



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 48 OF 2016
WILLIAM LIKOHE LURAMBJIRA.....CLAIMANT
VERSUS
KEYSTONE ENTERPRISES LTD.....RESPONDENT
J U D G M E N T

INTRODUCTION

1. This is a claim for terminal benefits plus compensation for unfair termination of the claimant's employment contract by the respondent on 31/8/2015. The respondent denies the alleged unfair termination and avers that she lawfully terminated the claimant's services on account of redundancy after following a fair procedure as advised by the labour officer. She has also raised a counter claim against the claimant for the sum of ksh.26500 which she advanced to the claimant at the prevailing market interest. In response to the counterclaim, the claimant has avers that the alleged loan agreement with an interest is illegal and unenforceable because the respondent is not a financial institution permitted by law to charge interest.

2. On 17/11/2016, the parties agreed that the loan of ksh 26500 was not disputed save for the interest and fixed the suit for hearing of the disputed issues on 19/1/2017. Come that date the parties agreed to dispense with oral testimonies and adopted the written witness statements and the documentary evidence filed. Thereafter they filed written submissions to dispose of the matter.

CLAIMANT'S CASE

3. The claimant's written statement is dated 3/2/2015 and filed the same date. He stated that he was employed by the respondent as a Sander on 2/5/1994 and worked until 31/8/2015 when he was declared redundant. His salary was ksh9960 as at the time of his termination. He averred that was not given the reason for the termination by the letter dated 30/6/2015 but the respondent asked him to look for alternative employment within 2 months from then. That later on he came to learn that his termination was on account of redundancy. According to him the termination was for no justifiable reason.

DEFENCE CASE

4. Mr. Gabriel Mburu, the respondent manager filed written statement dated 21/3/2016. He admitted that the claimant was employed by the respondent. He however contended that due to terrorism factor, tourism went down and there was need to downsize. As a result the claimant among other employees were terminated on account of redundancy.

5. Mr. Mburu explained that before the redundancy, adequate notice was served on the employees and the labour officer and the latter assisted in calculating the dues for the redundant employees. He therefore denied that the termination was unfair. He further denied the claim for leave and contended that the factory used to close down for one month in December of every year to allow the employees go for their annual leave.

ANALYSIS AND DETERMINATION

6. There is no dispute that the claimant was employed by the respondent from 2/5/1994 to 31/8/2015 when his services were terminated and his dues calculated. The issues for determination are:

- a. Whether the termination of the employee contract was unfair.
- b. Whether the claimant is entitled to the reliefs sought,
- c. Whether the respondent is entitled to interest on her loan to the claimant.

Unfair termination

7. The claimant contends that his termination was unfair because it was not for a justifiable reason and the procedure followed was not in accordance with Section 40 of the Employment Act. The respondent contends that she had suffered reduced business due to terrorism which affected tourism sector and that forced her to downsize. That before the redundancy, she notified the labour officer who assisted in calculating the redundancy dues. He produced the notice of termination to the Labour office dated 30/6/2015 which was served on 26/8/2015.

8. Under section 45(2) of the Employment Act, termination of employment by the employer is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure. In this case the respondent has alleged that her business which depended on flow of tourists, had dwindled due to terrorism. He however, did not prove the said loss by any financial statements except a letter by the claimant dated 18/3/2009 by which he had resigned from employment. In my view the said letter by the claimant never acknowledged that the respondent's business had dwindled and even if it did, that was awhile before the redundancy. Consequently, I find that the reason for the termination was not valid.

9. In addition, I find that the procedure followed was not in accordance with the provision of Section 40 of the Act. Under the said Section, the employer is barred from terminating his employees on account of redundancy before serving them and the labour officer with at least one month notice in writing, followed by a fair selection of the employees to be laid off and finally paying them their accrued benefits plus severance pay. In this case the claimant was served with two months' notice in writing but the same was served on the labour officer on 26/8/2015, giving him only 4 days' notice. The criteria used to select the claimant for redundancy was not demonstrated by the defence and the terminal dues are still outstanding.

10. Considering the fact that the employer herein has failed to prove that she terminated the claimant's services on ground of a valid and fair reason, and after following a fair procedure, it is my holding that the termination was unfair within the meaning of Section 45(2) of the Act.

Reliefs

11. Under Section 49(1) of the Act, I award the claimant ksh.9960 being one month salary in lieu of notice plus 119,520 being 12 months salary as compensation for unfair termination. In awarding the said compensation, I have considered the claimant's 21 years' service and the fact that he did not contribute to the termination through any misconduct.

12. The claim for leave is however dismissed because the respondent's allegation that the claimant used to go for one month leave in December every year was not rebutted in evidence. I also dismiss the claim

for severance pay because the termination has herein above been converted from a normal redundancy to unfair termination for which maximum compensation has been compensated. The claim for certificate of service is however granted because it is a right under Section 51 of the Act.

Counter claim

13. The loan of ksh.26500 is not disputed. However the claim for interest is opposed because the agreement is illegal and unenforceable because the respondent lacked the legal authority to charge interest on the loan. The respondent has not rebutted the foregoing defence. Consequently, I find and hold that the respondent has no legal right to charge interest on the said loan either at commercial market rate or at all.

DISPOSITION

14. For the reason that the termination of the claimant's services was unfair, I enter judgment for him in the sum of ksh129,480 less the loan due and owing to the respondent of ksh.26500, leaving a net of ksh.102,980 plus costs and interest from the date hereof. He will also get a certificate of service.

Dated, signed and delivered this 23rd June 2017

O. N. Makau

Judge