



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 635 OF 2017**

**BENSON MURIITHI KAGAI.....CLAIMANT**

**VS**

**KENGA EQUATORIAL HOTELS LTD T/A**

**MOMBASA CONTINENTAL RESORT.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Benson Muriithi Kagai, the Claimant in this case worked for the Respondent in the position of Purchasing Manager. He brought this claim following the termination of his employment on 30<sup>th</sup> April 2016. The claim is contained in a Memorandum of Claim dated 3<sup>rd</sup> August 2017 and filed in court on 4<sup>th</sup> August 2017. The Respondent filed a Memorandum of Response on 8<sup>th</sup> May 2018 to which the Claimant responded on 9<sup>th</sup> May 2018.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its General Manager, Mary Stevens.

**The Claimant's Case**

3. The Claimant was employed by the Respondent on 10<sup>th</sup> December 2015. He worked until 30<sup>th</sup> April 2016 when his employment was terminated. The Claimant states that the termination was unjustifiable and unfair. He therefore claims the sum of Kshs. 720,000 being 12 months' salary in compensation for wrongful and unfair termination.

4. The Claimant further seeks costs plus interest.

**The Respondent's Case**

5. In its Memorandum of Response dated 7<sup>th</sup> May 2018 and filed in court on 8<sup>th</sup> May 2018, the Respondent denies terminating the Claimant's employment and states that the Claimant was declared redundant in accordance with Section 40 of the Employment Act.

6. The Respondent pleads that before terminating the Claimant's employment on account of redundancy, the Respondent notified the Labour Officer vide letter dated 28<sup>th</sup> April 2016 and the Claimant himself vide letter dated 30<sup>th</sup> April 2016. The Claimant was paid two (2) months' salary in lieu of notice.

7. The Respondent avers that having been employed on 10<sup>th</sup> December 2015 and declared redundant on 30<sup>th</sup> April 2016, the Claimant had worked for a period of only four (4) months. He is therefore precluded by Section 45(3) of the Employment Act from bringing a claim for wrongful/unfair termination.

**Findings and Determination**

8. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case for unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

## Unlawful Termination?

9. The Claimant's employment was terminated by letter dated 30<sup>th</sup> April 2016 stating as follows:

*"Dear Benson,*

**SUBJECT: REDUNDANCY**

*The hotel industry has been performing poorly for the last four years or so. It still continues to show no major signs of improvement in the predictable future. Currently, we are going through the low season during which time, occupancies are usually very low.*

*We find ourselves in a very difficult financial position due to the extremely low business, we are under pressure to remain in operation and to maintain the few bookings that we have from our clients.*

*The Board of Directors has made a decision to drastically reduce staffing levels at the hotel. I regret to inform you that your position has been made redundant with effect from April 30, 2016.*

*You may be requested to work on casual basis from time to time when there is business.*

*Your redundancy package shall be computed as follows;*

- Full month's salary as at 30<sup>th</sup> April 2016*
- 2 Months' pay in Lieu of notice*
- Pending leave, public holidays or any other claims*
- Severance pay at 16 days' wages for each completed year of service on a prorata basis for the year of service not completed LESS*
- Any advances, shortages, loans owed to the company*
- Any statutory deductions that may be lawfully effected*

*We would like to thank you for your dedicated service to Mombasa Continental Resort and wish you the best in your future endeavors.*

*A computation of your final dues shall be communicated to you in a separate cover.*

*Yours Sincerely,*

*For and on Behalf of*

***Mombasa Continental Resort***

*(Signed)*

*Mary Stevens*

**General Manager"**

10. From this letter, it is evident that the Claimant's employment was terminated on account of redundancy. Section 2 of the Employment Act defines redundancy as:

***"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."***

11. While redundancy is a legitimate mode termination of employment, the law places stringent conditions to be met by the employer. In this regard, Section 40 of the Employment Act provides as follows:

***40. (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.*

12. In determining a claim for unlawful and unfair termination on account of redundancy, the Court will ask two related questions; first whether there was a genuine case of redundancy and second, whether in effecting the redundancy, due procedure was followed. In most cases, the substantive justification of a termination on account of redundancy will be determined by an examination of the procedural steps taken by the employer.

