



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

CAUSE NO. 470 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PETER MUCHINE MWANGI.....CLAIMANT

-VERSUS-

ALIBHAI SHARRIF & SONS LTD.....RESPONDENT

JUDGMENT

1. This case was filed by PETER MUCHINE MWANGI by way of statement of claim and filed on 4th April 2013. He alleges that his employment was unfairly terminated by the respondent ALIBHAI SHARRIF AND SONS LIMITED on 3rd October 2012 without notice. He prays for the following remedies:-

- a) Declaration that the termination was unfair and unlawful both under the Constitution of Kenya and under Employment Act.
- b) An order directing the respondent to immediately issue valid certificate of service to the claimant.
- c) An order that the respondent do pay the claimant one month salary in lieu of termination notice.
- d) An order that the respondent do pay the claimant a sum equivalent to the balance of the contract period (being 3 years less the period worked) on the account of the breach of contract.
- e) An order that the respondent do pay the claimant a sum equivalent to the balance of leave days due to the claimant at the time of termination.
- f) An order that the respondent do pay the claimant service pay for the period served.
- g) General damages for unfair and unlawful termination.
- h) Costs and interest.

2. The respondent filed statement of defence denying that the termination of the claimant's employment was unfair. It states the claimant's position of supply chain and logistics manager had become redundant and the termination followed full discussions with the claimant. It further states that the claimant was paid redundancy benefits in the sum of Kshs.111,37.60 which he received on 30th October 2012 in full and final settlement.

3. On the hearing date the respondent did not appear in court and neither did its advocates on record Kyalo & Associates. After confirming that proper service was effected and an affidavit of service filed, the court permitted the claimant to proceed with the hearing in absence of the respondent on 15th November 2017.

Claimant's case

4. The claimant testified that he currently lives and works in Mombasa for a shipping line. He was employed by the respondent on 1st April 2012 as reflected in his letter of appointment annexed as Appendix 1 of the claim. His gross salary was Kshs.185,000. He worked for 7 months. His employment was terminated through a letter dated 17th October 2012. He was paid Kshs.111,317.60. he was not informed of

the redundancy prior to that date. He did not believe that he was made redundant because after his termination someone else was employed to carry out his duties. He was not issued with a certificate of service.

5. The claimant denied that he was absent for 28 days prior to the termination of his employment as alleged in the statement of defence.

Determination

6. I have considered the pleadings and viva voce evidence of the claimant. I have also considered the documents filed together with the pleadings. The issue of determination are:-

(i.) Whether the claimant was unfairly terminated or declared redundant.

(ii.) Whether the claimant is entitled to the remedies sought.

Whether claimant was unfairly terminated or declared redundant

7. There is no letter of termination on record. What was produced by both the claimant are a letter of acknowledgement of terminal dues from the respondent signed by the claimant on 3rd October 2012 and correspondence for the parties in respect of the letter of demand.

The procedure for redundancy is provided for under Section 40(1) of the Employment Act as follows:-

“40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer ;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant , paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and

(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.”

8. The respondent who avers that the claimant was lawfully declared redundant did not comply with the procedure as set out under Section 40. The first time that the issue of redundancy was raised was in the response to the letter of demand. Even if the respondent intended to declare the claimant redundant, its failure to comply with the statutory provisions for redundancy would render such redundancy unfair termination.

9. From the foregoing reasons, I find that the claimant was not declared redundant but was unfairly terminated without any reason being advanced for the termination or being taken through a disciplinary process.

Remedies

10. Taking into account the very short duration of service of the claimant from March to October 2012, I award him one month salary as compensation for unfair termination of employment.

11. The claimant is entitled to a certificate of service in terms of Section 51 of which I direct the respondent to issue to him within 30 days from the date of judgment.

12. The claimant was paid one month’s salary in lieu of notice and the prayer for the service therefore fails. The claimant is not entitled to pay for the unexpired period of his 3 years constraint as this is not provided for either by law or the terms of his contract. The prayer for service pay has not been proved as no evidence was adduced to prove that the claimant was not a member of NSSF or any other retirement or gratuity scheme established by the respondent.

The claimant is entitled to annual leave as the respondent did not deny that he did not take annual leave. Based on his salary of Kshs.185,000 per month and service of 6 months at the statutory rate of 1.75 days per month, I award the claimant Kshs.64,750.

Conclusion

13. In conclusion I enter judgment for the claimant against the respondent as follows:-

(i.) Kshs. 185,000 as compensation;

(ii.) Kshs.64,750 for annual leave

(iii.) Certificate of service

The respondent shall also pay claimant's costs for the suit and the decretal sum shall attract interest at court rates from date of judgment to the date of payment in full.

Dated, delivered and signed at Nairobi this 23rd day of February, 2018

MAUREEN ONYANGO

JUDGE