



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 447 OF 2016
BAKARI RAI.....CLAIMANT
VS
BESTBUYS TECHNOLOGIES LIMITED.....RESPONDENT
JUDGMENT

Introduction

1. This claim is brought by Bakari Rai against his former employer, Bestbuys Technologies Limited. The claim is contained in a memorandum of Claim dated 7th June 2016 and filed in court on 8th June 2016.
2. The Respondent filed a Response on 8th August 2016 but chose not to call any witnesses. The Claimant testified on his own behalf. Both parties filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent as a messenger at a monthly salary of Kshs. 10,000 effective 2011. He worked as such until 29th February 2016, when his employment was terminated on the ground that his services were no longer required.
4. The claimant terms the termination of his employment unlawful and unfair and therefore claims the following:

- a) 1 month’s salary in lieu of notice.....Kshs. 10,000
- b) 5 years’ leave pay.....40,384
- c) Severance pay for 5 years.....28,886
- d) 12 months’ salary in compensation.....138,000
- e) Costs plus interest

The Respondent’s Case

5. In its Response dated 8th August 2016 and filed in court on even date, the Respondent admits having

employed the Claimant at a monthly salary of Kshs. 10,420.

6. By letter dated 2nd February 2016, the Respondent issued a one month's notice of termination of employment to the Claimant. At the end of the notice period, the Claimant was entitled to his salary for the month of February plus 13 days accumulated leave pay amounting to Kshs. 14,836.13, to be paid upon proper handover. The Respondent pleads that the payment had not been made because the Claimant had not completed the clearance process.

7. It is the Respondent's case that the termination of the Claimant's employment was fairly and lawfully carried out in accordance with Section 35(1) of the Employment Act, 2007. The Respondent therefore denies the Claimant's entire claim. With regard to the Claim for leave pay, the Respondent states that the Claimant took all his leave days during his period of service.

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 Claimant's employment was terminated by letter dated 2nd February 2016, stating as follows:

"Dear Bakari

RE: TERMINATION OF YOUR EMPLOYMENT

Reference is made to the above mentioned matter and hereby notify you that your employment with Bestbuys Technologies Ltd has hereby been terminated based on the operational requirements of the company. Your last working day is 29th February, 2016.

This termination has been effected in terms of clause 11 of your employment letter whereby Bestbuys Technologies and yourself are entitled to terminate the employment contract by giving one month's notice or payment of one month's pay in lieu of notice.

We have taken the liberty of giving you 1 month's notice and computing your final dues which will be paid as follows:

- ◆Salary for days worked in February
- ◆Earned but Unused Leave days

Release of your final dues' cheque will be done upon confirmation of proper handover and return of company property and may be subject to any amount owing to the company.

We thank you for your valuable contribution during your employment with us and we wish you all the best in your future endeavors.

Yours Faithfully,

For Bestbuys Technologies Ltd

(Signed)

Group HRM”

10. The Respondent states that the Claimant’s employment was terminated pursuant to Clause 11 of his letter of appointment as well as Section 35(1)(c) of the Employment Act. The Response and the termination letter however make reference to ‘operational requirements of the company’ as a major consideration in the termination. In my view, this is a case of redundancy. 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. While redundancy is a legitimate mode of bringing employment to an end, there are stringent conditions to be met by the employer. These conditions are enumerated in Section 40 of the Employment Act as follows:

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. The Respondent made no attempt to comply with any of the foregoing conditions and as held by this Court in **Francis Maina Kamau v Lee Construction [2014] eKLR** where an employer declares a redundancy without observing the conditions set out under Section 40 of the Employment Act, the redundancy becomes an unfair termination within the meaning of Section 45 of the Act.

Remedies

13. In the circumstances of this case, the Court finds the termination of the Claimant’s employment substantively and procedurally unfair and awards him ten (10) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service and the Respondent’s complete failure to comply with the law on redundancy.

14. Under Section 40 (1) (g) of the Employment Act, payment of severance pay to employees declared redundant is mandatory. The Claimant is therefore entitled to severance pay at the rate of 15 days' pay for each completed year of service.

15. From the evidence on record, the Claimant was paid one month's salary in lieu of notice and the claim thereon is therefore without basis.

16. Regarding the claim for leave pay I have this to say; the Claimant told the Court that he had taken his leave for 2014 and 2015 but had accumulated leave from 2011 to 2013. The Court was unable to understand the logic behind this claim more so because there was no evidence of any prior complaint by the Claimant that he had been denied leave for the said period. At any rate and more importantly, such a claim would be statute barred under the second part of Section 90 of the Employment Act, which caps the limitation period for continuing injury at 12 months. Consequently, the claim for leave pay fails and is dismissed.

17. Ultimately, I enter judgment in favour of the Claimant in the following terms:

- a) 10 months' salary in compensation.....Kshs. 100,000
- b) Severance pay for 5 years (10,000/30x15x5).....25,000
- Total.....125,000**

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

19. The Claimant will have the costs of the case.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL 2018

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JUDGE

Appearance:

Mr. Kenga for the Claimant

Ms. Moka for the Respondent