



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2155 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 27th September, 2018)

PAUL OTIENO OCHOLA.....CLAIMANT

VERSUS

UNILEVER KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed his Memorandum of Claim on 1/12/2015 and later an Amended Claim on 21st July 2016 through the firm of Paul Otieno Ochola seeking damages for wrongful, unlawful and malicious termination.
2. He avers that at all material times relevant to this cause, he was employed by the Respondent as an Accounts Assistant until 1st November 2015 when he was unlawfully and maliciously dismissed allegedly on grounds of redundancy with no reason/or proper explanation contrary to the Employment Act, terms of service and other relevant statutes.
3. He states that prior to him starting work with the Respondent, he was working with Earnst and Young Certified Accountant on a permanent and pensionable basis and was earning a monthly salary of Kshs. 87,500 where he had worked from 4th March 2014 to on or about 20th April 2015. He avers that the Respondent approached him and offered him his current job with an attractive remuneration where he was to earn a monthly salary of Kshs. 116,385.
4. He avers that even before he could settle into his new job with the Respondent, he was suddenly served with a letter of redundancy by the Respondent indicating that his services will be terminated with effect from 31st December 2015 which went contrary to what was agreed by the parties in the employment contract.
5. He avers that the actions of the Respondent were carried out and calculated in so maliciously a manner that the real intention was to render the Claimant jobless even before his employment contract reached its full objective.
6. He further avers that he was employed by the Respondents on 2nd June 2015 on permanent and pensionable terms which was to run till his retirement age at 60 years. Despite demand and notice of intention to sue having been made, the Respondent has refused to make good his claim.
7. The Respondents filed their Replying Memorandum where they deny each and every allegation contained in the Memorandum of Claim. They aver that the allegations by the Claimant that his employment was unfairly, wrongfully, maliciously and/or unlawfully terminated is untrue. They also denied that he is entitled to the declarations sought as he has not established a basis for the claim of 12 months' salary under Section 49 of the Employment Act.
8. They further aver that the claim for loss of employment up to retirement is unfounded as they were not bound to retain the Claimant in employment until retirement. They state that it is clear that the Claimant has no reasonable or justifiable cause of action against them making this suit an abuse of the Court and hence should be dismissed with costs.

Submissions

9. The Claimant filed his submissions where he submits that the Respondent abandoned the assertion on his reply to the Amended Memorandum of Claim on how they hired him. He submits that the Respondent was not able to show the Court any job advert inviting eligible candidates to apply for the job he was ultimately employed to do. He states that his recruitment involved a cunning approach of

luring him with a higher remuneration package compared to his then remuneration but it also involved approaching him on their own volition which in contemporary business parlance can be described as 'poaching'.

10. He avers that the Respondent identified a vacancy to deliver on P2P Transformation duties in March 2015 as per paragraph 2 of the Respondent's witness statement meaning that as at the time of vacancy identification, they were already aware of the impending redundancy but chose not to disclose the same until after such a time that he resigned from his immediate permanent and pensionable job to execute a new contract with them.

11. He states that fair labour practices demand full disclosure on both parties at the time of negotiations and or entering into an employment contract. He avers that failure by the Respondents to disclose material information affected harsh his social, economic and dignity among other inconveniences which constituted to violation of his constitutional rights to access to information under Article 35(1)(b) of the Constitution of Kenya 2010. He relied on the case of **Sita Steel Rolling Mills LTD Vs Jubilee Insurance Company LTD (2007) eKLR**.

12. He further avers that at the time his employment was unlawfully terminated he was the sole bread winner for his siblings and dependants. He states that in his case, not only was his constitutional rights violated but also his chances of getting a next job made difficult since he did not have a progressive record of continuous employment for at least 2 years which most potential employers look for hence he seeks compensation in terms of the consideration in **Dr. Samson Gwer & 5 others case**.

13. He also seeks general damages for breach of contract which breach he has demonstrated to be based on failure on the part of the Respondent to disclose material facts that were very imperative at the contract making stage as well as remedies sought under the Amended Statement of Claim as provided under Section 49(1)(b) and Section 49(1)(c) of the Employment Act, 2007.

14. The Respondent filed their submissions where they submit that the allegations by the Claimant that he was lured into joining their employment is misconceived and has no merit. They aver that the engagement by the Respondent was voluntary and at the Claimant's behest, he had the opportunity to accept or reject the employment offer and having accepted employment, he cannot claim to have been coerced.

