



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 894 OF 2015

HENRY JUMA OBUDHO.....CLAIMANT

VS

DAVID ENGINEERING LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. David Juma Obudho, the Claimant in this case, was an employee of David Engineering Limited, the Respondent herein. He brought this action, following the termination of his employment on 29th January 2015. The claim is contained in a Memorandum of Claim dated 20th May 2015 and filed in court on 25th May 2015. The Respondent’s defence is documented by a Statement of Response dated 29th June 2015 and filed in court on 1st July 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Gilbert Meo.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent in the position of Welder at a monthly salary of Kshs. 31,988 effective 9th February 2004. He worked until 29th January 2015, when his employment was terminated.

4. The Claimant states that no valid reason was given for the termination of his employment and that he was not given an opportunity to be heard. He submits that the termination was unlawful and unfair and therefore claims the following:

- a) Salary for January 2015.....Kshs. 31,988.00
- b) 1 month’s salary in lieu of notice.....31,988.00
- c) Leave pay for 39.5 days.....48,597.15
- d) Gratuity @ 20% of basic salary for 132 months.....767,712.00
- e) Severance @ 15 days for each year of service.....202,999.50
- f) Compensation for unlawful termination.....383,856.00
- g) Damages for loss of income
- h) Certificate of service
- i) Costs plus interest

The Respondent’s Case

5. In its Statement of Response dated 29th June 2015 and filed in court on 1st July 2015, the Respondent admits having employed the

Claimant in the position of Welder from 9th February 2004. The Respondent states that as at 2014, the Claimant earned a monthly salary of KShs. 18,941 inclusive of house allowance.

6. The Respondent avers that by letter dated 29th January 2015, the Claimant was duly informed of the reason for the termination of his employment, being harsh market conditions leading to low levels of work and restructuring.

7. The Respondent maintains that the termination of the Claimant's employment was lawful and fair, within the dictates of Section 40 of the Employment Act, 2007.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

9. The termination of the Claimant's employment was effected by letter dated 29th January 2015, stating as follows:

"Dear Mr. Henry,

RE: TERMINATION OF SERVICE

The above subject refers.

We regret to hereby notify you that the company cannot be able (sic) to continue engaging your services owing to the current low levels of work (low market conditions) and restructuring.

Consequently, your services to the company are coming to a halt on 31st January 2015.

Your final dues will be computed as follows:-

- Salary for days worked up to and including 31st January 2015
- Notice period of 30 days
- Leave balance of 39.5 days

Please arrange to complete all clearance formalities and return any company property in your possession to enable us process and pay your final dues less outstanding liabilities.

Yours faithfully,

David Engineering Limited

(Signed)

Gary Bangera (Mr.)

Director

Michael Omondi

HR & Administration office"

10. This letter, as well as further evidence placed before the Court, confirm that the termination of the Claimant's employment was triggered by a redundancy situation. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

"the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

11. The law recognises redundancy as a legitimate mode of termination of employment but there are stringent conditions to be met. In this regard Section 40 of the Employment Act, 2007 provides that:

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 of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

12. Section 40 of the Employment Act is couched in mandatory terms and as held by this Court in *Francis Maina Kamau v Lee Construction [2014] eKLR* a redundancy that does not observe the conditions set thereunder is an unfair termination within the meaning of Section 45 of the Act.

13. In the instant case, the Court did not see any attempt by the Respondent to comply with the dictates of Section 40 of the Employment Act. This renders the termination of the Claimant's employment substantively and procedurally unfair.

Remedies

14. Section 49(1) of the Employment Act provides for remedies for wrongful dismissal and unfair termination, including the equivalent of salary for a number of months up to a maximum of twelve months. The Court was referred to the decision by the Court of Appeal in *United States International University v Eric Rading Outa [2016] eKLR* where it was held that in making an award for compensation under Section 41(1) (c) of the Employment Act, this Court should be guided by the principles on assessment of damages. In my view, the matters to be taken into account in this regard, are well spelt out in Section 49(4) of the Act.

15. In the case now before me, the Claimant had worked for the Respondent for over ten (10) years and upon termination, he was denied his terminal dues in unclear circumstances. For these reasons, I award him twelve (12) months' salary in compensation for unfair termination of employment.

16. The claims for salary for January 2015, one month's notice pay, leave pay for 39.5 days and severance pay @ 15 days for each completed year of service are admitted and are payable.

17. In response to the claim for gratuity, the Respondent referred to the decision by the Court of Appeal in *Central Bank of Kenya v Davies Kivieko Muteti [2009] eKLR* and the decision by my brother Radido J in *George Onyango Akuti v G4S Security Services Kenya Limited [2013] eKLR* where it was held that a claim for gratuity must be grounded either on provisions in the contract of employment or statute.

18. This is the correct legal position as I understand it and having found no such provision in the Claimant's favour, the claim for gratuity fails and is dismissed. No basis was laid for the claim for damages for loss of income which also fails and is dismissed.

19. The Claimant was issued with a certificate of service in the course of the trial, thus extinguishing the claim thereon.

20. In the ultimate, I enter judgment in favour of the Claimant in the following terms:

- a) 12 months' salary in compensation.....Kshs. 332,196
- b) Salary for January 2015.....27,683
- c) 1 month's salary in lieu of notice.....27,683
- d) Leave pay for 39.5 days (27,683/30x39.5).....36,449
- e. e) Severance pay for 10 years (27,683/30x15x10).....138,414

Total.....562,425

21. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

22. I award the costs of this case to the Claimant.

23. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 13TH DAY OF FEBRUARY 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF MARCH 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mr. Mburu for the Claimant

Mr. Shah for the Respondent