



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 43 OF 2018

KENNEDY MURIITHI RIUNGU.....CLAIMANT

VERSUS

SANLAM INVESTMENT LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for alleged unfair termination from employment and for discrimination, non-payment of his salary and terminal benefits. The Claimant averred that he was offered a position of a Senior Portfolio Manager by the Respondent through the appointment letter dated 2nd May 2012. He averred that subsequently on 2nd June 2012, he was promoted to the position of Chief Executive Officer earning a gross salary of Kshs. 1,004,509/- inclusive of all allowances. He averred that he was notified of the intended redundancy by the Respondent vide a letter dated 3rd November 2017 and on 1st December 2017 was issued with a letter referenced "termination on account of redundancy" informing him that his position had been abolished and setting out the terms of the redundancy. The Claimant averred that the Respondent also took steps to demonstrate that his position had indeed been abolished and thereafter issued him a schedule of dues payable as Kshs. 8,515,959.43. The Claimant averred that the Respondent declined his leave applications made in the month of December 2017 and that the Respondent unilaterally and without legal basis reduced the Claimant's outstanding leave days from 63 to 22.36 days. The Claimant averred that the Respondent unlawfully and without cause discriminated against and treated him unfairly during the termination process by failing to pay him like the rest of the employees who were affected by the redundancy and by procuring the Line Manager to fail and/or decline to sign the Claimant's clearance form without any lawful cause. The Claimant averred that his termination was unlawful and unfair because the Respondent failed to pay all his dues before the redundancy as provided for under Section 40(1)(e), (f) and (g) of the Employment Act. He averred that he was not afforded the opportunity to be heard in the event that there was any basis to fail to pay his final dues on or before the 31st December 2017 contrary to the provisions of Section 45 of the Employment Act. The Claimant prayed for judgment against the Respondent for severance pay – Kshs. 5,608,508.58, compensation for pending leave days – Kshs. 2,551,051.06, pay in lieu of notice – Kshs. 2,009,018/-, 12 months' pay as damages for unfair termination, general damages for discrimination and unfair treatment, interest at court rates from 31st December 2017 until payment in full plus costs of the suit.

2. The Respondent filed a memorandum of defence and averred that it employed the Claimant as a Senior Portfolio Manager on 16th April 2012 and promoted him to Chief Executive Officer vide a letter dated 26th September 2016. The Respondent averred that it transferred its business to Sanlam Investment East Africa Limited (SIEAL) and agreed to offer the Claimant employment on the same terms and conditions as his employment with the Respondent but the Claimant failed to take up the offer. The Respondent averred that the Claimant was advised on his salary, leave days, and terminal dues in the termination letter. The Respondent averred his leave days were calculated according to the rules set down in the HR Manual which the Claimant had knowledge of and an employee was entitled to carry forward a maximum of 5 days. The Respondent averred that the assertion by the Claimant that he is entitled to 63 days is an afterthought and unsupported. The Respondent averred that the Claimant's termination was lawful and in compliance with statutory requirements and the internal procedures on redundancy. The Respondent averred that the Claimant was not discriminated against whether prior to or during redundancy. The Respondent averred in any case no ground of discrimination had been disclosed. The Respondent averred that the Claimant's form by his line manager was subject to completion of the Claimant's tasks, which were still outstanding and that the Claimant was paid his net terminal dues amounting to Kshs. 6,160,828.90. The Respondent averred that there is no basis in law for a contention that an employee's terminal dues on redundancy should be paid prior to issuance of termination letter. The Respondent averred that it fully complied with the provisions of Section 40 as read with Section 45 of the

Employment Act and that the Claimant has no cause of action against it. The Respondent averred that the short delay in payment of terminal dues was occasioned by the Claimant's failure to complete his tasks in relation to the transaction between the Respondent and SIEAL on time a fact that he was made aware of via email of 15th December 2015. The Respondent averred the Claimant's full terminal dues were paid on 13th February 2018 and thus prayed that the claim be dismissed with costs as his termination was fair, lawful and procedural.

