



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 280 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

BENSON KEUYA MAUTI.....CLAIMANT

-Versus-

ELDORET MATTRESS LIMITED.....1ST RESPONDENT

KAMTINGA SERVICES LIMITED.....2ND RESPONDENT

JUDGMENT

In his Memorandum of Claim the Claimant avers that he was unlawfully declared redundant by the 1st Respondent, a general merchant store operating in Eldoret Town within Uasin Gishu County and dealing in general wholesale supplies of assorted goods.

The Claimant seeks the following remedies:

1. A declaration that the termination process as carried out by the Respondents is unlawful and that during his employment with the Respondents, he was not remunerated as required by law;

2. (i) One month's salary in lieu of notice Kshs. 23,885

(ii) Severance pay Kshs. 114,235

(iii) Overtime Kshs. 621,180

3. (iv) Compensation Kshs. 286,626

Total Claim Kshs 1,045,926

Less payment received Kshs. 156,405

Balance due Kshs. 889,521

4. Costs and interest

5. Any other relief the Honourable Court may deem fit to grant.

The Respondents filed a Reply to the Memorandum of Claim in which they admitted employing the Claimant as a general worker. The Respondents aver that due to financial difficulties arising from market

forces and competition, Eldoret Mattresses had to reorganize itself and reduce its supplies to the market and this necessitated a significant reduction in its labour force. The Respondents aver that by notification dated 1st February 2015 Eldoret Matresses Limited communicated to the employees and the Labour office its desire to declare 8 employees redundant in accordance with section 40 of the Employment Act. The Respondents aver that they observed the principle of last in first out in selection of employees to be declared redundant and that the process was carried out in good faith. The Respondents pray that the claim herein be dismissed with costs.

The case was heard on 17th November 2016 in the absence of the Respondents who failed to attend court or notify the court of its inability to attend. The court allowed the Claimant to proceed ex parte after confirming that the hearing date was taken in court by consent.

The Claimant testified that he was employed by the Respondents on 27th October, 2003 as a shop assistant. His starting salary was Kshs. 10,400. After 4 years he was promoted to supervisor and was also responsible for banking. He worked for the Respondents for 11 years and 4 months. His last salary was Kshs. 20,500 consolidated.

The Claimant testified that on 28th February 2015 he worked from 8 am to 8 pm. He was not given notification of redundancy. He was informed that there was no work and was later paid Kshs. 156,405 which he was informed was service for years worked. He thereafter went to the union which calculated his terminal dues and wrote a demand letter to the Respondents. The Respondents failed to Respond and he was advised by the Union to see a lawyer who would file his claim in court. He testified that the Respondents also failed to respond to the demand letter from the lawyer.

The claimant testified that he blames the Respondents for wrongfully terminating his employment and prays for notice, overtime, risk allowance and severance pay. He further prays for compensation for unfair termination.

Determination

There is no dispute that the claimant was declared redundant. The only issues for determination are whether the redundancy was in accordance with the law and if the Claimant was paid his full terminal dues.

Redundancy is provided for in section 40 of the Employment Act as follows:

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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.

The Respondents stated in the Reply to the Claim that they notified the workers and the Labour office but no copy of the notification letter was availed to the court. The Claimant denies that such notice was issued.

Section 47(5) of the Employment Act provides that

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

Section 10(6) and (7) further provides that where an employer fails to produce prescribed records the burden of proving or disproving an allegation by the employee shifts to the employer. In this case there is no evidence that the Claimant was issued with notification for redundancy as provided in section 40(1) (b) of the Act. Since the Respondent did not avail a copy of the notification to the court I hold that there was no such notice and the redundancy was therefore procedurally unlawful.

Remedies

1. Pay in lieu of Notice

The Claimant prayed for one months' salary in lieu of notice. According to the discharge voucher at page 14 of Claimant's bundle of documents, he was paid notice of Kshs. 12,389. The Claimant however states that this was an underpayment as his gross salary was Kshs. 23,885. I however note that in the Grievance Form signed by the Claimant when he reported the dispute to the union he states that his wages at the time of dismissal was Kshs. 18,578. The Respondent did not make any comment on the rate of pay for the Claimant. I will therefore use the figure in the dispute form of Kshs. 18,578 as the Claimant's last salary and award him the said sum of Kshs. 18, 578 as pay in lieu of notice.

2. Severance Pay

The Claimant worked for 11 years and 4 months as admitted by the Respondent in the Reply to the Claim. At 15 days salary per month provided under section 40 of Employment Act the Claimant is entitled to Kshs. 102,179 which I award him on account of severance pay.

3. Overtime

The Claimant testified that he worked from 8am to 8pm every day from Monday to Saturday and 9 am to

7 pm on Sundays and Public Holidays, a fact that was not contested by the Respondents who did not attend court on the hearing date. The Claimant therefore worked a total of 82 hours per week instead of the prescribed 52 hours per week. He thus worked an extra 30 hours per week. Overtime is a continuing wrong and under section 90 of the Employment Act can only be claimed for 12 months. For this reason I award the Claimant 30 hours per week for 52 weeks at 1.5 hours which amounts to kshs. 192,356.30. I have used the formula at Rule 6 of the Regulation of Wages and Conditions of Service (salary/226th).

I award the Claimant Kshs. 192,356.30 as overtime.

4. Compensation

The Claimant having been declared redundant unfairly is entitled to compensation. Having worked for 11 years and taking into account all relevant factors, I award him 12 months' salary as compensation in the sum of Kshs. 222,936.

The Claimant having been paid Kshs. 156,405, the said amount shall be recovered from the sum awarded to him herein.

In summary therefore, I enter judgment for the Claimant against the Respondent in the total sum of Kshs. 536,049.30 less 156,405 leaving a balance of Kshs. 379,644.30 which I award the Claimant.

The Respondents shall pay Claimant's costs of this suit and decretal sum shall attract interest from date of judgment.

Orders accordingly.

Dated, Signed and Delivered this 4th day of May, 2017

MAUREEN ONYANGO

JUDGE