



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 176 OF 2010
PETERSON MUTHIKE MURAGE.....CLAIMANT
v
SILPACK INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. On 2 March 2010, Peterson Muthike Murage (Claimant) instituted legal proceedings against Silpack Industries Ltd (Respondent) alleging wrongful and unlawful termination of employment and breach of contract.
2. In its Response filed on 1 November 2010, the Respondent contended that the Claimant's employment was lawfully terminated after it decided to outsource labour.
3. The Cause was heard on 7 February 2018 when the Claimant testimony and the Respondent's Administrator's examination in chief was conducted.
4. When the hearing resumed on 5 April 2018 for cross examination and re-examination of the Respondent's witness, the Claimant and his advocate were not in Court.
5. The Court scheduled proceedings to commence at 10.30am.
6. When the file was called out at 11.10am, the Claimant and his advocate were still absent and the Respondent applied to close its case.
7. The Court acceded to the request and gave directions as to the filing of submissions.
8. The Claimant did not file submissions while the Respondent filed its submissions on 27 April 2018.
9. The Court has considered the pleadings, evidence and submissions and identified the questions for determination as, *whether there was unfair termination of employment, whether there was breach of contract and appropriate remedies.*

Unfair termination of employment

10. The Claimant's pleaded that his contract was terminated verbally. The Respondent's case was anchored on business restructuring.

11. On the circumstances surrounding the separation, the Claimant testified that sometime in 2008, the Respondent introduced written contracts which some employees including himself refused to sign as the remuneration was reduced.

12. However he continued to work until 2009 when the employees including himself were issued with contracts on the letterhead of *Benori Agencies & Services Ltd*.

13. According to the Claimant, there was no explanation why the employees were required to sign new contracts with the new entity. He stated that the new contracts did not indicate remuneration and therefore he declined to sign the contract. He was therefore asked to leave.

14. The Respondent's witness on her part testified that in 2009 it decided that it would outsource employees through *Benori Agencies & Services Ltd* and that the agency came on board on 31 August 2009.

15. On the separation with the employees before the Agency came on board, the witness stated that all employees were consulted, some accepted to come on board through the Agency while others declined, and that all the employees were paid dues on 31 August 2009. She added that the Agency was to deal with the employees on its own terms.

16. It is not in dispute that the separation was occasioned by the decision of the Respondent to outsource labour to a different entity.

17. In the view of the Court, this was a case of redundancy, and therefore the provisions of sections 40 and 45(2)(b)(ii) of the Employment Act, 2007 became implicated.

18. The Respondent did not suggest that it gave the employees including the Claimant and the Labour Officer 1 month advance written notice as envisaged by section 40 of the Act.

19. On that singular reason, the Court can conclude that there was unfair termination of employment of the Claimant.

Breach of contract

Leave

20. An employee is entitled to at least 21 days annual leave with full pay.

21. The Claimant did not lay an evidential foundation as to the periods he did not go on annual leave during testimony, and the Court is therefore unable to determine whether there was breach of contract in respect of leave.

Overtime

22. Various *Regulation of Wages Orders* (specific to certain sectors of industry) prescribe minimum working hours beyond which an employee would be entitled to overtime pay.

23. Although testifying as to his working hours, the Claimant did not disclose the particular *Regulation of Wages Order* which applied to the industry the Respondent operated in or the nature of the business it was involved in. Even the formula used to compute the Kshs 114,336/- was not proved.

24. The Court is therefore, again unable to determine whether Claimant worked overtime warranting payment and at what rate.

Appropriate remedies

Pay in lieu of notice

25. In terms of section 40(1)(f) of the Employment Act, 2007 the Claimant was entitled to the equivalent of not less than one month's wages in lieu of notice (Claimant was on a daily rate of Kshs 473/- and multiplied by 26, the monthly average wage should have been about Kshs 12,298/-).

Severance pay

26. In terms of section 40(1)(g) of the Employment Act, 2007, the Claimant should have been paid severance pay.

27. The Claimant computed the severance pay as Kshs 50,022/-, an amount the Respondent did not interrogate.

28. The Claimant was paid about Kshs 4,880/- on account of *full and final dues*.

29. Considering the period of employment, severance pay must have been more than the amount paid.

30. The Court will allow the amount as computed by the Claimant.

Damages

31. The Claimant filed the pleadings while acting in person. An advocate later on came on record for him but the pleadings were not amended to seek compensation.

32. Damages, *strictu sensu* is not one of the remedies available in cases of unfair termination of employment and the Court therefore declines to award compensation in lieu of the damages sought.

Conclusion and Orders

33. The Court finds and holds that the employment of the Claimant was unfairly terminated and awards him

(a) Pay in lieu of notice Kshs 12,298/-

(b) Severance pay Kshs 50,022/-

TOTAL Kshs 62,320/-

34. The amounts paid to the Claimant to be deducted from the award herein.

35. Claimant is denied costs for not filing submissions.

Delivered, dated and signed in Nairobi on this 4th day of May 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mwaura instructed by Karanja Kiarie & Co. Advocates

For Respondent Mrs. Kinyanjui instructed by D.P. Kinyanjui & Co. Advocates

Court Assistant Lindsey