



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 1202 OF 2014

STEPHEN ODHIAMBO OLUOCH.....CLAIMANT

VERSUS

FREIGHT WINGS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant has brought this suit alleging that his employment contract was unfairly and unlawfully terminated on account of redundancy by the respondent's letter dated 3.7.2012. He therefore prayed for his salary for July 2012, one month salary in lieu of notice, severance pay plus compensation for unfair termination. The respondent has however denied liability for the alleged unfair termination and averred that it is the claimant who voluntarily resigned from his employment by the letter dated 19.7.2012. She therefore prayed for the suit to be dismissed with costs.

2. The suit was heard on 12.4.2018 when the claimant testified as Cw1 and the respondent called the HR Manager of a sister company as Rw1. Thereafter both parties filed written submissions which I have carefully considered herein together with the rival evidence adduced.

Claimant's Case

3. Cw1 testified that he was employed by the respondent in November 1991 as a supervisor and later promoted to Export coordinator earning Kshs.32,000 per month. In June 2012 he took a few days leave and on 2.7.2012 he was called by Mr. Njagi who told him to attend a meeting with the respondent's Group HR Manager Ms Eva Okallo on 3.7.2012. In the meeting, he found 3 other colleagues and the Group HR Manager told them that the company was downsizing and as such their positions were being declared redundant. She therefore gave them a letter dated 3.7.2012 terminating their services from 4.7.2012 and scheduling a meeting on 11.7.2012 to discuss their exist pan. The said meeting of 11.7.2012 was postponed just like all the other subsequently scheduled meetings.

4. On 19.7.2012, the Group HR Manager told him to write a resignation letter in order to enable her fast track the processing of his terminal dues and enhance his chances of getting future employment in the Group of Companies. He indeed got the job in a sister company after 3 months of the termination, that is, on 24.10.2012 but again he was terminated after 6 months on account of poor performance. He contended that the resignation letter was not voluntary and it was done after redundancy.

5. On cross examination, Cw1 admitted that he did not plead in his suit that he was forced to write the resignation letter dated 19.7.2012. He further admitted that he was a member of respondent's provident fund and the NSSF. He maintained that he was terminated on account of redundancy a notice dated 3.7.2012 before the resignation letter dated 19.7.2012 which he made under pressure. He admitted that the employer had the discretion to terminate his contract of service. He however contended that he was never paid his salary for June and July 2012.

Defence Case

6. Rw1 is the HR Veg Pro Group of Companies, a sister company to the respondent. He denied that the claimant was declared redundant and contended that he resigned on his own volition by the letter dated 19.7.2012. He further contended he responded to the resignation by the letter dated 20.7.2012 setting out the dues payable after clearance but the claimant disappeared before doing the clearance.

7. Rw1 further testified that the claimant returned after 3 months begging for a job on ground that he was suffering and he was employed by the appointment letter dated 29.9.2012.

8. On cross examination, Rw1 maintained that the claimant resigned and disappeared without clearance and only returned to seek fresh employment. He confirmed that the signature in the appointment letter and approval for appointment belong to the Group HR Manager Ms Eva Okallo.

Analysis and Determination

9. There is no dispute from the evidence that the claimant was employed by the respondent until July 2012. The issues for determination are:

- (a) Whether the claimant voluntarily resigned or he was unfairly and unlawfully terminated on account of redundancy;
- (b) Whether the claimant is entitled to the reliefs sought.

Resignation or Unfair termination

10. The claimant has produced the letter dated 3.7.2012 by the respondents Group HR manager Ms Eva Okallo and contended that his services were terminated by the respondent on account of redundancy. The author of the said letter never testified herein to deny the authenticity of the letter.

11. Rw1 on the other hand has produced the letter dated 19.7.2012 to contend that the claimant voluntarily resigned from his employment. The claimant has however denied that the said letter was voluntary and contended that he was pressured by Ms. Eva Okallo to write it in order to have his terminal dues processed and to enhance his chances of future job in the Group of Companies. Again Ms Eva Okallo has not testified herein to rebut the said evidence by the claimant. Rw1 was not in the meeting where Ms. Eva Okallo forced the claimant to write the resignation letter on 19.7.2012 after the redundancy letter dated 3.7.2012.

12. In view of the fact that the redundancy letter dated 3.7.2012 has not been disowned by the author or in any other way proved to be fake, I find that the claimant has proved on a balance of probability his contract of employment was terminated on account of redundancy. The respondent has not proved that the claimant continued working after 4.7.2012 when the redundancy took effect. Having terminated the contract by the letter dated 3.7.2012, there was no contract left from which the claimant could resign by the letter dated 19.7.2012.

13. The facts of this case and those in *Ali Munga Muruba Vs Ketty Tours Travel & Safaris [2016]eKLR* are distinguishable because in the said case, the claimant was pressing a case for constructive dismissal while in this case the claimant was served with a termination letter citing redundancy as the reason for the termination. The said decision is therefore not relevant to this case.

14. The question that follows is whether the termination of the claimant's services by the letter dated 3.7.2012 was unfair and unlawful. Section 40 of the Employment bars employer from terminating the services of an employee on account of redundancy without following strict procedure set out thereunder. First the employer must serve at least one month notice on the employee (or his union if one is a member) and the area Labour Officer. Second, the employer is to conduct a fair selection process to identify the staff for the layoff. Finally, the employer is to pay one month salary in lieu of notice, all accrued leave and severance pay.

15. In this case, the employer herein never complied with any of the said mandatory procedural requirements before terminating the claimant's services on 4.7.2012. The letter dated 3.7.2012, only gave one day notice and non of the dues outlined by section 40 of the Act was paid. The failure to follow the said mandatory set out by section 40 of the Act rendered the termination unlawful and unfair within the meaning of section 45 (2)(c) of the Act.

Reliefs

16. Under section 49 of the Act, I award the claimant Kshs.37,700 being one month salary in lieu of notice plus Kshs.452,400 being salary for 12 months as compensation for unfair termination. In making the said award, I have considered the 21 years of service and the fact that the claimant never contributed to the termination through misconduct.

17. In addition, the claimant is awarded Kshs.4,350 being salary for the 3 days worked in July 2012. However, the claim for severance pay is dismissed because wrong done to him through the termination is adequately remedied by the compensation for the unfair termination.

Conclusion and Disposition

18. In view of the finding herein above that the claimant was unfairly discharged, I enter Judgment for him in the sum of Kshs.494,450 plus costs and interest from the date hereof until payment in full. The said sum shall be subject to the applicable statutory dues.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE