented with a claim under this Section shall after affording every opportunity to both the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions of Section 49.

(3) The right of the employee to present a complaint under this section shall be in addition to him to complain to the industrial court on the same issue and to the right to complain on any other infringement of his statutory rights.”

23. It is clear from the foregoing provisions that an employee has a right to lodge a complaint to a labour office within three months after termination by his employer. It is also clear that the filing of the complaint to the labour office does not bar the employee from approaching this court on the same issue or any other infringement of his statutory rights.

24. However, the foregoing provisions should be interpreted through the lenses of Article 159(2) (c) of the constitution which recognizes Alternative Dispute Resolution mechanism as a lawful means of resolving civil disputes. The Article provides that:

“(2) (c) In exercising judicial authority, the courts and tribunals established shall be guided by the following principles:

(a) . . .

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

25. The foregoing provision means that the courts have a duty to encourage ADR while exercising judicial authority. In my view, one way of encouraging ADR is respecting and upholding any settlement agreements made between disputants. It follows therefore that where there is dispute as to whether a settlement agreement was entered between the parties, the court has every right to consider the matter.

26. In this case no written settlement agreement was signed between the parties herein and witnessed by the labour office. There is also no written evidence adduced to prove that any meeting took place between the parties herein and the labour officer on 27.7.2016 or at all. Finally, there is no proof that the claimant signed the petty cash voucher dated 29.7.2016 for Kshs. 110,000 which indicated that the sum paid was final settlement.

27. The claimant disputed the signature in the said petty cash voucher. In his reply to the defence filed on 17.5.2017 but the respondent did nothing to verify that indeed it was the claimant who signed the document. Consequently, I find and hold that the respondent has not proved on a balance of probability that the dispute herein was fully resolved and settled before the labour officer herein and as such the claimant is not estopped from instituting this suit.

(b) Whether the termination of claimant's employment was unfair and unlawful.

28. The respondent contended that the claimant was not dismissed but rather terminated on account of redundancy. The claimant averred in his reply to defence that the termination was unlawful because it was not done in compliance with Section 40 of the Employment Act. The respondent admitted in evidence that she never served the claimant and the labour office with a written notice of one month before the termination of the claimant's services on account of redundancy. It is also clear that she never paid the claimant, accrued leave and severance pay until the claimant lodged a complaint to the labour officer.

29. In view of the foregoing procedural breaches by the respondent the termination of the claimants employment on account of redundancy was unlawful and unfair within the meaning of section 40 (1)(b)(e) & (g) of the Employment Act read with Section 45 of the Act. Paragraph (b) requires the employer to serve the employee and labour officer with a written notice of at least one month; (e) requires the employer to pay off accrued leave in cash to the employee declared redundant; and

(g) requires the employer to pay the said employee severance pay at the rate of not less than 15 days pay for each completed year of service.

RELIEFS

30. In view of the foregoing finding that the termination of the claimant's services on account of redundancy was unlawful and unfair, I award him 3 months salary compensation under Section 49 of the Employment Act. In granting the compensation I have considered the fact that he served the respondent for 4 years without any disciplinary issues and that he did not contribute to the termination through misconduct. I have also considered the fact that the employer paid him severance pay plus one month salary in lieu of notice.

31. The claim for overtime is however dismissed because it appears to have been exaggerated. It is also lacking in material particulars and evidence.

32. The claim for the days worked before the termination was settled and the claimant admitted in evidence that he was fully paid. The claim for leave days lack particulars and it is dismissed save for what was assessed by the labour officer and paid on 29.7.2016 by the respondent.

CONCLUSION AND DISPOSITION

33. I have found that the termination of claimant's employment on account of redundancy was unfair and unlawful. I have further found that the lodging of a complaint by an employee to a labour office does not bar the employee from filing suit in this court on the same issue or other infringements. Finally have found that the claimant is entitled to compensation for the unfair termination of his employment contract. Consequently I enter judgment for the claimant against the respondent for the sum of Kshs. 90000 plus costs and interest at court rate from the date hereof. However, the decreed sum shall be paid less statutory deductions.

Dated, signed and delivered in open court at Nairobi this 20th day of December, 2019.

ONESMUS MAKAU

JUDGE