



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.374 OF 2017

PAUL WACHIURI NDONGA.....CLAIMANT

VERSUS

KEROCHE BREWERIES LIMITED.....RESPONDENT

JUDGEMENT

The claimant filed the Memorandum of Claim on 20th July, 2017 and served the respondent on 16th August, 2017 and returns filed through the Affidavit of Service of Peter Mugo. There was no appearance or defence filed. The court heard the claimant under the provisions of Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

On 17th January, 2012 the claimant was employed by the respondent company as a Technical Engineer at a salary of Ksh.50, 000.00 per month until 3rd May, 2018 when the respondent unfairly terminated the employment on account of redundancy. Such termination of employment and reasons given lacked validity as there was no notice or hearing and or payment of the terminal dues owing.

During the course of employment, the claimant's terms and conditions of employment were improved but not paid at the end of employment. The claimant had earned the following;

- 63 leave days amounting to Ksh.105, 000;
- Overtime hours amounting to Ksh.972, 308.00;
- Compensation in lieu of house allowance Ksh.397, 500.00; and
- NSSF benefits deducted and not remitted Ksh.5, 600.00.

The claim is that the respondent failed to follow due process and the reasons given for termination of employment were without justification. Such has exposed the claimant to anguish and mental torture. The provisions of section 40 and 45 of the Employment Act, 2007 were not followed and such led to unlawful termination of employment. The claimant is thus seeking his terminal dues and compensation for unfair termination of employment.

The claimant testified that upon employment by the respondent he worked diligently until 3rd May, 2016 when at 9.00am he received a call by his manager while on his way home after his night shift. He returned to the office and was sent to the human resource manager where he was issued with a letter terminating his employment on a purported redundancy. The claimant was then directed to clear so that his dues would be paid by 26th May, 2016 which he did but has never been paid.

The claimant also testified that in May, 2015 he had been directed to hand over to Mr Davinder Singh who had been seconded to his department. Both worked closely with the claimant training him. such directions ended up with the dismissal of the claimant, a plan he realised had been contemplated by the respondent all along.

The claimant only took his annual leave in the year 2015 and for previous due days he was not compensated. His overtime hours worked and note in the Engineers Overtime schedule 2011-2016 was not compensated and is due. the respondent had made effort to negotiate the overtime pay due and agreed at Ksh.1, 173,333.00 but such amounts were never remitted. The claimant was entitled to a house allowance which was not paid. The claimant checked his NSSF remittances and the respondent had not done so to the amount of Ksh.5, 600.00.

Despite the claimant inviting the respondent to a conciliation meeting on 28th July, 2016 they failed to attend.

A party served with summons to attend court is allowed under Rule 11, 13 and 14 of the Court Rules (Employment and Labour Relations

Court (Procedure) Rules, 2016) read together with the provisions of the Employment and Labour Relations Court Act, 2011 and Article 50 of the Constitution, 2010 is required to attend and file a response and in the case of an employer ensure the filing of work records to assist the court in arriving at an informed decision. Such requirements when not addressed and the employer keeps way from court despite being served and there is evidence in that regard only invites the court to enter judgment as pleaded.

In this case, where there was no appearance and defence not filed, the claimant's case shall be assessed on the pleadings, evidence, written submissions and the applicable law.

By letter dated 3rd May, 2016 the respondent terminated the claimant's employment on the grounds of company restructuring and stated as follows;

Company restructuring

This is to bring to your attention that the company is currently re-organising and restructuring its operations, hence deploying and reducing labour in some departments. During this exercise several factors regarding the staff members of the affected departments have been considered first being duration of service in the company including current skills held. This letter serves to notify you that your position as a Mechanical Technician has been declared redundant with effect from 3rd May, 2016. You are hereby requested to proceed on leave for 21 days from today; your last date with the company will be on 26th May, 2016.

Your final dues will be paid as per your contract of employment on redundancy as follows:

- *Salary for days worked in the month of May up to and including 26th, 2016*
- *One month salary in lieu of notice;*
- *60 days salary – severance pay on redundancy for the complete 4 years;*
- *49 leave days balance not taken*
- *Any monies owed to you*

The claimant was issued with letter of appointment dated 1st June, 2011. Such letter is executed by the respondent and the claimant in agreement. The claimant was appointed as Technical Engineer and not as *Mechanical Technician* as alleged in the letter terminating his employment.

