



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO. 225 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 27th February, 2017)

CAPTAIN (RTD) VICTOR WANJAU KANYUIRACLAIMANT

VERSUS

KENYA KAZI SECURITY SERVICES LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum of Claim on 20th February 2014 through the firm of Moses Odawa & Company Advocates. He states the issues in dispute to be:

“Wrongful, unlawful, illegal, unilateral, unconsionable and uncontractual termination, retrenchment, declaration of redundancy and/or alteration of terms of employment and/or attempts to wrongfully, unlawfully, illegally, unilaterally, unconsionably and uncontractually terminate, retrench and/or declare the Claimant as redundant”.

Claimant’s case

2. The Claimant told Court that he was employed by the Respondents on 7th May 2012 as a Management Trainee *inter alia* on the understanding that the schedule of his duties would be given to him upon completing training and his gross consolidated salary would be Kshs.90,000/= and during the employment he would be entitled to in and out patient care under 3rd party fund arrangement with AAR.

3. The Claimant was poached from ARN Security Consultants & Training Services Limited where he was Assistant Operations Manager in recognition of his excellent performance and excellent military background. The Claimant annexed his employment letter of 30th September 2011 and CV as exhibit.

4. He avers that he successfully completed his training and was deployed as Branch Manager Operations – Eldoret effective 1.2.2013 – Appendix VWK 3).

5. Subsequently the Respondent vide a letter of 16.7.2013 seconded the Claimant to the position of Operations Manager with KK Security Malawi upon his satisfactory and exemplary output performance and fulfillments of his obligations and he was paid a subsistence allowance of USD 750 – net of tax per month and it was expressly agreed he would revert back to current role at Head Office in Nairobi under same terms and conditions prevailing before the appointment (VWK 4a and VWK 4b).

6. The Claimant avers that he went to Malawi on or about 17th July 2013 to 7th October 2013 when he was directed to report back to Nairobi head office (VWK 5).
7. Upon returning to Kenya, he avers that he requested for 22 days leave effective 10th October 2013 which was granted. However, as he prepared to start leave, he was directed to report back to work (VWK 6). He requested for 5 days off to enable him settle down and he was granted. He proceeded for the off but he was involved in an accident and he fractured his left arm and was admitted for 3 days and put on 30 days sick off (VWK 7).
8. Upon concluding the sick off, he requested for his 22 days annual leave which request was duly granted and upon conclusion, he reported back to work.
9. He avers that upon his return the Respondent failed to deploy him or assign him any specific duties and further refused to pay him the accrued subsistence allowance of US 750 net of tax for the 3 months he was in Malawi.
10. The Respondent further demanded he refunds the monies he incurred in bills for the Claimant's cell phone when he was in Malawi.
11. The Claimant perceived that by their conduct the Respondent wanted to terminate him unfairly and alter terms of his contract. He avers that on 2.7.2013 there was a salary review and his salary was adjusted to 95,850/= with effect from 1st June 2013 (Page 95) of Respondent's documents. He produced his staff performance Development report and he contends that his report was very good.
12. On 11.2.2014, he was called for a meeting by HR and informed that she wanted to know his history with the Company as she could not find his file.
13. On 19.2.2014 she summoned him again and now indicated the file had been found and they were seeking to deploy him and matter was under discussion. The Claimant feared for his life and filed this case on 20.2.2014 because from the meeting of 19.2.2014, he sensed something irregular was going on. They had failed to pay him his allowance in Malawi and after a demand the Respondent finally paid.
14. On 21.2.2014, the Claimant was declared redundant. He had not been given any redundancy notice before. He avers that he was declared redundant as Respondent wanted to recruit a cheaper Operations Manager.
15. They then paid him 208,730/= after he filed this case.
16. On cross examination, the Claimant avers that the Respondent declared him redundant because of the injury he suffered. The reason for redundancy in the redundancy letter was restructuring
17. The Claimant seeks to be paid as per his claim claiming unfair termination/redundancy.
18. The Respondents filed their defence and counter claim on 15.4.2014 through the firm of Kale Maina & Bundotich Advocates. They contend that the Claimant was employed on a temporary basis upon signing a causal employment form agreement which was of a very temporary nature and was prone to termination without further notice.
19. They also aver that the Claimant was a perpetual absentee from work and on several occasions was found without Company uniform that had been assigned to him. He was also given several warnings. They deny that Claimant was terminated but that he absconded duty.
20. They want this case dismissed.
21. I have considered evidence of parties plus the submissions filed.

22. The Claimant have submitted that he was unfairly declared redundant as against provisions of Section 40 of Employment Act and wants Court to find for him.

23. The Respondents have admitted terminating the Claimant's services through redundancy.

24. From the above evidence, the issue the Court needs to determine is whether the redundancy was lawful. The Respondent avers that the Company was restructuring hence the redundancy.

25. Section 40(1) 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".

26. For a redundancy to be lawful, then, the above stated parameters must be met. There is no indication that the Respondents were restructuring and there is no evidence placed before Court of this activity.

27. The Claimant was not notified of the redundancy in advance and no discussion took place along the redundancy. The Claimant was declared redundant on 21.2.2014 without any prior notification hence the mode of redundancy was unfair and unjustified.

28. The issue of redundancies has been discussed in several cases- see **Aviation & Allied Workers Union vs. Kenya Airways Limited and 3 others (2012) eKLR; Kenya Union of Domestic Hotels, Educational Institutions & Hospital Workers vs. Mombasa Sports Club (2014) eKLR** and Courts have held that for a redundancy to be lawful, the law (Section 40 of Employment Act) must be followed.

29. It is indeed true that there must be notice, consultation, notification of the intended redundancy to the Labour Officer, all redundancy dues must be paid and there must be proof that the redundancy is not a sham and real and evidence of the reason must be submitted.

30. In the instant case, there is no evidence that there were valid reasons for redundancy and Claimant was not consulted nor notified. The whole process was a sham and unfair and I declare it so.

31. I therefore find for the Claimant and award him as follows:

1. 12 months' salary as damages for unlawful and unfair redundancy = $12 \times 95,850 = 1,150,200/=$;

2. 1 month salary as redundancy notice = 95,850/=

Total 1,246,050/=

3. Costs of this suit.

4. Interest at Court rates with effect from the date of this Judgment.

Read in open Court this 27th day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odawa for Claimant – Present

No appearance for Respondent