



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 129 OF 2015

OSCAR KISAKA.....CLAIMANT

VERSUS

ALI TAIB T/A AHZAB ACADEMY.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent on 6.5.2013 as Teacher worked until 25.11.2014 when his services were terminated on account of redundancy. It is the Claimant's case that the redundancy was done in breach of the law and it amounted to an unfair termination. He has therefore brought this on 13.3.2015 suit against Ahzab Academy claiming Kshs.225,000 made up salary for December 2014, one month salary in lieu of notice, service pay for 2 years, and 12 months' salary as compensation for unfair termination. On 22.2.2016, he amended the claim to substitute the Respondent with Ali Taib T/A Ahzab Academy.

2. On 1.4.2015 the then Respondent admitted laying off the claimant but averred that she did that fairly after serving him with a proper notice in advance. In addition, the Respondent averred that the claimant was paid his salary for December 2014 plus one month salary in lieu of notice and as such denied liability to pay the reliefs sought. She therefore prayed for the suit to be dismissed with costs. After the Claimant amended his Claim on 22.2.2016, the new respondent never participated in the suit despite being served with the process.

3. When the suit came up for hearing, the Claimant sought leave to dispense with the hearing and instead adopted his pleadings and written testimony and documentary evince filed and disposed the suit by written submissions.

Claimants' Case.

4. The Claimant case is that he was employed as a teacher by the Respondent on in 6.5.2013 for a 2 years contract. He started with a salary of Kshs.13,000 per month but later it was increased to Kshs.15,000. On 25.11.2014, he was served with a terminating his services with immediate effect citing restructuring as the reason for the termination. The letter send him on an unpaid leave for the year 2014 but offered to pay him salary for November 2014 plus one month salary in lieu of notice. The Claimant has however submitted that the termination of the Claimant's employment on account of redundancy was done in breach of the procedure provided by the Employment Act.

Analysis and Determination

5. I have carefully considered the material presented to the court and I now proceed to determine the following issues:

- a) Whether the claimant's employment was unfairly terminated.
- b) Whether the claimant is entitled to the reliefs sought.

Unfair termination.

6. The burden of proving unfair termination is placed by section 47(5) of the Employment Act on the employee who alleges that he was so terminated. Thereafter which the burden shifts to the employer to prove and justify the reason for the termination and the fairness of the procedure followed before the termination. In this case the uncontested evidence by the Claimant is that he was terminated on account of redundancy by the letter dated 25.11.2014. The termination took effect immediately and the only benefit offered to the claimant was one month salary in lieu of notice plus salary for the month of November 2014.

7. From the foregoing evidence it is obvious that the termination of the Claimant's employment on account of redundancy was in breach of

the mandatory procedure laid down by section 40 of the Act. The said provision requires in mandatory terms that before terminating the services of an employee on account of redundancy, the employer shall first serve the employee (or his trade union) and Labour officer with at least one month written notice, followed by fair selection process, then payment of salary in lieu of notice, accrued benefits plus severance pay to the employees selected for the redundancy. The failure to prove that fair procedure was followed rendered the termination of the Claimant unfair within the meaning of section 45 of the Act, and I so hold.

Reliefs sought

8. Under section 49 of the Act and in view of the foregoing finding that the termination of the Claimant's employment was unfair, I award him Kshs.15,000 as one month salary in lieu of notice plus Kshs.60,000 being 4 months' salary compensation for the unfair termination. In awarding the said compensation, I have considered the fact that the Claimant had served for a fairly short time and his contract was to expire in 5 months' time.

9. The claim for salary for December 2014 is dismissed because the termination of the employment relationship ended on 25.11. 2014.

Disposition

10. For the reasons stated above, I enter Judgment for Claimant in the sum of Kshs 75000 plus costs and interest from the date of filing suit. The said award will be paid subject to statutory deductions.

Dated and signed at Nairobi this 18th day of January, 2018

ONESMUS MAKAU

JUDGE

Delivered at Mombasa this 22nd day of February, 2018

LINNET NDOLO

JUDGE