REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.93 OF 2016

(Before D. K. N. Marete)

JAMES NGUNIA KINYUA..CLAIMANT

VERSUS

OSERIAN DEVELOPMENT COMPANY LIMITED......RESPONDENT

JUDGMENT

This matter is brought to court by way of an Amended Statement of Claim dated 22nd June, 2016. It does not disclose an issue in dispute on its face.

The respondent in a Memorandum of Response dated 6th July, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the respondent as an Inventory Control Manager on 13th April, 2006 at a gross salary of Kshs. 90,000.00. He rose through the ranks and at the time of termination was the Head of Division – Inventory Control and earned a gross salary of kshs.308,400.00.

It is the claimant's further case that on 28th January, 2016 he received a letter notifying him that he was being terminated on grounds of redundancy and further that the notice period would end on 27th February, 2016. He responded by writing back to the respondent inquiring on the terms of the intended redundancy and generally seeking further clarification on the same.

The claimant’s further case is that redundancy was confirmed by the respondent with a rider that he would be required to work for a further three months in accordance with the Employment Act. This to him amounted to unfair termination. It was confirmed by a letter from the respondent received on 27th February, 2016 which indicated that his last working day would be 27th May, 2016. It is the claimant’s case that the procedure of termination is not known in law and practice and is a violation of the claimant’s constitutional and statutory rights. The respondent further violated his rights and dues envisaged in a case of proper redundancy. This is pleaded as follows;

> *11. In further breach of the claimant's right, the respondent has failed, refused and/or neglected to follow the statutorily laid down procedure on payment of the claimant's final deus in the event of a proper redundancy.*
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> *12. The respondent has further unilaterally and in gross breach of the law purported to reduce the number of days that the claimant is entitled to in the form of severance/gratuity from the 24 days*

as provided in the Human Resource Policy to 15 days to a great detriment of the claimant. Attached and marked Appendix "F" is a copy of the Human Resource Policy of the respondent.

The claimant's other case is that the respondent proceeded to terminate the employment of the claimant on 27th May, 2016 but refused to release his terminal dues despite clearance from office. He puts it thus;

29. That the actions to terminate the claimant is in bad faith, devoid of any valid ground or justification in law and induced through procedural unfairness to the claimant in gross breach of his constitutional right to a job and to earn an honest living from it.

30. That the actions by the respondent to unilaterally reduce the claimant's entitlement under severance/gratuity from 24 days to 15 is tantamount to raiding a pension scheme since the respondent does not provide any other for of social security to its employees.

He prays as follows:-

a. *A declaration of that the redundancy and consequential termination is irregular, unfair, unlawful and unconstitutional.*

b. General damages.

c. Payment for terminal dues as tabulated hereunder:

i. Notice to declare redundancy @ 3 month – kshs 914,520.00

ii. Severance @ 24 days per each completed year of service.

d. Compensation equivalent to 12 months basic pay.

f. Costs of this claim and interest.

g. Any other relief that this honorable court may deem just and expedient in the circumstances.

The respondent's case is that the claimant did not work diligently as pleaded and put the claimant to strict proof thereof. She also avers that by a letter dated 28th January, 2016, the claimant was notified of redundancy and also issued with a one (1) month notice of the said redundancy effective from the date of the letter of notice.

The respondent further case is that vide a letter dated 27th February, 2016 she notified the claimant that his services would be terminated on 27th May, 2016 in that he would be required to serve a working notice of three (3) months in accordance with his Employment Contract. Indeed, the law allows termination for any reason by either party giving three months notice in writing or salary in lieu thereof.

The respondent further asserts following in rebuttal of the claim;

i. That payment of gratuity is discretionary and if granted to an employee, the commutation used is 15 days per each complete year of service and therefore the computation at 24 days per each compete year of service demanded by the Claimant has no basis whatsoever.

ii. That the payment of gratuity is discretionary as the claimant is a member of the National Social Security Fund who is not entitled to service pay as set out under section 35(5) and (6) of the Employment Act.

iii. The Claimant's contract of employment does not contain any clause relating to payment and computation of gratuity upon termination and/or retirement for employment.

iv. The Respondent has no company practice that pays exiting employees gratuity calculated at the rate of 24 days per each complete year of service as alleged therein or at all and the claimant is put to strict proof of any averments to the contrary.

v. The Respondent from time to time issues internal memorandums in respect of payment of gratuity and other issues touching on the employees contract of service.

vi. The Claimant's contract of employment is different from the other ex-employees as each employee has an individually negotiated agreement.

vii. The Human Resource Policy & Procedure does not relate to the claimant and thus the Claimant is estopped from utilizing the same to gain advantage contrary to the Respondent's company policy.

viii. The Claimant is purporting to utilize the Human Resource Policy in a bid to arm-twist the respondent to cave into the Claimants unreasonable, unjustifiable and illegal demands which conduct is unbecoming and ought to be frowned by this Honourabe Court.

The respondent closes by affirming a case of fair and lawful termination of employment and pursuance of redundancy law and procedure thereby denying the claim *in toto.*

This matter came to court variously until the 1st November, 2016 when it was heard.

