



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAKURU

CAUSE NO.413 OF 2017

Consolidated with

CAUSE NO.414 OF 2017

NAFTALI MATHARI..... CLAIMANT

ERICK MAKORI..... CLAIMANT

VERSUS

GREC NO.10RESPONDENT

JUDGEMENT

The two Suits, Cause No.413 and 414 of 2017 are hereby consolidated in terms of Rule 23 of the Employment and Labour Relations Court (Procedure) Rules, 2016 for judgement as the facts and cause of action are the same. For expeditious disposal of the matter, a joint judgement shall issue.

The claimants filed the Memorandum of Claim on 5th October, 2017. The respondent was served on 12th October, 2017 and accepted summons and returns filed confirm the same that the officer of *Crec No.10 Engineering Group Co. Ltd Nakuru Three (3)* received the summons. An Affidavit of Service is filed by Herman G Mwangi to confirm service.

There was no appearance of defence filed by the respondent.

The matters were mentioned for hearing directions on 17th September, 2018 and the court directed for fresh service upon the respondent and hearing on 4th October, 2018. The respondent was served again, notices were received but there was no attendance.

Satisfied that the respondent was aware of these proceedings and opted not to attend, the claimants were heard on case in terms of Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

Claim

The claimants were employed by the respondent as causal labourers in August and March, 2016 respectively on a daily wage of Kshs.411.00.

The claimants were laid off work following an alleged redundancy without notice and or being paid terminal dues. No reasons were given for the decision to terminate employment over a redundancy that had not been brought to the notice of the claimants.

The claimants is seeking the following;

- a) Notice pay of Kshs.12,330.00;
- b) Accrued leave Kshs.8,631.00;
- c) Severance pay kshs.147,960.00;
- d) Compensation Kshs.168,981.00

e) Costs.

The claimants testified that upon employment by the respondent in August and March, 2016 were laid off without notice or reasons. The respondent just stated that work had reduced and proceeded to terminate employment. Such resulted in unfair termination of employment.

Determination

Despite the respondent not filing any defence or attending at the hearing, the claims made shall be assessed on their merits and applicable law.

The claimants' case is that upon employment by the respondent, each worked for less than a year and then employment terminated on the grounds that there was a redundancy. There no notice and such redundancy had not been addressed in terms of the applicable law.

Section 40 of the Employment Act, 2007 allows an employer to lay off employees where there is a redundancy. However the motions of section 40 are that the employee(s) must be issued with the requisite notices as held by the Court of Appeal in the case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR**. where the employer fails to issue and follow procedures outlined under section 40 of the Act violates the provisions of section 43 of the Act where every termination of employment must be justified. These findings are reiterated in the case of **Parliamentary Service Commission versus Christine Mwambua [2018] eKLR**

In this case where the respondent was faced with a redundancy, provisions of section 40 are mandatory. Due process required notice be issued to the employees including the claimant. Such notices should have issued before termination of employment.

The resulting termination of employment even where the claimants were causal employees was imperative. For the continuous service of 5 and 11 months, the claimants are entitled to the protection of the law under the provisions of section 37 of the Employment Act, 2007.

The claimants are entitled to compensation following unfair termination of employment. An award of 3 months is hereby found appropriate at Kshs.36,990.00.

Notice pay is due in a case where termination of employment is fraught with fair procedure at one month pay in terms of section 40 and 35 of the Employment Act, 2007. The claimant is awarded notice pay kshs.12,330.00.

Severance pay is due in a case of unfair termination of employment in a redundancy. Such severance pay is pegged on work for a full year. There is no provision for pro-rated severance pay unlike other employment benefits such as annual leave. The claimant had served for 11 months at the time of his lay off.

Accordingly, judgement is entered for the claimants each and against the respondent for the payment of compensation at Kshs.36,990.00; notice pay kshs.12,330.00 and costs of the suit.

Dated and delivered at Nakuru this 11th day of October, 2018.

M. MBARU JUDGE

In the presence of: