



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

CAUSE NO 1059 OF 2014

DAVID WAFULA MUNYASIA.....CLAIMANT

VERSUS

FORUM SYD.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 19th June 2014 and filed in court on 25th June 2014, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent’s defence is contained in a Statement of Response dated 31st July 2014 and filed in court on even date.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Country Manager, Stephen Mwenda Gichohi. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent on 1st April 2010, as Finance and Administration Officer. In August 2012, he was appointed to the position of Finance Officer at a monthly salary of Kshs. 200,000. He was entitled to a pension benefit of 15%.

4. On 16th January 2014, the Claimant was issued with a fixed term employment contract by which he was appointed to the position of Finance Manager for a period of 12 months, with a possibility of renewal upon performance review.

5. On 28th March 2014, barely 2 months into the fixed term contract, the Respondent terminated the Claimant’s employment on account of redundancy.

6. The Claimant avers that the termination of his employment was unlawful and unfair. He now claims the following:

- | | |
|--|-----------------|
| a) Salary for remainder of fixed term contract period..... | Kshs. 1,800,000 |
| b) Unpaid gratuity for one year..... | 200,000 |
| c) One month’s salary in lieu of notice..... | 200,000 |
| d) Lost pension for remainder of contract period..... | 270,000 |

- | | |
|---|---------------|
| e) One month's leave dues..... | 200,000 |
| f) 12 months' salary in compensation..... |2,400,000 |
| g) Costs plus interest | |

The Respondent's Case

7. In its Statement of Response dated 31st July 2014 and filed in court on even date, the Respondent states that the termination of the Claimant's employment was occasioned by a genuine case of redundancy, owing to a restructuring process that began in 2011, starting with abolition of regional offices and followed by the restructuring of positions and structures that were deemed unsustainable. The restructuring was occasioned by diminishing donor funding.

8. Upon termination of his employment on grounds of redundancy, the Claimant was paid all statutory dues stipulated under Section 40 of the Employment Act, 2007. These included severance pay, gratuity, leave pay and notice pay.

9. The Respondent denies that the termination of the Claimant's employment was unfair and avers that he was paid a gross amount of Kshs. 1,566,666.67, before tax, as terminal benefits made up as follows:

- | | |
|---------------------------------|------------------|
| a) Gratuity (4 years)..... | Kshs. 800,000.00 |
| b) Severance pay (4 years)..... | 400,000.00 |
| c) Pay in lieu of notice..... | 200,000.00 |
| d) Leave pay..... | 166,666.67 |

10. The Respondent denies the Claimant's entire claim and puts him to strict proof.

Findings and Determination

11. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

12. The termination of the Claimant's employment was communicated by letter dated 28th March 2014 stating as follows:

"Dear David

RE: TERMINATION OF EMPLOYMENT CONTRACT

The above matter refers.

In line with the ongoing restructuring in Forum Syd and after thorough consultation with the Head Office a decision has been made to re-structure our current finance office to be able to adapt to

adapt to the arising needs of the Country Office.

*To this effect, the position of Finance Manager will cease to exist from **1st April 2014**. This has been necessitated by the unsustainable nature of the current structure and operations of the finance office and the urgent need to create a new position covering finance, human resource management as well as core administrative function of the office.*

*The new position will be named **Finance, Administration and Human Resources Manager** and will have delegated responsibilities on human resource management, operations and administrative roles previously attached to the Country Manager. This is to ensure more concentration towards fundraising and quality assurance by the Country Manager's office in this strategic phase of the Country Office. As such in-line with the Forum Syd recruitment policy, a full recruitment process will be embarked on to ensure that the new position is filled competitively. You are open to apply for the new position once the position has been advertised.*

This letter therefore serves as a notice of termination of contract as stipulated in the employment agreement section 8, signed on 30th June 2010 and 15th September 2010 between you and Forum Syd respectively. Your last day in office will be 31/3/2014.

Upon handover of the relevant Forum Syd office equipment as well as full handover of all documents and equipment in your docket to the Country Manager and Finance and Administration Assistant , Forum Syd will process your terminal dues within 10 working days. These will include;

- 1. Gratuity at the rate of one (1) month's salary for every calendar year worked;*
- 2. Payment in lieu of any accrued leave days;*
- 3. Severance (redundancy) pay at the rate of 15 days for each completed year of service;*
- 4. One month's pay in lieu of notice.*

Forum Syd will also issue you with a certificate of service in accordance with the law.

