



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2016 OF 2013

ANTHONY MURIGI NG'ANG'A

ANN MUGURE WANG'OMBE

PAUL WAWERU [suing jointly as dependants and

Administrator of the Estate of Anthony Murigi Ng'anga (deceased) **CLAIMANT**

VERSUS

VEGPRO KENYA COMPANY LIMITED,..... **RESPONDENT**

JUDGEMENT

Issue in dispute – unlawful and unfair termination of employment and non-payment of terminal dues.

1. The Claimant died while the suit was pending. The dependants and administrator of his Estate obtained the Letters of Administration and were herein enjoined as claimants. The Claimant amended the Memorandum of Claim and filed on 28th May, 2016.

2. The Claimant was employed by the Respondent in 2002 to 14th August, 2012 as a General labourer at a monthly wage of Kshs.17,776.00. on 9th July, 2012 the Claimant was sent on compulsory leave and asked to resume duty on 14th August, 2012 when the respondent's human resource manager handed him a letter dated 1st July, 2012 which declared him redundant. The Respondent promised to pay terminal dues but such has never been paid. These actions amounted to unfair termination of employment after the Claimant had served continuously without blemish for a period of over 10 years.

3. The claim is also that in his dismissal, the Respondent failed to follow mandatory provisions of the law and natural justice. There was no reason given for the redundancy and it was false and baseless; the procedure of redundancy declaration was not followed; and such was unlawful and equivalent to summary dismissal.

4. The claims are for;

a) *Notice pay at Kshs.17,776.00;*

b) *Salary arrears for 14 days in August, 2016 Kshs.8,295.00;*

c) *Pay for Untaken leave between 2002 to 2006 for 4 years Kshs.71,104.00;*

- d) *Leave travel allowance Kshs.35,552.00;*
- e) *Severance pay for 10 years Kshs.88,880.00;*
- f) *Compensation for unfair termination; and*
- g) *Costs of the suit.*

5. In evidence, Ann Mugure Wang'ombe, the wife of the Claimant (deceased) and the administrator of his Estate testified in support of the claim. That the Claimant was employed by the Respondent and worked at different firms in Likii, Naivasha and Mwingi in Nyeri. He was paid Kshs.18,000.00 per month and never took annual leave. In July, 2012 he reported to work but was sent home for some time. He was called back in August, 2012 and terminated from his employment. The claims made are due and should be paid to the Estate.

Defence

6. The Respondent admit they employed the Claimant but not from 2002 as claimed. His employment commenced on 20th September, 2006 in the position of Quality Controller cum Grader as a gross wage of Kshs.12,000.00. at the time of termination of employment the Claimant was a Truck Conductor whose main job was to accompany the driver to fetch flowers from various company farms and thus he started his journey from Nairobi early morning and arrived back in Nairobi late evenings. The salary was reviewed periodically and the last pay was Kshs.17,776.00.

7. By virtue of his position and duties, the Claimant was a member of the Kenya Commercial Food and Allied Workers Union. The Respondent has a recognition agreement with the union and a CBA.

8. Upon the Claimant becoming a permanent employee of the respondent, he joined the Vegpro Group Provident Fund, the Respondent retirement benefits scheme. By joining the Provident Fund, the Claimant started contributions of 5% of his salary towards his retirement and the Respondent matched the same making it 10% monthly contributions. Service pay was no longer applicable to the claimant.

9. The provident fund was administered by Alexander Forbes Financial Services (EA) Ltd is now being administered by Kenindia Insurance Company Limited. The Claimant was also a member of the NSSF and the Respondent was making contributions.

10. During employment, the Claimant took annual leave. His position became redundant when the truck system became farm based meaning that the Respondent trucks no longer started their trips from Nairobi.

11. In June, 2012 a meeting was held with the Claimant to let him know of the decision to declare him redundant. He was asked to take leave as the management looked for alternative employment for his deployment. Upon resuming duty, a meeting was held with the Claimant and there was a verbal communication on the decision to reallocate the Claimant duties in Naivasha and Nanyuki but he insisted that he wanted to work in Nairobi as he had children going to school in Nairobi. This was not possible to achieve as 6 other employees were affected by the redundancy. The Respondent had no option but to declare a redundancy and terminate the claimant's employment. This was communicated to the union.

12. The Respondent gave the Claimant more time to think about the offer made but this was rejected. The initial letters issued for redundancy had a one month notice. The CBA provided for 2 months' notice. The error was noted and remedied.

13. The union reported a dispute to the Minister and the matter was conciliated. In the CBA the manner of communication to the union on the redundancy is not stated and by the union attending the meetings to discuss the redundancy and reallocation of duty, the Respondent met the threshold of the CBA.

14. The Claimant was paid final dues. As a member of the Provident Fund, the Claimant was eligible to

apply and he did apply for payment of his retirement benefits being 100% of his contribution and 50% of the Respondent contributions which he did on 15th October, 2012. No claim remains unpaid for the Claimant and the claim should be dismissed with costs.

15. In evidence the Respondent witness was Charles Oduor Egesa with the Kenya Union of Commercial Food and Allied Workers Union. The Claimant was a number of the union and was terminated by the respondent. He worked from 2006 to 2012.

16. In 2012 there was a rumour that the Respondent was going to lay off workers and parties were invited before a conciliator. The witness had discussed the redundancy with the respondent. He became of the redundancy in July, 2012. There was an offer that turn boys should go to Naivasha and Nanyuki as the Respondent was not able to maintain trucks. The Claimant did not want to be relocated from Nairobi. The last conciliation meeting was in July, 2012. The Claimant then disappeared as conciliation was not concluded.

17. The other witness called by the Respondent was John Matanyi the human resource officer of the respondent. He testified that the Claimant (deceased) was an employee of the Respondent as a turn boy. The Respondent had drivers to carry flowers to Nairobi from various farms in Nanyuki and Naivasha and the Claimant would accompany the drivers. Since 2006 the Claimant was taken on permanent basis and did his work. He was laid off due to redundancy. The issue of redundancy was communicated to the union in April, 2012 and meetings held. The Claimant got an offer for a new position in the farm but he declined. Upon termination, the Claimant was paid all his terminal dues. The Claimant took all his leave days or was paid for the same.

18. Both parties filed written submissions.

19. It is not in dispute that the Claimant was an employee of the respondent. The employment contract submitted by the Respondent show that permanent employment commenced on 20th September, 2006 and termination was on 14th August, 2014 following the declaration of redundancy. The fact of the Claimant unionisation is confirmed and that there was a CBA between the Respondent and Kenya Union of Commercial Food & Allied Workers. The last paid salary was Kshs.17,776.00.

20. On the above admitted facts and on the evidence and submissions made, it is now settled law that where a redundancy has been declared, the employer is required to follow the mandatory provisions of section 40 of the Employment Act. The fact of having a CBA is not to take away the legal rights due to an employee. The CBA should not work to the disadvantage of an employee. It can offer more but not go below the legal minimum.

21. In **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** the Court of Appeal held that;

*... paragraphs (a) and (b) of Section 40(1) provide for 2 alternative notices. If the affected employee is a member of a trade union, notice should only be given to his union and not to both. Notice is to be given to the employee himself if he is not a member of trade union. ... Section 40(1) of the Employment Act requires employers contemplating redundancy to give the employees or their trade union notice of at least one month. In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations, the other objective of a reasonable notice, as was stated in the English case of **Williams versus Compare Maxam Ltd** as follows;*

to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

22. The rationale to the two-tier notices is also articulated in the case of **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...

23. In this case, the Respondent asserted that in April, 2012 they issued a notice to the claimants on impending redundancy and also communicated to the union. Such notices have not been attached to the defence. The notice attached and dated 1st July, 2012 is noted as having been received by the Claimant on 14th August, 2012. This is a document produced by the Respondent as annexure 9. I take it this was the first time the Claimant knew of his termination on account of a redundancy.

24. The Respondent witness Mr Egesa also testified that in April, 2012 there were rumours of a layoff of employees. The matter only came to his attention in July and a dispute was reported to the minister. However, around this time, the claimant is said to have been sent home for leave. It is not clarified as to when exactly the Claimant got to learn about the redundancy and the offer for redeployment to the farm. The clarity of annexure 9 in the defence is that, the redundancy notice was served on the Claimant on the same date of his termination.

25. As noted above, section 40 of the Employment Act requires an employer to issue a general notice on the redundancy and a specific notice to the affected employee. Where the Claimant got such notice on the date of termination of employment, even where there were rumours of an impending redundancy, the law requires an employer to issue the notice to the employee before any termination can be said to be lawful and fair.

26. In this case, the failure by the Respondent to issue the requisite notice in appropriate order and time resulted in an unfair termination of employment of employment. Such cannot be justified in terms and section 40 and 43 of the Employment Act application. The Respondent cannot also rely upon the CBA with the Union to justify non-compliance with mandatory provisions of the law.

Remedies

27. The last pay slip issued to the Claimant is one for August, 2012. The due salary paid was for the full month. However in the letter of termination of employment and dated 1st July, 2012 received by the Claimant on 14th August, 2012 the Respondent offers to pay;

- a) Salary due up to 31st July, 2012;
- b) Leave earned to 31st July, 2012;
- c) Off days not paid;
- d) One month notice pay;
- e) Severance pay for 15 days for each year;
- f) A certificate of service.

28. A cheque of Kshs.35,592.00 was issued to the Claimant and dated 15th October, 2012. This is an amount paid on account of Kenindia Insurance, the holder of the Provident Fund. This is not the amount with regard to the claimant's terminal dues following termination on account of redundancy. The alleged *discharge Voucher* noted at paragraph 21 of the defence and marked annexure "10A" and "10B" is a pay slip and cheque from Kenindia Insurance.

29. As such, notice pay is due to the Claimant on the basis that redundancy notice was issued to him on the same date of his termination of employment on 14th August, 2012. Such is computed at kshs.17,776.00.

30. The salary for 14 days worked in August, 2012 is also due all assessed at kshs.8,295.00.

31. On the claim for leave not taken or paid for, the Respondent has attached several leave application forms. Such covers the last application as on 29th June, 2012 where the Claimant had 8 days of leave paid for. The other application forms relates to;

2007 for 5 days;

2008 for 15 days;

2088 for 30 days;

2009 for 25 days;

2010 for 16 days;

2008 for 30 days;

32. In this order, from 2011 to 2012, the record only has 8 days of leave paid for. In the CBA clause 7 provided for annual leave at 26 days.

33. The claim with regard to leave earned and not paid relates to the period of 2002 to 2006. This is a period not covered under the employment contract between the claimant and respondent. It is not clear as to why the Claimant only sought leave for this period which is outside his contract period and even where such is due, immediately upon the conversion of embayment to permanent basis took effect as of September, 2006 any claim within any other contract is time barred within the current claim.

34. A leave allowance of Kshs.2,500.00 was due to each employee earning leave pursuant to clause 7(d) of the CBA. For the two years, the Claimant is entitled to Kshs.5,000.00 of leave travel allowance.

35. The service gratuity claim relates to the period of 2002 to 2006. The contract period between the parties is from 2006 to 2012. A claim outside of this period and going back to any other relationship between the parties outside of this period is time barred.

36. Severance pay is due to the Claimant on account of redundancy declaration. The CBA provides for redundancy process at clause 24 but the attached CBA at clause 24.c is interfered with in am manner of being lifted and a new provision inserted. The provisions do not give any computation save to add at clause 24.e that an employee paid under the clause and has earned gratuity does not benefit. Earning gratuity and severance pay are two different concepts and apply in different work scenarios. An employer cannot fail to pay for severance pay to an employee whose employment is lost following a redundancy on the basis that such an employee has earned gratuity. To do so would be to negate the application of gratuity in employment and punish the employee twice for losing his job through no fault of his own. As such, the legal minimum in a case of redundancy and in application of section 40 of the Employment Act is 15 days for each completed year of service.

37. The Claimant worked from September, 2006 to August, 2012 a period of six (6) years. Severance pay due is Kshs.53,328.00.

38. For the unfair declaration of redundancy that is wanting in terms of procedure and substance which resulted in unfair termination of employment, compensation is due. the Claimant is awarded 6 months gross wage all amounting to Kshs.106,656.00.

Accordingly, judgement is hereby entered for the Claimant that termination of employment was unprocedural and unfair; compensation awarded at Kshs.53, 328.00; notice pay Kshs.17,776.00; leave ravel allowance Kshs.5,000.00; salary for 14 days worked Kshs.8,295.00; and costs of the suit.

Delivered in open court and dated this 29th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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