



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1713 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 12th July, 2018)

DAVID MUNGE WAWERU.....CLAIMANT

VERSUS

SEN-TECH LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit on 1st October 2013 through the firm of Mang'erere Bosire & Associates Advocates seeking damages for unfair, unlawful & un-procedural redundancy.
2. He avers that at all material times he was an employee of the Respondent company having worked as a Mechanical Technician with due diligence to the satisfaction of the Respondent with his last salary having been computed at Kshs. 73,703.35 per month.
3. He states that on 30th April 2013, the Respondent notified the Claimant that they were purportedly ceasing operations and were therefore prompted to declare the Claimant/Redundant, he received a letter of termination on account of redundancy on 30th May 2013 and on 24th June 2013.
4. The Respondent operating under the name of KHS East Africa informed all its customers that the management team, sales team and an extensive service team of the respondent had joined KHS East Africa and that it will remain at the service of the customers as such.
5. He further avers that on 30th June 2013, the Respondent unequivocally informed their clients that from 1st July 2013 they will be operating as KHS East Africa Limited. The said letter was on a letterhead containing the names of both companies i.e. KHS East Africa and SEN Tech LTD.
6. He avers that on 23rd July 2013 a demand letter was issued to the Respondent and in response, their lawyers replied via letter dated 13th August 2013. The Respondent unfairly, unlawfully and unprocedurally declared his position redundant and therefore unlawfully terminating him from service.
7. The Respondent filed their Memorandum of Defence where they admit that the Claimant was their employee. They however deny that he was a Mechanical Technician but rather he worked primarily as a Milling Machinist but was occasionally deployed as a Service Technician when other staff were absent. They also state that although his salary for the month of June 2013 is the figure stated in the claim, his regular salary is Kshs. 38,000 as is shown in his pay slip.
8. They further aver that termination of the Claimant's employment was carried out in a fair, lawful and procedurally sound manner and with good faith. They aver that there is no evidence of malice whatsoever. The reason for termination of the Claimant's employment was based on the fact that the operational requirements of KHS East Africa are different from those of Sen-Tech and as a result of corporate restructuring a number of employees were therefore terminated on account of redundancy.
9. They also state that by an agreement between the Claimant and them dated 1st July 2013, the Claimant acknowledged that he had received all his dues in relation to his employment at the Respondent company; and further, that he irrevocably and unconditionally discharged the Respondent from all claims and liabilities arising out of or in relation to his employment.

Submissions

10. The claimant filed his submissions where he contends that he was notified of the intention by the Respondent to declare him redundant. He submits that the reason advanced by the Respondent to declare him redundant was not genuine and the same was misleading. He also submits that the Respondent did not cease to operate as alleged.

11. He avers that after his termination from his employment, the Respondent continued to carry out business as usual and that the alleged restructuring process was a sham and was meant to hoodwink him but could not have rendered his position redundant as it is only the name of the Respondent that changed. They failed to present evidence to support their case.

12. He avers that his termination was unfair, unlawful which violates the provisions of Section 40 of the Employment Act 2007. He relied on the case of **Caroline Wanjiru Luzze Vs Nestle Equatorial African Region Limited (2012) Eklr.**

13. He further submits that he has proved his case in a balance of probabilities as required by law and hence prays that judgment be entered in his favor as prayed in the Memorandum of Claim.

14. The Respondent filed their submissions where they submit that as is evident from the letter of termination of employment, the termination was done on notice and reasons for termination given making the termination lawful and legal.

15. They submit that it was no longer tenable to retain the Claimant as the business of the Respondent ceased effective 30th June 2013 and the Claimant could not also be transferred to the acquiring entity as KHS did not acquire the Respondent's division where the Claimant worked, making the reasons for termination valid grounds.

16. They further aver that they complied with all the requirements of Section 40 of the Employment Act in terminating the Claimant's employment where they wrote to the county labour officer months prior to the date of the intended termination informing the officer of their reasons and extent of the intended redundancy. They also notified the Claimant of his termination and issued a notice of termination on 30th May 2013. They also paid him all his dues in accordance with the requirements set out under Section 40 of the Act which he acknowledged receipt.

17. They state that they brought evidence before this Court to show that the Respondent Company no longer exists as it was acquired by KHS Group. Notably, the claim of affiliation by the Claimant is hinged on the letter dated 30th June 2013 addressed under the joint letterheads belonging to the Respondent company and the acquiring company hence the claim of there being a simple change of name is unsustainable.

18. They therefore submit that the prayers sought by the Claimant ought not to be granted as it has been evidenced that the termination was lawful, justifiable, fair and in accordance with proper procedure as set out by the law and that the Claimant was paid and indeed acknowledged receipt of his terminal dues and subsequently discharged them from all liability arising from his employment in the Respondent company. They therefore urge the Court to find that the Claimant suit is without merit and dismiss it with costs.

19. I have considered all the averments of both parties plus the submissions filed herein. The Claimant was indeed an employee of the Respondent vide the letter of employed dated 1/10/2010.

20. On 30/4/2013 he was served with a redundancy Notice informing him that he would be declared redundant after 30 days of the letter as the company was ceasing operations. On 30/5/2013, the Claimant was duly terminated after the expiry of the 1 months notice. He was promised payment of his final dues.

21. It is indeed true as submitted by the Claimant that on 24.6.2013 KHS EA Limited informed its clients that they the management team of SEN Tech Limited (the Respondent) had joined KHS EA Limited and would remain at the clients' service.

22. The letter also indicated that:-

***“All orders placed with SEN-TECH till the 30th of June 2013 will be duly executed. All orders placed from 1st July 2013 will be placed with KHS EA Limited.*”**

23. The import of this communication is that the Respondent ceased to exist then and was now to operate under KHS EA Limited with effect from 1.7.2013.

24. The Claimant has contended that they were unfairly declared redundant. The law governing redundancy in Kenya is Section 40(1) of the employment Act 2007 which states as follows:-

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

25. From the communication between the Claimant and Respondent, it is apparent that the Claimant was given due notice before the termination. It is also apparent that the Respondent ceased operations on its own from 1.1.2013. This fits squarely under the definition of redundancy as defined under Section 2 of Employment Act as follows:-

“Redundancy’ means 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”.

26. There is no indication that the Respondent acted in any illegal manner. They also notified the labour officer of the intended redundancy as expected and the labour officer advised them on how to pay employees they intended to declare redundant.

27. The Claimant dues were calculated at Kshs.75,789.68 Kshs which the Claimant received and acknowledged on 1/7/2013. He was also issued with a Certificate of Service.

28. It is my finding that the claim by the Claimant has no merit. The same is therefore dismissed with no order as to costs.

Dated and delivered in open Court this 12th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mumbi holding brief Bosire for Claimant – Present

Respondent - Absent