DW1 – James Ngunia Kinyua, the claimant, testified in reiteration of the claim. In his testimony he sought to rely on his Amended Statement of Claim and list of documents in evidence thereof. It was his testimony that he was in court due to unfair termination of his employment by the respondent.

The claimant further testified that the requirement of service for three months after expiry of the notice period for redundancy is an indication that the redundancy was not due and his services were still required. Again, there was no discussion on redundancy and therefore the irregularity of the same.

On cross examination, CW1, admitted that he was terminated on grounds of redundancy. His position was phased out in a situation of reorganization of the stores. He also agreed that the former set up of the stores was a failed system. His only ground was that the notice issued did not meet the requirements of Clause 16 of his contract of service.

On re-examination, the claimant testified that he had worked for ten years. He denied having being informed of the phasing out of his position. He also denied having been given a chance to air out his grievances or even prior knowledge of redundancy of his position. He, however, agreed that he did a follow-up letter of his redundancy and receive a response of the respondent. He also agreed that he was served with a notice by way of a letter.

DW1- Mary Kinyua testified on the set up of the Inventory Control office which had a Director of Administration as its head. She further testified that other personnel declared redundant were a personal assistant and several store keepers. This was the personal assistant to the claimant and all other positions of the office of personal assistant.

DW1 further testified that the claimant’s redundancy was a consequence of restructuring occasioned by the need to consolidate stores and reduce stock. Check and control of procurement was also brought in. She further testified that the claimant was required to work due to his immense expertise and was very co-operative on this stint. He was also fully paid for his terminal benefits.

On cross examination, she testified being Human Resource Manager during the time of this redundancy. All procedural aspects were undertaken before redundancy and the centralization system is now a big success and show case for the respondent. It was her further evidence that on restructuring, his services were not required and further, the centralization of stores is a process and not impromptu.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?

2. Whether the claimant is entitled to the relief sought?

3. Who should pay costs of the suit?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this.

The claimant in his written submissions disputes the veracity of the termination notice issued by the respondent as being inadequate and contrary to paragraph 16 of his employment contract which provides that;

> *After completion of the probation period, this contract may be terminated for any reason, by either party giving notice to the other not less than three (3) months notice in writing or salary in lieu thereof,*

He also cites the respondent's non compliance with section 35 (3) and 40 (1) (a), (b) and (c) of the Employment Act, 2007. This requires that an employer shall notify the labour officer of impending redundancy which was not done in the circumstances of this case.

The claimant in support of his case sought to rely on the authority of **Geoffrey Nyabuti Onguko Vs Blow Plant Limited (2015) eKLR** where Justice M. Mbaru stated as follows;

> *"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 result in reduction of staff or reorganization. Such situations do not arise overnight. An employer must assess and analyse their business and arrive at a decision that a downsizing of staff is necessary or a reorganization is required to turnaround the business into profits as held in KUDHEIHA versus The Aga Khan University Hospital Nairobi case and cited G N Hale & Son Ltd v Wellington etc. Caretakers etc. IUW (1991)1 NZLR 151 (CA), the New Zealand Court of Appeal held;*
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> *… This Court must now make it clear that na employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganization or other cost saving steps, no matter whether or not the business would otherwise go to the wall... The personal grievance provisions... should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or the expediency of the employer's decision.*
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> *"However, even where such a right exists, the law at section 40 of the Employment Act requires that the employer to inform the employees through a general notification that the redundancy is likely to affect their work and or employment. This is what the Court of Appeal has termed as issuing a general notice as held in Kenya Airways Limited versus Aviation & Allied Workers Union Case. Such general notice thus goes to prepare the employees as a whole that there is likelihood of their work being changed or reviewed or that some positions will no longer exist affecting the employment of some of them. Such notice mentally and psychologically sets the employees ready. This was the holding of the court in the case of Jane Khalechi versus Oxford University Press E.A. Ltd (2012) eKLR thus;*
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> *… the notices under section 40 is different from the notice as under section 41, the notices envisaged under a redundancy process is that once an employer has reviewed their business situation and realised that there is need to restructure and or reorganise for more productivity, there must be notification to the employees, whether they will be affected or not. This process does*

not just suddenly happen where an employer open their doors in the morning and realise they have to reorganise for better productivity or be more strategic in running their business at the close of the day.

He also sought to buttress his position by relying on the Employment Act, 2007 as follows;

Section 40(1) read together with sections 43, 45 and section 47 (5) of Employment Act 2007, establishes a valid defence to a claim for unfair termination based on redundancy, an employer has to prove;

i. That it has notified the labour officer of impending redundancy

ii. That it has reasons for termination on redundancy grounds.

iii. That the reasons given for termination are valid

iv. That the reason for termination is fair reason based on the operational requirements of the employer and

v. That the employment was terminated in accordance with fair procedure.

…. in this case the respondent did not give notices to the labour officer of the impending redundancy instead it served the claimant directly with a notice of termination. The respondent also failed to engage in consultation with the claimant on ways to without prejudice to mitigate effects of the purported redundancy hence offending the law applicable in termination of employment on account of redundancy."

