



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 407 OF 2015

(Before Hon. Justice Mathews N. Nduma)

FORTNATUS ONGIJO.....CLAIMANT

VERSUS

BOARD OF GOVERNORS ST. ALBERT ULANDA GIRLS.....RESPONDENT

JUDGMENT

1. The claimant was employed by the Respondent on 1st April 2006 as a driver. He worked continuously until 19th October 2015 when his employment was terminated. At the time the claimant earned Kshs. 12,800 per month. The claimant received a letter dated 12th October 2015 in which he was impliedly declared redundant for failing to accept another deployment from position of driver to the school's income generating project.

2. It is not in dispute that on 15th September 2015, the respondent summoned the claimant and gave him 7 days within which to accept deployment in writing to an income generating project since he was redundant in his current post. In effect, the claimant was declared redundant then. The claimant wrote a letter dated 14th October 2015 accepting to be redeployed as stated. He stated that he only had sought better particulars of the project.

3. The claimant prays for compensation for unlawful termination and payment of terminal benefits including, severance pay for 9 years and 7 months worked; 3 months salary in lieu of notice; overtime; arrear salaries and underpayments.

Defence

4. Respondent filed a statement of defence on 21st January 2016 in which the respondent states that the claimant became redundant by virtue of a circular by the Ministry of Education directing all schools to have a maximum of one driver. The circular was dated 24th November 2014. That the respondent complied with *Section 40 of the Employment Act 2007* by engaging a labour officer and also engaged the claimant to be deployed to an income generating activity which offer the claimant declined.

5. That the claimant was notified to collect his terminal dues but declined to collect the same.

Testimony

6. The claimant testified in support of his case as CW1 and produced exhibits marked '1' to '12' in

support of his case. He relied on a witness statement dated 19th November 2015 as his evidence in Chief. The claimant states that he was declared redundant without notice. That he was not redundant since the school had 5 motor vehicles and it had 4 drivers only. The claimant admitted that the Ministry of Education by a circular dated 24th November 2014 directed all schools to trim their staff. CW1 stated that he was the only one declared redundant. That he was not the last driver employed. That the school had employed two (2) drivers after him. Claimant denied that he had refused to be redeployed to an income generating project. That he accepted the offer in his letter dated 14th October 2015 but was not deployed.

7. That the respondent wrote a letter dated 9th October 2015 stating erroneously that the claimant had refused to be deployed. Claimant stated that he did not receive a letter of termination and that he was not paid terminal dues. That he had a good working relationship with the respondent. Claimant said he was only accused of masterminding joining of union by the support staff of the school. Claimant states this was the only reason he was targeted for retrenchment. Claimant states that he had only sought clarification of the project he was being deployed to. The claimant prays for the reliefs sought.

8. RW1, Antony Muhanji testified that he was the Bursar of the Respondent and was in charge of the support staff. That the claimant was a driver of the respondent for a period of 10 years. That in the year 2015, the school received a circular from the Ministry of Education giving guidelines on number of workers. That they were directed to employ one (1) driver. That the school had 43 employees and were to reduce them to 37 as per the directive. That the school deployed some workers to income generating project. That the school involved a labour officer in that endeavor.

9. A meeting was held with the staff, labour office and school management to that effect. That the school declared the claimant redundant and remained with a senior driver Mr. Ezekiel Asidi. The 3rd driver Mr. James Wangao was on probation. That the school had several farming projects and the claimant was to be deployed to one of them. RW1 stated that the claimant was dissatisfied with the deployment as per his letter dated 1st October 2015. That the claimant had disciplinary issues including insubordination and careless driving. That the claimant's terminal benefits were prepared but he did not receive them. RW1 did not provide computation before court. RW1 stated that he did not participate in the retrenchment process. RW1 prays that the suit be dismissed with costs.

Determination

10. The issues for determination are:

(a) Whether the declaration of redundancy of the claimant was for a valid reason and implemented fairly.

(b) Whether the claimant is entitled to the reliefs sought.

Issue (a)

11. The respondent declared the claimant redundant on 15th September 2015 verbally at a meeting held by the Board and the claimant was given 7 days within which to put in writing if he was ready to be redeployed to an income generating project. The respondent wrote a reminder to the claimant dated 28th September 2015 reminding him to respond to the resolution by the Board of Management. The claimant responded by a letter dated 1st October 2015 in which he stated that the issue of redundancy was not sincere and fair since the school had five motor vehicles and there were only three drivers. The claimant sought clarification on the issue of the project. Claimant offered to make his decision once clarification on the project had been given. The respondent responded by a letter dated 12th October 2015 in which the principal asked the claimant to visit his office to discuss payment of final dues since he had rejected the redeployment offer.

12. It is clear that the respondent had a valid reason to terminate the employment of the claimant but did

not give a one month written notice of the intention to declare the claimant redundant copied to the Ministry of Labour as is mandated by *Section 40 (1) (b) of the Employment Act 2007*.

13. The respondent however purported to discuss the issue of redundancy selection and offered a vague option to the claimant to which the claimant sought clarification before accepting. The respondent took the request for clarification to be a rejection of the offer and proceeded to invite the claimant to collect his dues and indirectly terminated his employment therefore.

14. It is manifestly clear that the respondent did not follow the mandatory procedure under *Section 40(1) (b) of the Act*.

15. The respondent did not compute terminal dues payable to the claimant and did not pay the same in violation of *Sections 40(1) (e), (f) and (g) of the Employment Act, 2007*.

16. The court finds that the termination of the claimant on grounds of redundancy was procedurally unfair in that there was no strict compliance with *Section 40 of the Act*, despite the respondent having a fair reason to terminate the employment of the claimant for operational reasons.

17. Accordingly, the termination of the employment of the claimant was procedurally unfair and in violation of *Sections 40, 41 and 45 of the Employment Act 2007*. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Employment Act, 2007*.

18. In this respect, the claimant had served 10 years. He was not paid severance pay. He was not subjected to the mandatory statutory notices. The claimant lost his employment unfairly and suffered loss and damage.

19. The court has considered the decision by Byram Ongaya in **Angela Shiukuru Ilongaga vs Airtel Networks Kenya Limited (2018) eKLR** in awarding the claimant the equivalent of ten (10) months salary in compensation for the unprocedural declaration of redundancy in the sum of Kshs. 12,800 x 10 128,000.

Terminal benefits

Notice pay

20. In answer to issue (b) above, the claimant was not paid in lieu of termination notice in the sum of Kshs. 12,800 and is awarded accordingly.

Severance pay

21. The claimant was also not paid severance pay for each completed year of service in the sum of Kshs. 57,600 and the same is awarded accordingly.

Underpayments/Leave pay.

22. The claimant did not prove that he was underpaid nor that he was owed payment in lieu of leave. These claims are dismissed for lack of merit.

23. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

(a) Equivalent of 10 months salary in compensation Kshs. 128,000.

(b) Severance pay calculated at 15 days salary for each completed year of service in the sum of Kshs. 57,600.

(c) One month salary in lieu of notice Kshs. 12,800.

Total award Kshs. 198,400.

(d) Interest at court rates from date of filing suit till payment in full in respect of (b) and (c) above and from date of judgment in respect of (a) above till payment in full.

(e) Costs of the suit.

Judgment Dated, Signed and delivered this 4th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Kisela for claimant

Mr. Omondi for Respondent

Chrispo – Court Clerk