3. The Claimant testified that he did not agree to the computation of leave days as the leave days computed were 22.36 days instead of 63.94 days. The Claimant stated that the Respondent never communicated that previous leave was nullified. He stated that he was paid the December 2017 salary on 15th December 2017 but his terminal dues were not paid. He testified that other staff were paid salary given terminal dues but he was told that he had to complete two tasks in order for him to be paid his terminal dues. He stated that there was a delay in carrying out the novation and that his tasks were in respect to two clients. He testified that he cleared once the tasks were finished. He admitted to have been offered an opportunity to work in the new company but he stated that the role he was to take was 2 grades below his previous job and it was a business development role on the retail side to which he was not an expert and that is why he did not accept the offer. In cross-examination he stated that he was aware of the redundancy and agreed that the reasons were valid since the Respondent was to become obsolete. He testified that he was not given his severance pay like the rest of the employees and his treatment was discriminatory.

4. The Respondent's witness was Rosemary Wairimu Muchiri a HR Business Partner at the Respondent. She testified that the Claimant was entitled to annual leave of 25 days and that is what he was given. She stated that the Claimant was only entitled to carry forward 5 days as per the company's handbook. She testified that the redundancy package was based on the annual leave earned in the month of December, one month pay for each year worked, 2 months in lieu of notice because he was serving one month leave, pro rata pay for leave. She stated that the dues were computed in December but his pay was released in February 2018 since he had incomplete tasks and as a CEO he was expected to complete the tasks before he went away.

5. The Claimant isolated the following as the issues for determination:-

- i. Whether the redundancy process in respect of the Claimant was substantially unjustified, procedurally unfair and breach of the law?
- ii. What was the accurate leave computation of the Claimant at the time of redundancy?
- iii. Whether the Claimant was discriminated against by the Respondent in redundancy process.
- iv. What remedies should the court grant?

The Claimant cited the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**, where Maraga JA (as he then was) stated that for any termination of employment under redundancy to be lawful, it must be both substantially justified and procedurally fair. The Claimant submitted that fairness of the redundancy process includes engagement of the employee by the employer in adequate consultations which should precede any decision on termination. The Claimant submitted that there was no engagement at all between him and the Respondent prior to the redundancy process and this was contrary to Section 40 of the Employment Act. He submitted that the Respondent opted to sell off its business and assets to a third party for a substantial gain ensuring that all jobs previously held at the Respondent were automatically redundant. He submitted that the process of redundancy was substantially unfair since the Respondent is still fully in operation to date, continues to derive a return from the transfer of that business and it was not a loss making entity at the time of the transfer of its assets. He submitted that additionally, the criteria for selecting the employees who were subject to redundancy was never discussed or disclosed to the Claimant. He cited the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others** (supra) where Murgor JA held that the appellant did not apply a fair selection procedure as required by Section 40(1)(c) of the Act and in so doing unfairly terminated the contracts of the 447 affected employees. The Claimant submitted that he completed the assigned tasks before 31st December 2017 which fact was confirmed by the Respondent when it issued a certificate of service to him dated 31st December 2017. He submitted that the Respondent failed to pay terminal dues to the Claimant contrary to Section 40(1)(e), (f) and (g) of the Employment Act and this failure offended the Employment Act and rules of natural justice. The Claimant submitted that there were no 'numerous outstanding tasks' to the completion of the transaction between the Respondent and Sanlam Investments East Africa Ltd (SIEAL) which he was required to complete, given that his position was redundant and superfluous. The Claimant submitted that the alleged tasks were an afterthought intended to deny him his rightful dues. The Claimant submitted that the said tasks were neither assigned specifically to him through his letter of employment nor reserved in his letter of redundancy or notice of termination of employment. The Claimant submitted that the exclusion of payment of his terminal dues was in bad faith, discriminatory and malicious as it was part of blackmail for having declined the job offer by the Respondent's counterpart to the business asset transfer agreement. The Claimant submitted that the Respondent did not produce any evidence demonstrating that the tasks were vested in the Claimant in person. The Claimant submitted that the expectation that he could participate in the conduct of annual audits after 31st December 2017 was a cynical act of malice and the continuation of harassment which been underway since 11th December 2017 when the supervisor threatened the Claimant. The Claimant submitted that the Respondent had adequate time to carry out all necessary tasks before the redundancy date and the issue of proper planning and dedication does not arise since the tasks alluded to were to be performed by identified third party professional services providers who were not under the supervision of or reporting to the Claimant. The Claimant further submitted that the Respondent failed to provide in evidence the statement of statutory deductions and the KRA P9 form to show the payment and deductions made from the Claimant's pay indeed related to his redundancy and that the taxes due were remitted contrary to the Income Tax Act. The Claimant relied on the case of **Ian Edwards v Bytes Technology Group Kenya Ltd [2018] eKLR** where the court held that the Income Tax Act does not place responsibility or any obligation on an employee to deduct or remit tax to KRA as such responsibility is placed on the employer. It was submitted that there was no legal basis for failure to pay the redundancy dues on the due date and the termination of the Claimant was thus laced with procedural unfairness and in breach of the law. The Claimant submitted that the Respondent should be condemned to pay damages. On the issue of computation of leave, the Claimant submitted that the Respondent unilaterally, arbitrarily and without any legal basis reduced his outstanding leave days from 63 to 22.36. The Claimant submitted that the Respondent declined to grant him the requested

