



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 271 OF 2015
STANLEY KENGARA GEORGE.....CLAIMANT
VERSUS
CONSOLBASE LTD.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent on 15/10/2012. The respondent has denied liability for unfair termination of the claimant's services and averred that she lawfully terminated the claimant's services on account of redundancy and paid all his terminal dues. The issues for determination are:

- a. Whether the termination of the claimant's services on account of redundancy was unfair.
- b. Whether the reliefs sought should be granted.

CLAIMANT'S CASE

2. The claimant testified that he was employed effective 1/3/2008 as a driver starting with a gross salary of ksh.25000 per month. His duties included driving trucks and Toploaders. He was entitled to 24 annual leave days after every 12 consecutive months of service.

3. The claimant stated that he served continuously well and his salary was increased steadily upto ksh.73000 per month of 4 years. However on 13/10/2012 he was served with a letter dated 5/10/2012 terminating his services effective 15/10/2015. The reason cited for the termination was that his position as a Machine Operator had been declared redundant due to adverse economic condition on the part of the company. After the termination the claimant was paid one month salary in lieu of notice, full salary for the month of October 2012 plus one leave day.

4. The claimant contends that the termination of his contract of service was unfair because it was not done in accordance with the redundancy law. He faults the termination because the reason for the termination was not valid and fair and the procedure followed was in breach of the law. Specifically he contends that his position was not declared redundant because other persons were left operating the same machine he was operating and he believes that his termination was discriminatory.

5. In addition he contends that he was not given any hearing before the termination and the statutory

procedure of “first in last out” was not followed because other operators who joined the respondent after him were left working after his lay off. He denied that he was invited to meetings to discuss the redundancy before his termination. He therefore prays for compensation for unfair termination, severance pay and accrued leave of one month.

DEFENCE CASE

6. The respondent’s HR and Administration Manager Mr. Yusuf Mwinyi (RW1) confirmed that the claimant was employed by the respondent and that he was terminated on account of redundancy. He further confirmed that after termination the claimant was paid ksh.146000 made up of one month salary in lieu of notice, salary for October 2012 plus leave of one day. He contended that the respondent held meetings with the employees on 2nd and 4th October 2012 that discussed redundancy due to operational need.

7. He further stated workers from various departments were laid off after the meeting including the claimant and another Toploader driver. He also stated that the company had sold off 2 Toploaders leaving only 2 and therefore only 2 drivers were required. He denied that the claimant was terminated through discrimination and contended that the claimant had performed his duties poorly which entitled the respondent to dismiss him but he spared him and opted for redundancy.

8. On cross examination RW1 admitted that he joined the company in 2013 after the termination of the claimant’s services. He further admitted that his evidence was acquired through perusal of the records in the HR office. He also admitted that the termination of the claimant’s service on account of redundancy was not in accordance with the Employment Act. He specifically admitted that no prior notice of the redundancy was served on the Labour officer and the factors considered for selecting the claimant for the layoff were not indicated in the HR records. Finally he admitted that the signatures on the leave application forms allegedly used by the claimant to apply for his annual leave were different but contended it was possible for an employee to send a proxy to sign leave application forms on his behalf.

ANALYSIS AND DETERMINATION

9. There is no dispute that the claimant was terminated on account of redundancy on 15/10/12 after which he was paid salary in lieu of notice, salary for October 2012 plus one leave day. I will therefore proceed to answer the twin issues for determination framed herein above.

Whether the termination was unfair

10. The procedure for termination of employment contract on account of redundancy is provided for under Section 40 of the Employment Act. The procedure is coined in mandatory terms and the breach thereof renders the termination unfair within the meaning of Section 45 of the Act.

11. Section 40 of the Act bars the employer from terminating his employees on account of redundancy before first serving him (or his union if a member of one) and the labour officer with at least one month notice of the intended redundancy. Secondly the employer must do a fair selection process to identify the employees for the layoff considering the principle of “first in last out” among other criteria. Thirdly the employer must pay the selected employees salary in lieu of notice plus all other dues accruing from the contract of employment. Finally the employer must pay the selected employees severance pay at the rate of at least 15 days pay per completed year of service.

12. In this case the defence witness admitted under oath that the declaration of redundancy of the claimant’s position was not done in accordance with the provisions of the Employment Act. The respondent never served one month notice in writing upon the claimant and the labour officer. He also never appraised the claimant and other Toploader drivers, before the termination and indeed went ahead to pick on the claimant for redundancy without indicating the reason for selecting him. Finally although the respondent paid the claimant salary in lieu of notice, salary and one leave day, she failed to pay him severance pay. Consequently, I find and hold that the termination of the claimant on account of

redundancy was in contravention of the strict provisions of Section 40 of the Employment Act and it was therefore unfair within the meaning of Section 45 of the Act.

Reliefs

Notice and compensation

13. Under Section 49 of the Act I award the claimant ksh730000 being 10 months gross pay as compensation for unfair termination. In making the said award, I have considered the fact that the claimant had not contributed to his dismissal through misconduct and that he had served for a fair long period. The claim for 3 months salary in lieu of notice is however dismissed because he was paid one month salary in lieu of notice after termination as provided by the Act and his contract.

One month leave

14. The claim for leave is not substantiated and it is therefore dismissed for lacking both particulars and evidence.

Severance pay

15. The claimant prays for severance pay for 4 years served at the rate of 15 day pay per year of service. I however dismiss that prayer because of my finding above that, what started as redundancy, ended up being unfair termination. Consequently the compensation awarded for the unfair termination is a sufficient remedy to the claimant.

DISPOSITION

16. For the reason that the claimant's contract of service was unfairly severed, I enter judgment for him in the sum of ksh.730,000 plus costs and interest from the date hereof.

Dated, signed and delivered this 28th July 2017

O.N. Makau

Judge