The claimant also testified that in May, 2015 a Mr Singh was introduced to him for training and orientation which he diligently did and who took over his duties.

As held by the Court of Appeal in the case of **Kenya Airways Limited versus Aviation & Allied Workers Union & Others (2013) EKLK**,

*.....redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase **based on operational requirements of the employer** must be construed in the context of the statutory definition of redundancy. What the phrase means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.*

it should therefore not just suffice for an employer to state that there is a redundancy. That it has arisen from removal of a position. the duty is vested upon the employer to show that the termination is attributed to the abolition of office after putting all factors into account. Indeed even where there may be underlying causes leading to redundancy as defined under section 40 of the Employment Act, 2007 the employer is bound by the mandatory of the law to show that termination of employment was necessary and the only option available.

In this case, the claimant position is different from the position rendered superfluous, if at all. He was never appointed a *Mechanical Technician* and always remained as appointed the Technical Engineer. Where the respondent found the need to employ Mr Singh in May, 2015 to take over from the claimant and without any evidence to challenge the testimony by the claimant, the court takes it that such employment arose after the claimant had been in service longer than such other employee. Based on the redundancy provisions under section 40 of the Act, the rules applicable, such newer employee ought to have been laid off and not the claimant who was a Technical Engineer and not *Mechanical Technician* as stated.

Section 43 and 45 of the Employment Act, 2007 provisions are therefore clear to the extent that;

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

And Section 45(1) of Act prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination as follows;

(2)A termination of employment by an employer is unfair if the employer fails to prove—

- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer;
- and
- c. that the employment was terminated in accordance with fair procedure.

The rationale is set out in the case of **Jane I Khalachi versus Oxford University Press E. A Ltd, Cause no.924 of 2010**. A redundancy cannot be undertaken to target a single employee. Such would defeat the purpose of the law as set out in section 43(2) of the Act. a notice ought to have issued to the claimant before termination of employment even where the respondent intended to pay for notice as under section 40(1) (f) and which pay is mandatory. Account had to be given as to the reasons and extent of the redundancy process and be justified in accordance with the law by application of fair procedure and ensure substantive justice to the claimant.

A termination of employment clothed as a redundancy which does not exist is apparent in this case and cannot be justified as a fair and valid reason which existed as at 3rd May, 2016 as a genuine reason leading to the claimant being laid off work. The sham behind the exercise is apparent to the court.

The failure to attend and offer any evidence in defence and response does not exonerate the respondent from undertaking due process and ensuring justice to the claimant before termination of employment. The resulting finding is that the termination of employment was unfair and contrary to section 45 of the Employment Act, 2007.

By letter dated 21st December, 2016 the Minister directed the respondent to pay the claimant his terminal dues. by letter dated 7th December, 2016 the respondent had offered to settle the dues but this was not addressed.

Contrary and against the letter terminating employment dated 3rd May, 2016 the respondent by letter dated 13th July, 2016 wrote to the NSSF asserting that the claimant’s employment remained on April, 2016. Such malice is apparent in the respondent failing to ensure the terminal dues are correctly assessed and paid as due.

Notice pay is due to the claimant assessed at Ksh.50, 000.00 based on the gross salary last earned by the claimant.

On the finding there was unfair termination of employment, compensation is due and the payment of 10 months gross salary is hereby found just and appropriate all at Ksh.250, 000.00.

The claim for overtime is not challenged. The claimant has attached a schedule for Engineers overtime computed and assessed and he is awarded Ksh.972.308.00.

On the claim for house allowance, the claimant had a consolidated salary under his contract of employment. Such allowance was not included as a separate payment.

Leave pay is due as unchallenged at 63 days payable in accordance with section 28 of the Employment Act, 2007 all assessed at Ksh.105, 000.00.

For the unremitted NSSF payments service pay is due assessed for one year upon failure by the respondent to make the necessary remittances in accordance with section 35 of the Employment Act, 2007 and all at Ksh.25, 000.00.

Accordingly, judgement is hereby entered for the claimant against the respondent for the payment of compensation at Ksh.250,000.00; notice pay Ksh.50,000.00; leave pay Ksh.105,000.00; overtime pay Ksh.972,308.00; service pay Ksh.25,000.00; and costs of the suit. The claimant shall be issued with a Certificate of Service covering the full term of employment and ending 26th May, 2016.

Dated and delivered at Nakuru this 18th day of December, 2018.

M. MBARU JUDGE

In the presence of: