



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 1025 OF 2013

EDWARD ORETE.....CLAIMANT

VERSUS

KENOL KOBIL LIMITED.....RESPONDENT

Mr. Change with Mr. Omondi for claimant

Mr. Maundu for respondent

JUDGMENT

Background of the Claim

1. The claim was brought vide a statement of claim dated 18th June 2013 and filed on the 17th day of July 2013.
2. The respondent filed a memorandum of response on the 8th day of August 2013.

Facts of the Case

3. The claimant was employed on 22nd September 1998 as a system analyst/programmer in the Accounting and Finance Department at a starting salary of Kshs.55,000/= where he served the respondent diligently until 18th January 2013 when his employment was terminated for alleged company's restructuring.
4. At the time of his termination, the claimant's lawful salary was Kshs.436,476.60/= which at the time had been unlawfully slashed down to Kshs.116,818.00/=.
5. The claimant asserts that throughout the years, his performance was either rated as excellent or very good in all the appraisals conducted by the respondent. As a result he was bestowed several commendations by the respondent and received numerous promotions, salary increments, gift vouchers and bonuses over and above his salary in the course of his employment as evidenced by Exhibits marked as EO 4 to 7B.
6. In May 2012, the claimant and his colleagues learnt that a foreign company by the name of PUMA Energy was due to take over the respondent company upon purchase of majority shareholding of the respondent.

7. As a condition precedent to the takeover, the employees were informed that the employees had to be down sized and when the representatives of PUMA visited the company, they confirmed that eventuality.
8. Employees became anxious upon learning of this development and instituted Industrial Cause No. 1022 of 2012 in a bid to secure their rights which cause is still pending before the court.
9. The said suit was instituted on behalf of all employees of the respondent where the claimant played a key role in mobilizing the staff and pushing for their rights to be upheld.
10. The claimant and the other three employee representatives in the said suit were urged on several occasions to withdraw the said suit but were adamant that they would only do so upon the assurance of their employment status by the respondent after the said takeover.
11. The respondent began the process of sacking employees from Kenol Kobil Limited which influenced the claimants to file injunction applications where the court ordered that the respondent maintains industrial peace at the employment premises. The respondent's attempt to continue with the termination exercise was thwarted with a contempt application which led to the respondent's CEO being held to be in contempt soon thereafter. **(See Vincent Edward Njoroge and 2 others versus Kenol Kobil Limited [2014] eKLR annexed).**
12. The respondent's hands having been tied by the court's injunctive orders embarked on a well-orchestrated harassment exercise aimed at breaking the claimant together with the other employee representatives into resigning from their jobs and abandoning the suit filed. To that end, the respondent carried out the following actions;
 - a. In June 2012, the claimant was summoned by the respondent's top management and coerced to withdraw Cause No. 1022 of 2012.
 - b. On 17th July 2012, the claimant was stripped off his powers of approving any transaction in the Management Information Systems with regard to leave applications, loan approvals, requisition and any invoices meaning his powers as IT Manager were reduced.
 - c. Reduction of the claimant's appraisal score to adequate for the first time in 14 years as compared to all previous ranking of excellent and very good.
 - d. In July 2012, the General Manager revised his appraisal ranking from very good to adequate cancelling the claimant's supervisor's ranking.
 - e. On 18th July 2012, the respondent reduced the claimant's phone allowance from Kshs.5,000/= to Kshs.3,000/= and the claimant's mileage was also reduced from 800 km per month to 200 km per month.
 - f. On 19th July 2012, the respondent's position as a member of the Management team was stripped off from him on false and unsubstantiated reasons.
 - g. On 31st July 2012, the respondent was ejected from his designated basement parking slot at Chester House and was transferred to the NSSF parking space.
 - h. 31st August 2012, he was presented with a document aimed at relinquishing the authority of the employee representative in Cause No. 1022 of 2012 to act on his behalf.
 - i. 6th September 2012, false and unsubstantiated allegations of "serious abuse and negligence of responsibility as the key custodian of the integrity and control of the IT system."
 - j. 11th September 2012, transfer of the claimant to Mombasa Depot and demotion to the position of

Depot Assistance.

k. 17th September 2012, immediate withdrawal from the car loan scheme and immediate demand of outstanding loan balance of Kshs.180,000/= and refusal to release the logbook upon payment.

l. Reduction of phone allowances for Kshs.3,000/= to Kshs.1,000/=.

m. 2nd October 2012, slashing down of salary from Kshs.436,476,60/= to Kshs.116,818.00/= where the claimant had to service his loans and other financial commitments thus earned absolutely nothing after the deductions.

n. 30th October, 2012, the claimant was placed on a 58 days leave by the respondent on false grounds to reduce leave days to meet policy limit.

o. 31st October 2012 unpaid compulsory leave without any basis.

p. 2nd November 2012 suspension from employment without pay.

13. It is worth stating at this juncture that the other employee representatives in Cause No. 1022 of 2012 suffered a similar fate.

14. When the respondent failed to cajole the claimant to resign, the respondent terminated his employment vide letter dated 18th January 2013 on alleged ground of restructuring the company based on the review of all business processes.

15. The claimant seeks for the reliefs set out in the statement of claim.

Defence

16. The respondent filed memorandum of response dated 3rd August 2013, and a list of documents filed on 12th September 2014.

17. The respondent denies the particulars of claim and the bulk of the allegations made by the claimant in the statement of claims.

18. In particular the respondent admits the employment of the claimant, his promotions and recognition in various ways stating that this was result of normal evaluation of staff and that there was nothing outstanding or exceptional in the case of the claimant.

19. The respondent adds that the claimant ceased being a good employee in the year 2012 and his performance dropped. That he was severally advised to improve to no avail.

20. The respondent denies that the claimant was targeted for harassment, demotion, transfer and eventual dismissal for suing the respondent in respect of a prospective takeover in which the employees sought more information and assurance that it would not affect their employment and/or terms and conditions of employment.

21. Respondent adds that the claimant instigated other staff based on false information and perception hence causing unrest in the company and the company performance.

22. Respondent denies having coerced the claimant to withdraw the case failing which he would lose his employment.

23. Respondent submits that the claimant was simply unable to deliver as IT Manager and the company therefore decided to undertake a restructuring which affected the position of the claimant and he was

deployed to other duties.

24. That the claimant participated in hacking of the IT system and caused abusive mails regarding management to be circulated to the staff through the system as well as virus attacking the system. That the department was unable to contain the situation after several consultative meetings were held.

25. A warning letter dated 19th July 2012 was issued to the Head of the IT Department.

26. The management decided to transfer the Head of the Department and the claimant for these failures. The transfer was meant to avoid termination of the employment of the claimant and was not malicious as alleged or at all. The claimant's salary was thus reviewed downwards just like other staff in the department. The IT service was subsequently outsourced. The claimant was no longer entitled to telephone and mileage allowance due to the changes in his position.

27. The review was from Kshs.5,000/= to Kshs.3,000/= and not to Kshs.2,000/= as alleged. The claimant was also stripped of his management role as per the letter dated 19th July 2012. That the claimant was not entitled to merit award as of right since this was based on performance.

28. Finally, the respondent states that the employment of the claimant was terminated because of restructuring of the company which arose as stated earlier and the claimant was to be paid notice pay and other terminal benefits. That the termination was for a valid reason and was done fairly. That the claimant's past record and skills were taken into consideration in selecting the claimant and others for termination.

29. The respondent prays that the suit be dismissed with costs.

Determination

30. The issues for determination are;

1. Whether the termination of the employment of the claimant was for a valid reason.
2. Whether the termination was effected in terms of a fair procedure.
3. What remedies if at all are available to the claimant?

Issue (i) and (ii)

31. The court will determine issue (i) and (ii) together. From the evidence before court, the respondent and the claimant developed tension following opposition by staff of a proposed takeover of the company by a prospective investor.

32. The dispute ended up before court with the employees seeking assurance of their jobs and terms and conditions of service before the takeover was effected.

33. The respondent blamed the claimant as the person behind the opposition to the takeover by the staff. The quarrel degenerated to the demotion, reduction of remuneration, re-deployment, transfer and eventual termination on grounds of redundancy of the claimant.

34. The case before court depicts a mixed bag of disciplinary actions taken by the respondent against the claimant without following any due process and pretext that the claimant all over sudden had fallen from a top performer in the organization to a non-performer who had no skills any more to serve the respondent. This turn of event is clearly explained by the fight between the staff of the respondent and the respondent regarding the impending takeover.

35. There is ample evidence to show that the claimant was victimized for daring to challenge the

respondent with a view to safeguard his employment and that of his fellow employees.

36. The respondent has failed to demonstrate that the position held by the claimant was abolished and or that the claimant had become redundant for operational reasons.

37. The respondent did not notify the Ministry of Labour of the impending redundancies nor was the claimant given a month's notice of the intention to declare him redundant.

38. The claimant was not accorded opportunity to challenge the selection criteria used by the respondent to select the claimant and other staff in his department for retrenchment.

39. The respondent did not offer severance allowance to the claimant upon termination in terms of Section 40 of the Employment Act.