leave days during the month of December 2017. The Claimant submitted that he had produced in evidence a schedule obtained from Sammy Maiyo the HR Manager showing the pending leave days that he had not taken as at the date of redundancy. The Claimant submitted that the Respondent's witness purported to introduce and rely on a HR Manual and that the said manual cannot form part of his contract of employment since the copy availed in court was a generic version which was purportedly printed from the internet and which was not signed by him. The Claimant submitted that only a manual signed and endorsed by him can be admitted as evidence in this suit. The Claimant submitted that the provisions in the purported manual on forfeiture of leave days and applicable notice period for termination of the employee's contract violated the terms of his contract of employment dated 16th April 2012 and Section 13 of the Employment Act. The Claimant submitted that there is no evidence that the said manual was circulated to him for the purpose and intention of modifying his contract of employment at any time or at all. The Claimant relied on the case of **Abraham Gumba v Kenya Medical Supplies Authority [2014] eKLR** where the court held that employees cannot be held accountable unless they have consented to be bound by signing their full acceptance of the standards set in the manuals. The Claimant submitted that the Respondent failed to prove that he took all the leave days that had accrued while working for the Respondent. He cited Section 28 of the Employment Act does not envisage forfeiture of leave days by an employee at the time of redundancy. The Claimant submitted that according to Section 74(1)(f) of the Employment Act it was the employer who is mandated to keep a written record of all employees including the employee's annual leave entitlement. The Claimant submitted that no such record was produced by the Respondent during trial and no evidence was tabled to show that the Claimant was indeed consulted and/or notified before the alleged forfeiture of his leave days. The Claimant submitted that arguments on forfeiture of leave were an afterthought intended to evade the statutory duty of the Respondent to compensate the Claimant for the leave days. The Claimant submitted that he had proved his leave days entitlement was 63.94 days as at the date of redundancy and the Respondent should be held liable to compensate him. The Claimant submitted that he was discriminated against by being paid later than the rest of the employees and also by the line manager failing to sign his clearance form without any lawful cause. The Claimant submitted that as further proof of malice, the line manager and supervisor contemptuously addressed him on 29th December 2017 in response to his request for his dues and purported to assign him further tasks on 2nd January 2018 when he was no longer expected to work for or report at the Respondent's office. The Claimant submitted that the Respondent's conduct demonstrated a pattern of intentional violation of law to deliberately punish and mistreat him. The Claimant submitted that failure to pay the redundancy dues as at the date of redundancy was mischievous and discriminatory and resulted in loss, damage and mental stress and anguish. The Claimant submitted that the actions of the Respondent failed to eliminate discrimination in employment policy and practice and failed to guarantee equality in employment contrary to Section 5 of the Employment Act and was thus unlawful and violated his rights.

6. The Respondent submitted that the Claimant's claim was unmerited and isolated the following as the issues for determination

- i. Whether the Human Resource Manual applied to the Claimant.
- ii. Whether the termination of the Claimant's employment on account of redundancy was valid and fair.
- iii. Whether the Claimant is entitled to damages.
- iv. Who should bear the cost of the suit?

