



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2404 OF 2012

ANDREW WAITHAKA KIRAGU CLAIMANT

VERSUS

GRAIN PRO KENYA INC LTD RESPONDENT

JUDGEMENT

1. The Claimant was on 1st June, 2010 employed by the Respondent, a limited liability company registered in Kenya and part of a multinational involved in global monoculture and marketing of hermetic storage systems and equipment for grain storage. The Respondent office covers East Africa region and the Claimant was employed as the Customer Service Manager. The Claimant served diligently and was paid a monthly salary of Kshs 51, 000.00 or the amount of \$600.

2. On 14th September, 2012 the Respondent issued the Claimant with letter of termination which he found to be malicious, without basis and unlawful. That the termination was not in accordance with the law and did not respect the claimant's rights and no terminal dues were paid. The Claimant is seeking;

a) Salary for 14 days for September, 2012;

b) House allowance

c) Loss of benefits;

d) Loss of stock option plans

e) Damages for unlawful termination;

f) Costs and interests.

3. In evidence, the Claimant testified that he was employed by the Respondent following long relations and working together when the Claimant was promoting Respondent products. Upon employment by the respondent, the claimant's salary was agreed at \$600 together with benefits which included a chance to own the company, stocks and global profits, and insurance. The head office for the Respondent as in the Philippines where the goods and commodities the Respondent was dealing with were shipped from. The Claimant did the clearing and tax returns.

4. The Claimant was called one morning and verbally terminated by the regional director in Kenya which was then followed by a written letter of termination. The director explained that the Philippines office had made a decision to terminate the claimant. There was no prior notice and no reasons were

given. The Claimant was the only employee terminated. The terminal dues paid were not for all dues owing.

5. The Claimant also testified that in his letter of offer, several benefits were set out being a salary of \$600; medical cover; life insurance; leave; profits sharing and other benefits. The profits sharing were qualified in that he was to benefit upon approval by the respondent. He could also get stocks upon approval by the Respondent board. That the management had to approve which they failed to do. The Claimant had the option of buying the stocks on his own initiative. He was never paid a house allowance and his salary was based on the United States Dollar (USD) rate applicable at the time.

6. That the terminal dues were paid at Kshs.172, 521.72. This was less what was due. The reasons for termination were that there were operational reasons and the position reverted back to the Philippines head office but the claimant's counter-part in Ghana was moved to the Philippines.

Defence

7. The Respondent in defence admit that they had employed the Claimant from 1st june, 2010 to 14th September, 2012 when he was lawfully terminated on the grounds of redundancy as his position was abolished. The Claimant was informed of the intention to be terminated vide letter of 14th spetmber, 2012 which was lawful. The remedies sought are not due as the Respondent followed the law. The Claimant was paid his terminal dues amounting to Kshs.172, 521.72 and comprising of;

<i>Severance pay at</i>	<i>Kshs.238, 448.45</i>
<i>Less</i>	
<i>NSSF at</i>	<i>Kshs.200.00</i>
<i>Tax charge</i>	<i>Kshs.66, 568.00</i>
<i>Personal relief</i>	<i>Kshs.1, 162.00</i>
<i>PAYE</i>	<i>Kshs.65, 406.74</i>
<i>NHIF</i>	<i>Kshs.320.00</i>
<i>NSSF</i>	<i>Kshs.200.00</i>

8. The Claimant was paid his terminal dues and signed a discharge and clearance thus relieving the Respondent off any liability. He is not entitled to any other claim as house allowance was inclusive in the monthly salary.

9. The Respondent also states that in 2011 they did not make any profits and thus there were no profits to be shared out. The Claimant was provided with medical cover while in employment and he did not express any interest in purchasing stock options in the Respondent company and thus not entitled to any stock shares or benefits thereon.

10. In evidence, the Respondent called Mr Bondi Maulid Omar the managing director of the Respondent for the East Africa Regional office. He testified that the Respondent is part of the GrainPo US Company and a subsidiary of the Philippines Company. He worked with the Claimant as his manager but the Claimant was directly reporting to the Philippines office. The Respondent was making losses and on 14th setpmber, 2012 he was directed by the head office to issue the Claimant with a termination letter. There was ad discussion on the respondent's performance in the market and the need to restructure the business to try and have profits. Since most customer service activities were moving to Philippines and the Respondent was going to use technology to advertise its goods, the claimant's position was no longer required. The office was abolished. This followed a business decision.

11. In the letter offering the Claimant employment, there were terms with regard to stocks in the company but one had to apply and have deductions from the salary. The Claimant did not apply. Upon termination the Claimant was paid for notice at 2 months' salary; he had a medical cover and severance pay. House allowance was inclusive of the gross pay. Salary for 14 days does not arise as the Claimant was paid 2 months' notice. No other dues owe.

Submissions

12. Only the Respondent filed submissions.

13. The Respondent submits that the Claimant as at all material times aware of the reasons for his termination which resulted from a redundancy and abolition of his office by the mother company Grainpro Philippines Ink Ltd. The Claimant was paid all his terminal dues. The Claimant never applied or requested to stock option shares in the Respondent company as required and did not follow the guidelines set out on how to have the same. House allowance was not a separate item from the gross pay and cannot be claimed outside the same. The remedies sought have not been proved and claim should be dismissed.

14. The Respondent relied on the following cases – **Mohammed Ali and another versus Sagoo Radiators Limited [2013] eKLR** where the Court of Appeal held that special damages must be pleaded and strictly proved. In **East Africa Tanning Extract Co. Ltd versus Joseph Oriento Slouch [2007] eKLR** the Court held that special damages attributable to the wrongful act must be averred and proved.

