



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NO 126 OF 2015

ABAS OMARCLAIMANT

VERSUS

AHZAB ACADEMY RESPONDENT

JUDGEMENT

Introduction

1. The claimant was employed by the respondent as a teacher on 12.1.2010 earning Kshs. 9,000 per month but later the pay was reviewed to Kshs.12,500. On 25.11.2014, he was served with a letter dated the same date by which the respondent terminated his employment contract with immediate effect and offered to pay him one month salary in lieu of notice plus the salary for the days worked up to the date of the date of the letter. The reason cited form the abrupt termination was restructuring of the respondent's establishment.

2. The respondent has admitted the employment relationship between the claimant and her but denies that the termination thereof was lawful because she served the claimant with proper notice as required under his employment contract. In addition she avers that the reason for the termination was restructuring process which was permitted by the law. Finally it is the defence case that she paid to the claimant all his terminal dues including December 2014 salary and therefore prayed for the suit to be dismissed with costs.

3. The issues for determination in this suit are:

(a) Whether the termination of the claimant's contract of service was unfair and wrongful.

(b) Whether the claimant is entitled to the reliefs sought or any part thereof.

4. In answer to the said issues the claimant testified as CW1 while the respondent never participated in the hearing which took place on 18.7.2016. After the claimant filed written submissions urging the court to enter judgment in his favor.

Analysis and determination

Unfair and wrongful termination

5. Under section 45(2) of the Employment Act termination of employment by the employer is unfair if the

employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A valid reason is one which is true while a fair reason is one which relates to the employees conduct or the employer's operational requirement. Fair procedure with respect to misconduct performance and physical incapacity explaining the reason for termination to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter according the employee and his chosen companion to air their representation for consideration before termination. On the other hand fair procedure with respect to redundancy refers to compliance with the procedure provided under section 40 of the Act which includes among other things service of at least one month prior notice in writing to the employee or his trade union and also on the Labour office.

Reasons for termination.

6. In this case the reason for dismissal according to the termination letter was redundancy following a restructuring process in the respondent's establishment. The said reason is a fair reason because it relates to the respondents operational requirement. The validity of that reason has however not been proved because the respondent never participated in the hearing. Under section 43 and 47(5) of the Act, the burden of proving and justifying the reason for the termination of the employee's contract of service in any legal proceeding like this one lies on the employer.

Procedure followed.

7. The redundancy of the claimant's position was communicated by the respondent vide the letter dated 25.11.2014 and it took effect the same date and the claimant was not given any hearing before the letter was issued. Section 40 of the Act provides the mandatory procedure which an employer must comply with before terminating the service of his employee on account of redundancy. First, the employer is required to secure at least one month prior notice in writing on the employee or his union, and also on the Labour Officer. Second, the employer must conduct a fair selection process considering expertise and experience of the employees and the principle of first and last out. Third, the employer must pay to the employee to be laid off at least one month salary in lieu of notice, accrued benefits plus severance pay. In this case the foregoing conditioning precedent to redundancy were not fulfilled and therefore the procedure followed before terminating the claimant was unfair within the meaning of the section 40 of the Act.

8. In view of the finding above that the validity reason from the dismissal has not been proved and that the procedure followed to terminate the employment contract was unfair, I hold that the termination of the claimant's employment contract by the respondent on 25.11.2014 was unfair.

Reliefs

Notice of compensation.

9. Under section 49(1) and (4) of the Act, I award the claimant Kshs.12,500 being one month salary in lieu of notice plus Kshs.125,000 being ten month salary as compensation for unfair termination. In awarding the said compensation I have considered the long period of service by the claimant and the fact that he did not contribute to his termination through misconduct.

Service pay

10. The prayer for service pay is dismissed because the claimant was a member of NSSF as per the pay slip he produced as exhibits.

Salary for November 2014.

11. I award the Kshs.10,416.70 being salary for the 25 days worked in November 2014.

Disposition

12. For the reason, the termination of the claimant's conduct of service was unfairly terminated. I enter judgement for him in the sum of Kshs.147,916.70 plus costs and interest.

Dated, signed delivered at Mombasa this 27th January 2017.

O.N. MAKAU

JUDGE