On behalf of Forum Syd I take this opportunity to wish you the very best in the recruitment for the new position as well as your next phase of career.

Yours Sincerely

Stephen Gichohi

Country Manager

Forum Syd Kenya”

13. According to this letter, the termination of the Claimant's employment was on account of redundancy. Section 2 of the Employment Act and the corresponding section in the Labour Relations Act define redundancy as:

“the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

14. While the law recognises redundancy as a legitimate form of separation from employment, it sets stringent conditions to be met by the employer. In this regard, Section 40(1) of the Employment Act,2007

provides as follows:

40. (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 of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.**

15. The Claimant faults the termination of his employment on two counts; first, that there was in fact no genuine redundancy as he had been issued with a 12 months' fixed term contract two months before the termination; second, that in effecting the termination, the Respondent failed to comply with the mandatory provisions of Section 40 of the Employment Act.

16. On the first issue, the Court inquired as to why the Respondent would issue the Claimant with a one year contract of employment only to declare his position redundant barely two months into the contract. In making this inquiry however, the Court bore in mind the source of the Respondent's funding. In this regard, the Stephen Mwenda Gichohi testified that the Respondent's operations were fully donor funded. Gichohi further told the Court, that the Respondent had been through a long drawn restructuring process and in this particular case, it was not only the Claimant's position that was declared redundant.

17. With the foregoing in mind, the Court found no justification in the Claimant's assertion that the phasing out of his position was coloured. Consequently, I find that there was indeed a genuine case of redundancy. The next question therefore is whether, in effecting the redundancy, the Respondent complied with the conditions set out under Section 40(1) of the Employment Act, which I have reproduced above.

18. The first condition has to do with notice. In *Thomas De La Rue v David Omutelema [2013] eKLR*, the Court of Appeal affirmed that in declaring redundancy, an employer is required to issue two separate and distinct notices of at least one month each. The first is a general communication to employees generally notifying them of an impending redundancy. The second is a specific notice to the affected employees. In addition, the employer is required to issue a one month notice to the local Labour Officer.

19. In addressing this issue in *Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3*

Others [2014] eKLR, Maraga JA (as he then was) rendered himself as follows:

“...when an employer contemplates redundancy, he should first give a general notice of the intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties”

“.....the requirement of consultation is implicit in the principle of

fair play under Section 40(1) of the Employment Act itself and other labour laws. The notices under this provision are not merely for information.....The purpose of the notice under section 40(1)(a) and (b) of the Employment Act, as is also provided for in the....ILO

Convention No 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

20. In the instant case, the Claimant was not issued with a redundancy notice and the notification to the Labour Officer was issued after the termination.

21. In ***Frederick Mulwa Mutiso v Kenya Commercial Bank Limited [2017] eKLR*** this Court held that the notice to the Labour Officer serves a dual purpose; first, it is intended to elicit advice to the employer on the modalities to be employed in the redundancy process; second, it acts as a control measure to curb against unlawful termination clothed as redundancy. It follows therefore that this notice cannot be issued after termination has taken effect.

22. Since the position occupied by the Claimant was singular by nature and definition, the conditions on selection criteria were not applicable. However, for the sole reason that the Respondent failed to issue the redundancy notice to the Claimant and the Labour Officer, the Court finds that the ensuing redundancy was unprocedural.

Remedies

23. In light of the foregoing, I award the Claimant four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the finding that there was a genuine case of redundancy.

24. From the evidence on record, the Claimant was paid one month's salary in lieu of notice and this claim is therefore superfluous. The claims for salary, gratuity and pension for the remainder of the contract are anticipatory in nature, meaning that they could only accrue if the Claimant remained in employment up to the end of the fixed term contract. Once the contract to which they were attached came to an end, they also lapsed.

25. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 800,000 being four months' salary in compensation for unfair termination of employment.

26. This amount will attract interest at court rates from the date of judgment until payment in full.

27. The Claimant will have the costs of the case.

28. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF

SEPTEMBER 2017

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JUDGE

Appearance:

Mr. Kaseke for the Claimant

Mrs. Kayugira for the Respondent