Determination

15. The Respondent has admitted that the Claimant was terminated following a meeting held on 14th septmeber, 2012 and the letter of equal date. That the reason for termination was due to abolish of office and digitisation of the claimant's function by the moth office in the Philippines. The office held by the Claimant was declared redundant. This is not contested by the claimant.

16. What is contested is that there was no notice or hearing before termination and the reasons for the termination were only communicated to the Claimant on the date of his termination. That this resulted in unfair termination of employment.

17. On the admission that there was a redundancy at the respondent, and that there was a management decision to terminate the claimant, section 40 of the Employment Act applied. Section 40 requires that;

40. Termination on account of redundancy

(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

18. There are statutory procedures that must be adhered to before a termination of employment can issue. As held in **Aviation and Allied Workers Union v Kenya Airways Limited & 3 others [2012] eKLR** The Court held that in a redundancy;

... the affected employees have done no wrong: neither their conduct, nor their capacity is in issue; it is only that in the circumstances, the employer feels the employees are considered to be surplus to the needs of the business. Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions may become redundant because there is a decrease in business, the operations have become mechanized, or there is a necessity to re-organize, to enhance operations and prevent closure. The employer has the prerogative to change job descriptions, duties and responsibilities. There may also be situations, where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical place.

19. As redundancy result from operational and business reorganisation needs, once an employer has made that decision, the employee should be given notice of such redundancy and another notice to the individual affected by the redundancy. A redundancy process cannot be undertaken to only affect one employee. To do so would be to negate the provisions of section 40 of the Employment Act as held in **Jane Khalechi versus oxford University Press [2013] eKLR**. The Court of Appeal also held in **Thomas De La Rue (K) Limited versus David Opondo Umutelema eKLR** this Court said:

"It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer..."

20. The above decision is given affirmation in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**. The employee must be given a notice of redundancy and another notice of termination of employment and such notices also must be issued to the Labour Officer serving in the area where the employer is situate.

21. It is therefore not sufficient that the Claimant was aware of the termination and that he was called for a verbal meeting on the date of his termination. The law requires the procedures set out under section 40 of the Employment Act to be followed and the Notice to the Labour officer is required to ensure that this government officer is able to advice and give guidance on the applicable law and policy with regard to redundancy. Where the mandatory provisions of section 40 are not addressed, the resulting termination of employment becomes unfair. The payment in lieu of notice does not sanitise an otherwise unlawful process.

In this case, I find the Claimant was not given the requisite notices of redundancy and termination as contemplated under section 40 of the Employment Act, such notices are mandatory and the termination was unfair. The Claimant is entitled to payment of compensation in terms of section 49 of the Employment Act.

Remedies

22. On the claim for payment of Salary for 14 days worked in September, 2012 such is due as notice pay and salary for days worked are two items regulated differently in law. Section 35 of the Employment Act requires a contract of service to be terminated upon notice whereas Part IV of the Employment Act regulates the payment of wages/salary for days worked. Even where an employer intends to issue an employee with notice or pay in lieu of such notice, salary due for days worked must be paid. The Claimant is entitled to the salary for 14 days worked in September, 2012 all being Kshs. 23,800.00 as set out in the memorandum of claim.

23. The claim for house allowance s made on the grounds that this was not included in the contract of service. In the offer letter issued to the Claimant and dated 13th May, 2010 the Respondent stated that;

After a probation period of 6 months, you will receive your final appointment. GRainpro Kenya Inc is glad to offer you the following benefits;

An initial salary of USD 60000 monthly payable every end of the month through payroll account;

...

Other benefits are required by law.

24. I have gone through the work policy submitted by the Respondent and the question of house allowance or gross pay is not addressed. Save for what is stated in the letter of offer that an initial salary will be paid, nothing is mentioned as to whether this is gross pay inclusive of housing allowance. The other benefits due to the Claimant are well set out including a medical cover, life insurance; leave but not house allowance. The all-round rider of *other benefits required in law* open up the benefits due to the Claimant based on applicable law. On the claim for house allowance, section 31 of the Employment Act makes provision for house allowance where no housing is given to the employee. On the open-ended contract such as the one issued to the claimant, where no allowance or housing was given and based on the claim for the same, such is due. The Claimant is awarded Kshs.571,531.00 in house allowances.

25. The claim for loss of benefits and loss of stock option plan is made on the basis that the Claimant was entitled to these benefits but they were not paid. I however find that the Claimant has admitted that these benefits were regulated in a separate regime of regulations, he was required to show i=his interest in writing for the Respondent to make a management decision and upon which the Claimant was to be issued with certificate and the deductions be made from his monthly salary. The Claimant did not express written interest, he was not allocated any shares or stocks and therefore enjoyed his full salary for the duration of employment. To demand for the loss of benefit or loss of stock option where the Claimant had not invested in the same would be an unjust enrichment. Such is declined.

26. On the finding that the Claimant was unfairly terminated form his employment as the Respondent did not follow the statutory procedures under section 40 of the Employment Act, section 49 of the Act gives the Court power to award compensation and not damages in a case such as this one. The Claimant is awarded 3 months' salary in compensation the same computed based on the last salary paid at \$600 on the current applicable exchange rate of Kshs.103.00 as at close of business 2nd March, 2017. The Claimant is awarded Kshs. 185,400.00 in compensation.

27. The Claimant was paid for notice adequately and for his severance.

In conclusion therefore, judgement is hereby entered for the Claimant in the following terms

a) Compensation Kshs.185,400.00;

b) House allowance Kshs.571,531.00;

c) Unpaid salary for 14 days worked in September, 2012 Kshs.23,800.00; and

d) Costs of the suit.

Dated and delivered in open Court at Nairobi this 9th day of February, 2017.

M. MBARU

JUDGE

In the presence of:

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