



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO 218 OF 2017

VICTOR KIPLAGAT KISORIO.....CLAIMANT

VERSUS

LELBREN DAIRIES LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant filed the Memorandum of Claim was filed on 1st August, 2017. A Defence was filed 18th September, 2017.

2. In the defence, the respondent admitted that they are able to pay the terminal dues on redundancy. At paragraph 5 the respondents admits that the claimant is entitled to the following dues;

a) 1 months' salary in lieu of notice Kshs.18,000.00;

b) Gratuity Kshs.22,500.00;

c) Leave allowance Kshs.27,000.00;

d) Days off Kshs.7,800.00;

e) Gross pay Kshs.14,00.00 Less VAT Kshs.30, 637.00 Total Kshs.114, 863.00

3. The respondent contested claims relating to; *Compensation;*

Severance pay Leave due

4. On 29th May, 2018 parties attended court for hearing directions. Noting the defence, the court directed parties to report to the County Labour Officer, Uasin Gishu (CLO) for the computation of redundancy dues and put into account the defence by the respondent.

5. Both parties attended before the CLO and agreed on the computation of terminal dues. A report was filed with the court by the CLO on 18th June, 2018.

6. On 25th June, 2018 Both parties agreed to the CLO report and which was adopted by the court save for the questions of unfair declaration of redundancy. The agreed claims were that the claimant is entitled to the following;

(a) Notice pay Kshs.18,000.00;

(b) 3 years accumulated leave Kshs.24,490.00;

(c) Off days Kshs.78,000.00;

(d) Basic pay Kshs.9,000.00;

(e) Severance pay Kshs.22,500.00 Total Kshs.151, 990.00

7. The CLO also made a recommendation that the court should award compensation on the grounds that the respondent had delayed in paying the due terminal payments.

8. The court directed both parties to file written submissions on the question of unfair redundancy.

9. The claimant submits that the redundancy declared by the respondent was unlawful, unprocedural and unfair. The respondent failed to follow section 40 of the Employment Act as held in the case of **Julie Tupiran Njeru versus Kenya Tourist Board Cause No.886 of 2010** that termination of employment due to redundancy to be procedurally fair and justifiable must follow the law in terms of section 43 and 45 of the Employment Act. Fair redundancy process must involve the employee. In this case the respondent failed to follow the due process of the law in terms of procedural and substantive justice.

10. The claimant also submits that compensation is due in a case of unfair termination of employment due to unfair redundancy as held in the case of **David Kinyua Nthumbi & Emmanuek Nato Wakhungu versus Travellers Petrol Point Ltd, Cause No.2043 of 2014**. The claimant should be paid a compensation of 12 months gross salary all at Kshs.124, 200.00 with costs to be assessed by the court.

11. The respondent also submits that as the employer they complied with the due process of the law when the claimant was paid all the terminal dues on notice, severance pay, leave days due, gratuity, and off days. Nothing else is arising and payable to the claimant. The respondent had admitted to owing Kshs.114, 863.00 and upon assessment by the CLO this was enhanced to Kshs.154, 500.00 which the respondent is willing to pay in settlement of the claimant's case.

12. The respondent also submits that the offer to pay the claimant the sum of Kshs.154,500.00 is in compliance with the provisions of section 40 of the Employment Act for notice pay, leave days due, notice pay in redundancy, severance pay all putting into account the strict provisions of the law.

Determination

13. As set out above, by consent of the parties on 25th June, 2018 the CLO report in computation of the redundancy dues to the claimant was adopted. Such report put into account that the claimant is entitled to Kshs.151, 900.00 and comprising;

- (a) Notice pay Kshs.18,000.00;
- (b) 3 years accumulated leave Kshs.24,490.00;
- (c) Off days Kshs.78,000.00;
- (d) Basic pay Kshs.9,000.00;
- (e) Severance pay Kshs.22,500.00 Total Kshs.151, 990.00

14. In submissions, the respondent has offered to make a payment of Kshs.154, 500.00 and comprising the following;

- (a) Notice pay Kshs.18,000.00;
- (b) Leave pay Kshs.27,000.00;
- (c) One (1) month notice pay Kshs.18,000.00;
- (d) Severance pay Kshs.22,500.00; Total Kshs.154, 500.00.

15. based on the agreement of the parties and the adoption of the CLO report on the computation of terminal dues, the parties have addressed the procedural motions of section 40 of the Employment Act, 2007. Invited to file submissions on the question of unfair termination of employment on account of redundancy, the claimant was thus required to demonstrate how the respondent failed to address the procedural and substantive justice in the process of declaring a redundancy.

16. In this regard, section 40 of the Employment Act, 2007 requires the employer to issue notice on the impending termination on account of redundancy as held in the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** held that;

The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees.

17. In addressing section 40(1) (c) of the Act, the court in **Kenya Plantation Agricultural Worker Union versus Harvest Limited [2014] eKLR** held that;

Section 40(1) (c) of the Act clearly provides that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. The court holds that the idea of last in first out satisfies the seniority criterion...

18. In this case, the claimant pleaded that on 23rd November, 2016 there was oral termination of employment and the respondent failed to pay terminal dues owing to him. in an agreement the respondent agreed to pay the claimant Kshs.114, 863.00 in notice, gratuity, and leave due, days off, gross pay and such less the taxes due. however such terminal dues were never paid despite agreement.

19. In assessing the payments now computed by the CLO and agreed upon by the parties, and assessing the same vis-à-vis the provisions of section 40 of the Employment Act, 2007 the respondent has complied by the letter of the law. The payments agreed upon cannot be faulted as being unfair settlement out of the redundancy provisions. The only aspect that the respondent failed to abide is to ensure that the terminal dues owing to the claimant were paid to him without undue delay putting into account section 40(1)(e) of the Act that;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

20. save for the delay in making payments due, the computation of terminal dues and the offer by the respondent to enhance the payments from Kshs.151, 500 to Kshs.154, 500.00 is a generous settlement. Had such payment been made as admitted from the onset, the suit herein would have been unnecessary. Costs are therefore due.

accordingly, judgement is hereby entered for the claimant for the sum of Kshs.154, 500.00 in terminal dues and subject to the provisions of section 49(2) of the Employment Act, 2007. costs awarded at 50%.

Delivered in open court at Eldoret this 26th day of September, 2018.

M. MBARU

JUDGE

In the presence of:

.....

.....