The Respondent submitted that the Claimant's case had glaring discrepancies meant to mislead the court into awarding him unjustifiable reliefs. The Claimant had stated that his terms of employment were contained in a letter of appointment dated 2nd May 2012 but no such document was presented as evidence in this court. The Claimant further acknowledged in his reply to the memorandum of defence that the Respondent's Human Resource Manual applied to him. The Respondent submitted that they indicated in the Claimant's termination letter that the final dues would be based on the provisions of the Respondent's Human Resource Manual. The Respondent submitted that there was no record of the Claimant writing back to the Respondent to enquire about the human resource manual it referred to. The Respondent submitted that its witness was able to demonstrate to the court that the Claimant was enjoying numerous benefits provided for in the human resource manual during the period of his employment. The Respondent submitted that the Claimant was insincere having acknowledged to have received Kshs. 6,160,828.90 in his bank account but lied to the court that he did not know that the money was his redundancy dues because he told the court that the money was received from Sanlam Life Insurance Ltd and that he thought that the amount comprised of his pension dues. The Respondent submitted that when questioned if he contacted Sanlam Life Insurance Ltd to confirm if the money comprised his pension dues he stated that he did not think it was important. The Respondent submitted that a review of the Claimant's December pay slip showed his total pension contribution was Kshs. 3,152,285/- and accordingly he could not have expected to receive more than Kshs. 3,152,285/- as his pension dues. The Respondent submitted that based on the HR manual which the Claimant acknowledged applied to him he was entitled to 25 days annual leave and he was only allowed to carry forward a maximum of 5 days and in the email correspondence of 15th December 2017, the Claimant did not raise an objection to such leave being calculated on the basis of an accrual rate of 25 days. The Respondent submitted that in the correspondence the Claimant insisted that his final annual leave balance was 26.36 days and not 22.36 as per the calculation by the Respondent and upon filing the suit, the Claimant's position changed significantly as he alleged that his annual leave balance was 63.94. The Respondent submitted that the Claimant had earlier alleged that the annual leave accrual rate applicable to him was 21 days with full pay per year. The Respondent submitted that therefore, the Claimant's response was completely absurd, it is mathematically impossible to compute a year's leave balance of 26.36 days from an annual leave entitlement of 21 days. The Respondent further submitted that the Claimant having acknowledged in his pleadings and from part of his evidence adduced in court that the Respondent's HR Manual applied to him, the Claimant is bound by those pleadings. His subsequent oral testimony and written submissions to the effect that he had never seen the Respondent's HR manual, and that he had never signed an acknowledgement and/or a deed of adherence relating thereto and that the Respondent's HR Manual did not apply to him must be disregarded. The Respondent relied on the case of **Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C 91/2002** where the Supreme Court of Nigeria held that "... it is now a very trite principle that parties are bound by their pleadings and that any evidence led by nay of the parties which does not support the averments in the pleadings, goes to no issue and must be disregarded." The Respondent urged the court to make a finding that the Claimant was subject to and bound by the contents of the Respondent's human resource manual and he should not be allowed to rely on certain provisions which suit him and argue against the provisions that he feels that they do not suit him. It was submitted that it should also be noted that the contents of the Respondent's HR manual expressly states that its provisions supersedes all other terms and conditions of an employee's employment contract with the effect that if there is a variance between the employment contract and the contents of the HR manual, the latter should take precedence. Relying on the case of **National Bank of Kenya Ltd v Hamida Bana & 103 Others [2017] eKLR** which stated the principle that a party cannot be allowed to approbate and reprobate, the Respondent submitted that the Claimant

