



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1024 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 11th December, 2018)

LEONARD LUSINDE MUKHAYA.....CLAIMANT

VERSUS

OXFORD UNIVERSITY PRESS

EAST AFRICA LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant filed suit vide a Memorandum of Claim dated 19th June, 2014, through the firm of Khaminwa & Khaminwa Advocates seeking for the following prayers:

- a. A declaration that the termination by the Respondent was unfair, malicious and illegal in the first instance.*
- b. General damages for breach of employment contract.*
- c. Exemplary damages for illegal termination.*
- d. declaration that the Claimant is entitled to three months' salary in lieu of termination.*
- e. A declaration that the Claimant is entitled to his bonus for the sales made in the 2013/2014 financial year.*
- f. Severance pay for the 22 years worked.*
- g. Full salary for the month of January, 2014.*
- h. Costs of the suit.*
- i. Interest on (b), (c), (d), (e), (f), (g) and (h) above from the date of accrual until payment in full.*

2. The facts leading to the suit are that the Claimant was employee of the Respondent for 22 years and at the time of termination he was earning a gross salary of Kshs. 141,993.00. That the Claimant had won accolades for his diligence in his service and had never been admonished nor chided for abdication of responsibility or any form of misconduct.

3. He avers that he was sent by the Respondent to the Republic of South Africa for training at the end of which it was expected that he would be training new staff as would be recruited from time to time. Thereafter on 14th January, 2014, after successfully training the new staff and without notice, he was informed through a letter that his employment services were no longer required.

4. That the said decision to terminate him was malicious and without justifiable cause which caused him immense psychological trauma and as a result of the impugned decision of the Respondent, he was unable to repay loan obligations, school fees and other related obligations he had entered into. He prays for the Claim to be allowed as drawn.

5. The Respondent filed a Response on 17th September, 2014, through the firm of A.F. Gross & Company Advocates wherein they admit

employing the Claimant up to 31st January, 2014, when he was terminated on account of redundancy.

6. That at the time of termination the Claimant held the position of data entry clerk, which position became redundant following the scrapping of the SUN system which was replaced by the new SAP system which was automated. That the selection process was not biased but affected all positions of data entry clerks in the old system. Furthermore, that there was no work in the Respondent Company that required additional resources that the affected staff could offer and thus the decision to declare them redundant.

7. The Respondent aver that the management formally held sessions with the affected staff including Mr. Mukhaya on 14th January, 2014, in which the impending redundancy was clearly explained to all affected and the Labour officer was duly informed as required by law. That the affected were equally notified of the impending redundancy and explanation through a letter dated 16th January, 2014.

8. They aver that the Claimant was issued with a recommendation letter and his dues were worked out and duly cleared and as such the law on redundancy was followed to the latter.

9. The Respondent contend that bonus is not payable in view of their existing bonus policy to the effect that:

“If you are not in the employment of OUP on 31st May of any given financial year, you will forfeit your right to participate in this scheme.”

10. That the redundancy was lawful and they deny that the Claimant suffered any trauma as a result and pray for the Claim to be dismissed with costs.

Evidence

11. In evidence, he reiterated the contents of the Memorandum of Claim and stated that he had not been able to secure alternative employment since the termination.

12. The Respondent's witness also relied on the Statement of Response and her witness statement filed in Court dated 29th June, 2017, stated that the redundancy was lawful and that the Claimant does not have a claim against the Respondent and as such the suit should be dismissed with costs.

Submissions

13. It is submitted on behalf of the Claimant that the termination is unfair as none of the procedures of redundancy were followed and rely on the case of **Paul Ngeno Vs Pyrethrum Board of Kenya Ltd Cause No. 26 of 2012** to buttress the position that procedures must be followed otherwise the redundancy is unfair. They urged the Court to allow the claim.

14. The Respondent on the other hand submits that the termination was lawful and the redundancy was in accordance with Section 40(1)(a) and (b) of the Employment Act. That the redundancy was on account of the Respondent's need for a better economy, efficiency or effectiveness in service delivery thus abolishing the office of the Claimant. They cite the case of **Samuel Mwinani vs Social Service League M.P.Shah Hospital (2018) eKLR** where it was held:-

“The Court retains that abolishing of office is one instance whereby the employee may be rendered redundant and it may be independent or in merger with the loss of employment on account of redundancy due to the employer's need for better economy efficiency or effectiveness in service delivery... is a valid and genuine reason for redundancy.”

15. That the decision to terminate the Claimant's services was grounded on the fact that the Claimant's position ceased to exist following the scrapping of the SUN system which was replaced by the new SAP system which was automated.

16. The Labour officer was informed of the impending redundancy on 6th January, 2014, and they held a meeting with the Claimant on 14th January, 2014 informing him of the redundancy prior to issuing the letter of termination as envisaged under Section 40(1)(c) of the Employment Act.

17. That the Claimant via a letter dated 16th January acknowledged the termination notice and accepted the terms of the said termination notice. It is submitted that the Claimant requested for a certificate of service which was issued on 30th January, 2014, when the Claimant's services were terminated. That the termination was lawful as both a reason for termination was given and procedure on redundancy was duly followed.

18. It is further submitted that the Claimant having been lawfully terminated, the Claimant is not entitled to the reliefs sought.

19. I have examined all the evidence and submission of both parties. The issues for determination are as follows:-

1. Whether the Claimant's redundancy was lawful in accordance with the law.

2. Whether the Claimant is entitled to the remedies sought.

20. On the issue No. 1, Section 40 of Employment Act states as follows:-

(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.

21. The Respondent avers that prior to the termination of the Claimant, they notified the Labour Officer of the impending redundancy vide a letter dated 6/1/2014.

22. The Respondent also avers that they held a meeting with the Claimant on 14th January 2014 prior to the issuing of the letter of termination. The notice to the Labour Officer in my view was quite in order as per the law. There is however no evidence that there was a notice issued to the Claimant before the redundancy on 1.2.2014.

23. On 15/1/2014 is when the notice was served upon Claimant indicating that the termination would be effected on 1.2.2014. The notice days given were therefore 15 and not as expected for 1 month. There is also no indication that consultation was done before the termination. That alone makes the redundancy being done without following the law.

24. In the circumstances, I find the redundancy unfair and unjustified. I will therefore find for the Claimant as follows:-

1. 1 months' salary in lieu of notice = 113,594/=

2. 8 months as compensation for unlawful redundancy = 8 x 113,594 = 908,752/=

Total = 1,022,346/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 11th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mrs. Gulenywa for Claimant – Present

Munyoki holding brief for Michuki for Respondent – Present