The claimant further submitted on a case of discrimination in the process of his termination as follows;

... the claimant was issued with a termination notice without being given any explanation for the said redundancy notice, the claimant was further given 30 days notice contrary to the 90 days notice provided in employment contract. No redundant severance pay and wages in lieu of notice pay was made to the claimant as provided for by the Employment Act, 2007. In addition the respondent has, to date and without any justification, not issued the claimant with a certificate of service and a letter of clearance.

From the foregoing it is clear that the respondent applied discriminatory practice with respect to the claimant contrary to section 5(3) & (6) of the Employment Act, 2007. The respondents in their response to claim have not provided any explanation to disprove that the applied discriminatory practice with respect to the claimant. Thus they have not discharged the burden placed upon them by section 5(7) of the Employment Act, 2007 which states the following;

"In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section."

The respondent in her comprehensive written submissions stated the defence case to fullness. She narrated that the claimant in evidence admitted that he was aware of the centralization of the inventory control division and had been part of the process six months prior to his redundancy. She also submitted that the claimant had admitted the bureaucracy and clumsiness of the set up of the division which comprised of fifteen (15) stores geographically spread over long distances and apart with 29 people working under him. The claimant further admitted that none of these 29 people were elevated to his position on termination of employment.

The respondent further wishes to rely on section 47 (5) of the Employment Act, 2007 which burdens the employee to prove a case of unlawful termination but also burdens the employer to justify termination. It

is her case that the claimant was always aware of the redundancy and its due process and cooperated in its implementation.

She sets out the following as salient features coming out during trial;

- *The respondent began the restructuring process in the year 2015 and the respondent's witness was involved in the process.*
- *The claimant was the Head of Inventory and Control Division which had two (2) primary functions i.e Stores and Procurement which were all under one department and the claimant coordinated all the fifteen(15) stores that were all geographically placed in different locations.*
- *The restructuring involved splitting the Inventory and Control Division in to two (2) i.e Stores and Procurement which are both headed by different people i.e Head of Stores and Head of Procurement and both are reporting to the Director of Administration.*
- *After the claimant was declared redundant the claimant in evidence confirmed that none of the employees working under him was elevated to his position. Evidently, the position of Head of Division Inventory Control was indeed abolished. The claimant also in evidence while being cross-examined confirmed that the position of Inventory Control Manager as per his contract of employment no longer existed.*
- *The centralization did not mean housing all the stock under one building but having the stores in one (1) geographical area as opposed to what was in place before.*
- *That due to the centralization, the stores were reduced from fifteen (15) to nine (9) with the supervisors reporting to the Head of Administration and the only people declared redundant were the claimant, his Personal Assistant and seven(7) store keepers.*
- *That it was not possible to redeploy the claimant to another department as it emerged that the claimant's first training was in accounting and he had only worked in the Division for ten (10) years. Clearly, he had not interactions with other departments in the respondent company.*
- *The head of procurement and head of stores reported to the director of administration who had various qualifications e.g. management was his first study, experienced in logistics, supply management, freight, packaging areas etc.*
- *The respondent's witness stated in evidence that the centralization was a success story in view of reduction of manpower, reduction of stock and capital, ensured a check and control system, reduction of labour, avoidance of pilferage and reduction of costs.*
- *The claimant in evidence stated that the centralization system was a failure and yet he did not elaborate and/or advance any reasons as to why he reached such a conclusion and yet he himself in evidence stated that he was part of the centralization process six months prior to his disengagement with the respondent.*
- *The respondent also stated in evidence that it was not necessary to conduct a performance appraisal as the redundancy did not related to the claimant's competence and even if done would not have changed anything. The redundancy related to phasing out of the claimants position.*

  Notice of intention to terminate

  Section 40 (1) (a) of the Employment Act stipulates that where an employee is a member of a trade union, the employer is required to notify the concerned union and the labour officer the reasons for the intended redundancy and give notice which should not be less than a month prior to the intended date of termination on account of redundancy.

  In the case herein, the claimant was not a member of any trade union and in any event the claimant led no evidence stating otherwise. Thus, it was not a requirement for the respondent to notify any union as the claimant belonged to none.

  Under section 40(1) (b) of the Employment Act, where an employer is not a member of a trade union, the employer is required to notify the employee personally in writing and the labour office

The respondent further rebuffs non-compliance the provision of Section 40 (1) (b) in that the claimant was not a member of a union and it was therefore needless to notify or engage the labour officer or a

union in the redundancy process. It is clear that the position of the claimant was in the management cadre and in any event, he does not adduce evidence of being a member of a union and therefore qualifying for the provisions of Section 40 hereof.

The claimant's submissions, elaborate as they are, fall out of the way in overshadowing the respondent's case and rebuttal. She overwhelmingly brings out a case against wrongful, unfair and unlawful termination. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment, the claimant would not be entitled to relief, or at all.

I am therefore inclined to dismiss the claim with costs to the respondent. And this answers all the issues for determination

Delivered, dated and signed this 31st day of January 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Wabuyabo instructed by M/s Wabuyabo Lukoba & Company Advocates for the Claimant.

2. Miss Akonga instructed by Mwangi Njeru & Company Advocates for the Respondent.