13. The Claimant told the Court that the termination of his employment was as a result of extraneous matters arising from a frosty work relationship with his superiors. He therefore took the view that there was no genuine case of redundancy more so because after his exit the Respondent employed other persons to perform the duties of his office. In his final submissions filed on 30<sup>th</sup> July 2018, the Claimant referred to the decision in *Geoffrey Nyabuti Onguko v Blow Plant Limited [2013] eKLR* where my sister, **Mbaru J** stated the following:

***“Section 40 regulates the redundancy process. Redundancy does not arise due to any mistake of the employee. Rather it is a business situation that the employer must address that results in reduction of staff or reorganization. Such situations do not arise overnight.”***

14. The foregoing is the essence of the notices required under Section 40 of the Employment Act and as held by the Court of Appeal in *Thomas De La Rue(K) Ltd v David Opondo Omutelema [2013] eKLR* there are two separate and distinct notices under redundancy. The first is a general notice to all employees, the union (where applicable) and the local labour officer, that the employer is considering redundancy. The second is a specific notice to each affected employee. The time difference between the two notices must be at least thirty days.

15. The Respondent's General Manager, Mary Stevens told the Court that the Labour Officer was notified of the intention to terminate 40 employees redundant by letter dated 29<sup>th</sup> April 2016. The following day on 30<sup>th</sup> April 2016, the Claimant was notified that his employment had been terminated on the basis of redundancy.

16. Stevens alluded to a staff notice dated 21<sup>st</sup> April 2016 and a subsequent meeting held on 23<sup>rd</sup> April 2016 which the Claimant did not attend. She however did not produce either the notice or any record of the meeting and the Court was therefore unable to verify her assertion in this regard.

17. What is clear is that in effecting the termination of the Claimant's employment, the Respondent failed to adhere to the notice requirements of Section 40 of the Employment Act. In *Fredrick Mulwa Mutiso v Kenya Commercial Bank Limited [2017] eKLR* this Court held that the requirement for notice to the Labour Officer serves a dual purpose; first, it is intended to elicit advice on modalities of managing redundancy to reduce its adversity and second, it acts as a control measure against abuse of the redundancy process to serve a collateral purpose.

18. The Claimant now before the Court states that the Respondent used the provisions of redundancy to force him out of employment unlawfully. In advancing this line, the Claimant referred the Court to an earlier case being, *Benson Muriithi Kagai v Kenya Equatorial Hotels Limited T/A Mombasa Continental Resort Limited [2014] eKLR* in which he was awarded compensation for unlawful termination against the Respondent.

19. I have had occasion to read the judgment by my brother, **Makau J** in the earlier case and find that the ground for termination as disclosed in the termination letter was redundancy as well. It would appear that the Respondent, having terminated the Claimant's employment on the basis of redundancy on 19<sup>th</sup> August 2013, re-employed him on 10<sup>th</sup> December 2015 at a higher position and enhanced salary, only to terminate him four months later, again on the basis of redundancy.

20. What emerges is an unusual situation where an employer hires, fires re-hires and fires again on the same ground. The Respondent was under a duty to explain this unusual occurrence to the Court but chose to remain silent on it. Employees plan their socio-economic lives on the basis of their employment status and an employer cannot therefore be allowed to treat employees as if they were pawns on a chessboard. This becomes even more real in a country such as ours where jobs are hard to come by.

21. What is more, the Respondent was obligated to support its assertion that it was experiencing financial difficulties by providing relevant financial reports. Such reports would have shown that the Respondent was indeed unable to sustain the Claimant's position. The Respondent

failed to provide any such report and the Court was unable to confirm whether there was a genuine case of redundancy.

22. Overall, the Court finds and holds that the Respondent not only failed to establish a genuine case of redundancy but also violated the procedural requirements set out in law.

### **Remedies**

23. For the foregoing reasons, I award the Claimant the sum of Kshs. 720,000 being twelve (12) months' salary in compensation for unlawful and unfair termination of employment. In making this award, I am aware that the Claimant had only served for four months in his second stint of employment with the Respondent. I have however taken into account the Respondent's callous and irresponsible conduct in managing the termination.

24. I am also persuaded by the decision by **Lenaola J** (as he then was) in **Samuel G. Momanyi v Attorney General & another [2012] eKLR** where Section 45(3) of the Employment Act which places a 13 months' minimum employment period as a condition for claims of unfair termination, was declared unconstitutional.

25. I therefore enter judgment in favour of the Claimant and against the Respondent in the sum of sum of Kshs. 720,000 being twelve (12) months' salary in compensation.

26. This amount will attract interest at court rates from the date of judgment until payment in full.

27. The Claimant will have the costs of the case.

28. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF NOVEMBER 2018**

**LINNET NDOLO**

**JUDGE**

Appearance:

Benson Muriithi Kagai (the Claimant in person)

Miss Mwanazumba h/b Mr. Oluga for the Respondent