



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1360 OF 2014

(Before Hon. Justice Mathews N. Nduma)

JAMES OPERE OTIENO.....CLAIMANT

VERSUS

MAJI UFANISI (WATER & DEVELOPMENT)RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as a Programme Officer on 25th October, 2013. The Claimant left Water Services Trust Fund, to join the Respondent. The Claimant worked until 1st August, 2014 when his employment was terminated by the Respondent following a rationalization process. The letter of termination is dated 1st July, 2014 but the Claimant told the court that, the same was merely backdated. That he did not receive any notice at all. That he was not paid salary for July, 2014 and received no terminal benefits upon termination. The Claimant states that the termination was not for a valid reason and the Respondent did not follow the procedure under section 40 of the Employment Act, 2007.

2. The claimant prays for:-

- i. An order declaring the termination was unlawful.
- ii. Payment of July 2014, salary.
- iii. One month salary in lieu of Notice.
- iv. Payment in lieu of leave not taken.
- v. Service Pay for the period served.
- vi. Pension (Employer's contribution) for the unexpired term of the contract.
- vii. Certificate of Service.
- viii. Costs and interest.

3. The contract of employment dated 25th October, 2013, stating the terms of employment, undated letter, sending the Claimant on compulsory leave citing poor work performance for the last six (6) months written by Prof. Edward Kairu, the Executive Director and letter of termination dated 1st July, 2014 were produced as exhibits. The Claimant also produced payslips for the month of December 2013 showing a gross salary of Kshs.139,500 per month. The Claimant's salary was deducted NSSF and Pension dues, NHIF and PAYE.

4. The Respondent got a letter of demand by Aoko Otieno & Associates dated 1st August, 2014. The same was not responded to.

5. The Respondent filed a Memorandum of Reply on 14th October, 2014 in which it denies having poached the Claimant from Water Services Trust Fund and admits having employed the Claimant vide a contract of employment for a fixed term from 25th October, 2013 to 31st December, 2014.

6. That the Claimant's services were lawfully terminated on 1st August 2014, after serving 9 months following a staff rationalization within the Respondent organization which was occasioned by a reduction in inflow of donor support.

7. The Respondent states that it notified the Claimant of the decision to terminate his services on account of redundancy in terms of section 40 of the Employment Act No. 11 of 2007. The Respondent called RW1 Edward Nganga Kairu, the CEO of the Respondent to testify in defence of the suit.

8. RW1 confirmed the averments in the statement of Response aforesaid and denied the Claim in its totality stating that the termination was for a lawful and fair reason.

9. The Respondent had fallen short of funds from the donors. They were forced to rationalize and hence terminated the employment of the Claimant.

10. The Respondent prays that the suit be dismissed with costs. RW1 said five (5) staff were affected by the rationalization. The reasons were put in the letters of termination.

11. RW1 insisted that the Claimant was properly notified by a one month notice. RW1 added that the Claimants competence and performance was a factor but not the overall issue.

12. The Claimant did not complete clearance, hence was not paid. RW1 stated that they would pay his July salary, payment in lieu of notice and in lieu of leave days not taken. He did not get certificate of service. He said claimant is entitled to severance pay but not service pay.

13. RW1 denied any malice stating that he explained the financial crisis to the Claimant. RW1 admitted having sent the Claimant on compulsory leave prior to terminating his employment around 24th July, 2018.

14. RW1 admitted not having notified the Labour Office of the intention to declare the Claimant and other staff redundant. He also admitted not having given the Claimant prior notice of intended redundancy.

Determination

15. The issues for determination are:-

i. Whether the termination of employment of the Claimant on grounds of redundancy followed the provisions of section 40 of the Employment Act.

ii. What remedies the Claimant is entitled to.

Issue i

16. The Claimant served the Respondent from 25th October, 2013 until 1st August, 2014 a period of about 9 months. He earned a salary of Kshs.139,500 a month. The Claimant was employed on a fixed term contract due to expire on 31st December, 2014. At the time of termination he was yet to serve about five (5) months.

17. From the totality of evidence adduced by the Claimant and that by RW1 for the Respondent the court has arrived at a conclusion of law and fact as follows:-

a. The Respondent declared the Claimant and five (5) others redundant due to operational reasons.

b. The Respondent did not give the Claimants and the Labour Office one month notice of intended redundancy in terms of section 40(1) (b) of the Employment Act, 2007.

c. The Respondent did not pay one month salary in lieu of notice in terms of Section 40(1)(f)

d. The Respondent did not pay the Claimant in lieu of leave days not taken in terms of Section 40(1) (e).

e. The Respondent did not pay the Claimant severance pay calculated at not less than 15 days salary for the period served in terms of section 40(1) (g).

18. The Respondent was not insolvent but continued to operate even though it faced financial difficulties. The Respondent was obliged therefore to strictly follow the provisions of Section 40 of the Employment Act. The termination of the Claimant on account of redundancy was unprocedural and therefore unfair and in violation of section 40 as read with section 45 of the Employment Act 2007. The court makes a finding accordingly. **See Francis Maina Kamau Vs Lee Construction [2014]eKLR**

Issue ii

19. Having found that the termination was unfair and in violation of section 40 as read with section 45 of the Act, the Claimant is entitled to

compensation in terms of section 49(1)(c) as read with sub-section 49(4) of the Act. In this respect, the Claimant had served 9 months and was due to serve five (5) more months to completion of contract. The Claimant was not paid any terminal benefits including salary for days worked upon termination. The claimant did not get a certificate of service to help him get alternative employment. He was still unemployed, though doing some business at the time of the hearing. These are all aggravating circumstances. The court owes the Claimant the equivalent of five (5) months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs.697,500. The court also awards the Claimant terminal benefits as follows:-

a. One month salary in lieu of notice	Kshs.139,500
b. One month salary in lieu of leave	
days not taken	Kshs. 139,500
c. 15 days salary, severance pay	Kshs. 69,750
Total award	Kshs.1,046,250

20. In the final analysis judgment is entered in favour of the Claimant as against the Respondent for the sum of kshs.1,046,250. The award is payable with interest at court rates from date of filing suit till payment in full except the award in respect of compensation which attracts interest from date of judgment.

21. The Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 20th day of July, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 10th day of August, 2018

Maureen Onyango

Judge

Appearances

M/s. Aoko Otieno for Claimant

Mr. Obok for Respondent

Anne Njung'e – Court Clerk