40. This was a disciplinary case disguised as a redundancy.

41. In **Kenya Airways Limited –vs– Aviation and Allied Workers Union Kenya and 3 others [2014] eKLR**, the Court of Appeal stated;

“Thus redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means is that while there may be underlying causes leading to a true redundancy situation, such as re-organization, the employer must never the less show that the termination is attributable to the redundancy – that is that the employee has been rendered superfluous or that redundancy has resulted in abolition of office, position or loss of employment.”

42. This is not the case here. The preponderance of evidence show that the claimant was systematically pushed out for daring to challenge the respondent. The termination was not for a valid reason and was not effected in terms of fair procedure.

(iii) Remedies

43. The claimant having been declared redundant is in terms of Section 40 of the Employment Act entitled to payment of: -

a. Severance pay calculated at ½ month's salary for each completed year of service in terms of Section 40 (1) (g) of the Employment Act in the sum of Kshs.3,109,895.78/= (½ x 436,476.60 x 14.25)

b. The claimant is also entitled to one month's salary in lieu of notice in the sum of Kshs.436,476.60/=.

c. The claimant has demonstrated that he was entitled to payment in lieu of 58 untaken leave days in the sum of Kshs.1,150,711.04/=.

d. The claimant also demonstrated that his remuneration was unlawfully reduced from Kshs.436,476.60/= to Kshs.116,818/=. The claimant is therefore entitled to the difference for the month of October 2012 in the sum of Kshs.319,618/=.

e. The claimant unlawfully placed the claimant under suspension in the months of November and December 2012 and up to 18th January 2013. The suspension was without pay. The claimant is awarded Kshs.1,230,070.42/= being unpaid salary for that period.

f. The claimant is also entitled to the logbook of KBB 163F Volkswagen Golf in respect of which he fully paid the outstanding car loan immediately.

g. In addition, due to the unlawful termination, the claimant incurred a penalty of Kshs.100,000/= in respect of the car loan to which he is entitled to a refund and the court awards him accordingly.

Compensation

44. The court has found that the employment of the claimant was unlawfully and unfairly terminated contrary to Section 40 as read with Section 45 of the Employment Act. The claimant is entitled to compensation in terms of Section 49 (1) (c) of the Employment Act. The maximum compensation available is the equivalent of 12 month's gross salary in terms of Section 49 (1) (c).

45. The court is guided by the factors set out under Section 49 (4) to determine whether to award the maximum or to reduce the award.

46. In this regard, the wish of the employee; the circumstance of the termination; employee's length of service; reasonable expectation of the employee as to the length of time, the employee would have served the respondent; opportunity of the employee to get alternative employment; the value of severance pay; expenses and loss incurred by the employee as a result of the termination, any contribution by the employee to the termination and failure by employee to mitigate the loss.

47. In this regard, it is clear that the claimant was a Senior Manager earning a very high salary and was a high performer before his fortune changed and he was subjected to systematic harassment, humiliation, reduction in salary, unfair deployment and transfer and eventual unlawful termination.

48. This was callous conduct by the respondent which the court considers to be aggravating factor. The claimant was not paid salary for three months while under suspension and was not paid any terminal benefits including severance pay upon termination. These are aggravating factors too.

49. The claimant was a young professional with very good career prospects with the respondent company. He was employed permanently but he lost the job in a most dishonorable manner.

50. The claimant clearly fought to retain his job and would have wished to continue working. No employee should be punished for accessing a court of law to vindicate his rights as the claimant and his colleagues did in this case.

51. This is an appropriate case to award maximum compensation but considering the favourable salary the claimant received and that he had since moved on to new employment, the court awards him 10 months' salary as compensation for the unlawful and unfair termination of employment in the sum of Kshs.4,364,476/=.

52. In the final analysis the court enter judgment in favour of the claimant as follows;

1. Kshs.4,364,476.60/= equivalent of 10 months' gross salary compensation
2. Kshs.436,476.60 in lieu of one month's notice.
3. Kshs.3,109,895.78/= severance pay.
4. Kshs.1,150,711.04/= in lieu of 58 days' leave.
5. Kshs.319,618/= being unpaid salary for October 2012.
6. Kshs.1,230,070.42/= being unpaid salary during suspension in the months of November, December 2012 up to 18th January 2013.

7. Kshs.100,000/= being loss of 5 months' authentication benefit on the car loan.

Total award **Kshs. 10,711,248.44/=**

8. The award except compensation is payable with interest at court rates from date of filing suit till payment in full, whereas compensation is to attract interest at court rates from date of judgment till payment in full.

9. Costs to follow the outcome.

Dated and Delivered at Nairobi this 30th day of June 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE