



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1971 OF 2014

PATRICK KIOKO MAINGA CLAIMANT

VERSUS

MAREBA ENTERPRISES LIMITED RESPONDENT

JUDGMENT

Introduction

1. Patrick Kioko Mainga, the Claimant in this case was an employee of Mareba Enterprises Limited. He brought this action against his former employer seeking compensation for unlawful dismissal and payment of final dues.

2. The claim is contained in a Memorandum of Claim dated 4th November 2014 and filed in court on 5th November 2014. The Respondent filed a Reply on 11th December 2014 but did not call any witnesses at the trial. The Claimant testified on his own behalf.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a Storekeeper on 5th May 2012. His monthly salary as at the time he left employment was Kshs. 11,000.

4. The Claimant avers that upon reporting for duty on 30th June 2014, he was informed by the Respondent’s General Manager, Mrs Mitchel Adjibodou that his services were no longer required. Adjibodou stated that the Respondent’s management had made the decision to lay off the Claimant because the Company was undergoing financial difficulties. The Claimant was promised that he would be recalled when his services were required. The Claimant was however was not recalled. He therefore lays a claim for unlawful dismissal.

5. The Claimant pleads that during his employment with the Respondent he did not go on leave. He adds that the Respondent did not remit his National Social Security Fund (NSSF) dues for the years 2012 to 2014. Further, the Respondent failed to pay him salary arrears amounting to Kshs. 106,800.

6. The Claimant’s claim is as follows:

- a) Salary arrears.....Kshs. 106,800
- b) 1 month’s salary in lieu of notice.....11,000
- c) Pay in lieu of leave for 2012-2014.....33,000
- d) Service/gratuity @ 15 days’ pay for 3 years.....16,500
- e) 12 months’ salary in compensation.....132,000
- f) Costs plus interest

The Respondent’s Case

7. In its Reply to Memorandum of Claim dated 10th December 2014 and filed in court on 11th December 2014, the Respondent denies the Claimant’s claim for unlawful termination. The Respondent states that by letter dated 27th June 2014, the Claimant was notified of the

impending closure of the Company.

8. The Respondent maintains that the termination of the Claimant's employment was due to a substantive economic reason, in that his position was declared redundant due to closure of the Respondent Company. The Respondent adds that the Claimant took all his leave days and all his NSSF dues were duly remitted. Regarding the claim for salary arrears, the Respondent states that all outstanding arrears were cleared and in any event, the claim thereon is time barred.

9. The Respondent goes on to plead that the Claimant's dues were tabulated by letter dated 18th October 2014 and paid to the Claimant by cheque.

Findings and Determination

10. 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

11. In response to the Claimant's claim for unlawful termination of

employment, the Respondent states that the termination was occasioned by closure of the Company. This falls within the province of redundancy.

12. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act 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 practice commonly known as abolition of office, job or occupation and loss of employment.”

13. While redundancy is a legitimate form of termination of employment, there are stringent conditions to be followed and they are found in Section 40 of the Employment Act. The said conditions have to do with adequate notice to the affected employees, their trade union and the Labour Office, fair selection criteria based on length of service, skill and reliability as well as payment of terminal dues.

14. Regarding the issue of notice, the Court of Appeal in *Thomas De La Rue v David Opondo Omutelema [2013] eKLR* and *Kenya Airways v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR* confirmed that in cases of redundancy, there are two separate and distinct notices of thirty (30) days each, to be issued. The first is a general notice to all employees likely to be affected by the redundancy and the second is a specific termination notice issued to each employee individually.

15. The requirement on selection of employees to be sent home on account of redundancy is intended to assure objectivity and fairness in the process.

16. In support of its case, the Respondent produced a letter dated 27th June 2014 addressed to the Claimant, communicating closure of the Company effective 30th June 2014. This letter made reference to a discussion held with the Claimant on 11th June 2014. Subsequently, the Respondent communicated tabulation of the Claimant's terminal dues by letter dated

18th October 2014.

17. My reading of this communication is that although there was some information given to the Claimant of an impending redundancy, this did not constitute adequate notice as defined in law. The result is that the redundancy was tainted with procedural unfairness and the Claimant is entitled to some compensation for this.

Remedies

18. In light of this, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service tempered with the fact that he was paid his terminal dues including severance and notice pay.

19. The Claimant claims leave pay for 2012 to 2014. He however told the Court that he had taken his leave for 2011-2013. I will therefore only allow prorata leave for six (6) months in 2014.

20. The Claimant also claims salary arrears in the sum of Kshs. 106, 800. He however did not bother to provide any details of this claim which is in the nature of special damages. The claim therefore fails and is dismissed

21. No basis was laid for the claim for service/gratuity which therefore fails and is dismissed.

22. In the end, I enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation..... Kshs. 66,000

b) Prorata leave pay for 2014($11,000/30 \times 1.75 \times 6$)..... 3,850

Total..... 69,850

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

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

25. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JULY 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI 18TH DAY OF JULY 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr Mukeli for the Claimant

Miss Khayetsi for the Respondent