15. They aver that as at March and April 2015 when the Claimant was recruited, they were not aware of the actual date of the roll out of the P2P transformation in Kenya and the specific positions that would be declared redundant. They aver that this information only came to them in September 2015.

16. They state that the argument that the Claimant was employed with the knowledge of eventual declaration of redundancies does not make any business sense. They aver that the position taken up by the Claimant as an Accountants Assistant was routine and did not require unique skills at the time so as to justify immediate employment in knowledge of immediate impending redundancies and it would have been foolhardy for them to make such appointment in the circumstances. Therefore in the premises, the claim that they knew of the impending redundancies cannot be correct.

17. They further state that there were valid reasons for redundancies and they followed the mandatory procedure as set out under Section 40 of the Employment Act. They aver that the redundancy was carried out in compliance with the Employment Act and Article 41 of the Constitution on Fair Labour Practices making the claim for damages for unfair termination not to arise for the reasons set out.

18. They further aver that they have demonstrated to the Court that there were valid reasons for the redundancy and that they complied with the statutory procedure in declaring the Claimant redundant hence not entitled to the damages sought in his claim. They relied on the case of **James Omwoyo Nyang'au Vs Heritage Insurance Company Limited [2014] eKLR**. They urge the Court to dismiss the entire claim with costs to the Respondent.

19. I have considered all the averments of the Parties. I have also considered the submissions filed herein. There is only one issue to determine being whether the Respondent set out the Claimant for termination at the time of employing him thus making their action unfair and in breach of fair legal practices.

20. The Claimant has averred that he was enjoying his employment with Ernest and Young where he had been previously employed as a Certified Accountant earning a salary of 81,500/=.

21. He contends that the Respondent approached him with an attractive package to pay him Kshs.116,385/=. As proof of this "Poaching", the Claimant relied on his Appendix 12 the email exchange between him and the Respondent's Irene Mugo which show that there was a discussion on phone on possible employment. The Claimant submitted his CV as agreed. He was also asked to send his payment and he did.

22. The Claimant was asked when he could start work and he responded as follows:-

"I am yet to give my resignation which I should do once I receive the contract from your end".

23. This communication was sent on 9.4.2015. The Claimant was also send details of the comparison between what he was currently earning at Ernest & Young and what he was going to be offered at Unilever. It is therefore apparent that the Claimant was 'poached' for this work by the Respondent who offered him an attractive payment package and finally employed him from 2.6.2015.

24. The Claimant contends that the Respondent knew all along that they would sack him after the implementation of P2P Programme and had employed him specifically to roll out the P2P Programme which was going to declare him redundant.

25. The Claimant on this issue has pointed out when he reported to work, he was given job objectives also known as 3 +1 target and one of

the items included a P2P Transformation, which required him to do knowledge transfer and among others this had to be completed by October 2015. He avers that the knowledge transfer meant familiarizing the HUB IBM INDIA team with the work they were doing in Kenya for them to take over.

26. The Respondent averred that they only knew of the P2P implication in September 2015 which is not true because the Claimant was employed in June 2015 and learnt of the work details he was to do which included the P2P Programme.

27. It therefore emerges that the Respondent were well aware before they employed him which fact they failed to disclose to him. This amounts to unfair labour practices contrary to Article 41 of the Constitution of Kenya.

28. In the case of **Sita Steel Rolling Mills Limited vs Jubilee Insurance Company Limited (2007) eKLR**, Justice Maraga (as he then was) rendered himself thus:-

“At this stage what I need to add is that because the duty of disclosure arises by law and not as term of contract, whether or not the proposer knows that he is under duty to disclose is totality irrelevant. Innocent non-disclosure is as actionable as negligent non-disclosure or fraudulent concealment (emphasis is mine)”.

29. The Respondent knew of their planned restructuring but they deliberately failed to disclose this to the Claimant and “used” him to carry out the said restructuring for 4 months then dumped him.

30. This in my view is unfair and callous. The Claimant worked for Respondent for just over 6 months and was thereafter declared redundant.

31. The redundancy process was followed fully but the callous intention of the Respondent cannot be ignored and left unpunished.

32. In the circumstances, I find for the Claimant and I award him damages equivalent to 12 months’ salary = **12 x 116,835.58 = 1,402,026.96/=**.

33. The Respondent will also pay costs of this suit and also issue the Claimant with a Certificate of Service.

Dated and delivered in open Court this 27th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person – Present

Weru for Respondent - Present