having received and enjoyed payments and benefits under the its HR Policy, cannot be heard to argue that duties, obligations and responsibilities owed by him under HR Manual are not lawful and do not bind him. On the issue as to whether the termination of the Claimant's employment on account of redundancy was valid and fair, the Respondent relied on the case of **Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 Others [2013] eKLR** and submitted that it followed all the elements laid down in that case in regard to a valid and fair redundancy. It submitted that it had a valid reason as acknowledged by the Claimant in his pleadings, it issued him with notices as required by law, it took all the staff through the legal obligations of the process as acknowledged by the Claimant in various statements contained in his pleadings and evidence that the consultations had taken place. The Respondent submitted that it is trite law that the statutory selection criterion does not apply where an entire business is to be closed and all employees are to be laid off. It relied on the case of **Kenya Union of Domestic, Hotels, Educational Institutions Hospitals and Allied Workers Union & 26 others v Gusii Mwalimu Co-operative Savings and Credit Society Limited [2014] eKLR**. The Respondent submitted that it calculated the Claimant's dues in a lawful and justified manner and computed the Claimant's final annual leave balance as 22.36 days according to clause 6.2 of the Respondent's HR Manual. The Respondent submitted that the Claimant being the senior most executive amongst the Respondent's employees had some outstanding tasks and duties to carry out in relation to the sale of the Respondent's assets and business to SIEAL and the Claimant expressly acknowledged these tasks in his email sent to the Respondent's representatives on 18th December 2017 and as at 31st December 2017. The Respondent submitted that the Claimant had not completed these tasks hence the delay in payment of his dues and that he was paid his terminal dues in full on 13th February 2018 being a net amount of Kshs. 6,160,828.90. The Respondent submitted payment was made by Sanlam Life Insurance Limited because the Respondent was no longer trading and it had not bank signatories. The Respondent submitted that by the position the Claimant took in these proceedings was pushing for double payment of his redundancy dues since he had not offered to refund to Sanlam Life Insurance Limited the payment made to him on 13th February 2018. The Respondent submitted that Claimant therefore seeks to enrich himself at the Respondent's cost. The Respondent submitted that the Claimant made a vague reference to discrimination. The Respondent submitted that the Claimant made reference to Section 5 of the Employment Act, however no particulars of the same have been provided in the pleading and the evidence filed in court and having not particularized the alleged instances of discrimination or referred to any grounds of discrimination and not supplied any evidence, the Claimant's discrimination claim must fail. The Respondent submitted that the Claimant has not proven any of his claims against it hence is not entitled to the damages and/or reliefs sought. The Respondent submitted that the Claimant had introduced new allegations in his oral testimony and through his written submissions such as the criteria of selecting the employees, breach of statutory obligations set out in Section 20(1) and 21(4) of the Employment Act on the failure to issue the Claimant with an itemized pay statement relating to his redundancy dues, an allegation in relation to PAYE due and tax payable from the Claimant's redundancy dues. The Respondent submitted that the Claimant is bound by his pleadings and accordingly those fresh allegations should be completely disregarded and this case be dismissed with costs.

7. The Claimant sued seeking recovery for his alleged unlawful and unfair termination on account of redundancy as well as for discrimination. It is common ground that the Claimant was a CEO of a business line that was sold off to the new enterprise and his job accordingly declared redundant. He was given notice of the intended redundancy and was offered a job which he felt was beneath him to accept as it was apparently a few notches lower than the position he held in the company that was being acquired. As his payment was delayed he asserted that he was discriminated against. His pleadings did not give particulars of the discrimination but it came across as the delay in payment of his terminal dues as compared to other employees facing redundancy. The Respondent on its part asserts the Claimant's termination was lawful and procedural and that his terminal dues computation was proper. Whereas the Respondent is the keeper of records, it did not avail a record that would show the Claimant's leave entitlement was not as contained in the letter authored by the Human Resource Manager of the Respondent. Equally, the Respondent being the employer had the records such as the record of endorsements on the Human Resource Manual that the Claimant disavowed. The copy that was availed in evidence was a generic composite and not proof the Claimant had been presented with a copy and signed in acceptance so as to be bound by it. The Respondent proved that there was reason for the termination of the employment and therefore it would be untenable for the Claimant to recover for the alleged unlawful dismissal as it was not unlawful. Whereas the Claimant was not paid at the same time as the Respondent's other employees, he did not prove this was discrimination for which he could recover. He was aware he had tasks to complete and having failed to complete them in the time given he cannot now turn around and accuse the Respondent of delaying payments though there was a slight lag in the time it took to process his dues. It was not controverted that he received a significant payment which he asserts was his pension dues but having evaluated the evidence adduced it is clear that was inclusive of his final dues though the leave was not properly calculated. He was entitled to 41.58 extra days and this translates to Kshs. 1,392,249.40 due on leave. He would be entitled to recover for the underpayment on leave. As no discrimination or unlawful termination process was discerned he would not get any damages whether special or general (for discrimination). The Claimant's claim having largely been unsuccessful is only allowed in so far as the leave computations are concerned and for that he will be entitled to capped costs on the sum he has succeeded in recovering. There shall be interest on the sum awarded from the date of judgment till payment in full. I therefore enter judgment for the Claimant against the Respondent for:-

- i. Kshs. 1,392,249.40
- ii. Costs of the suit on the sum above
- iii. Interest on (i) above at court rates from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 17th day of December 2019

Nzioki wa Makau

JUDGE