



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2012 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 20th September 2017)

JOSEPH MUISYO KIMEU.....CLAIMANT

VERSUS

VEGPRO KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein Joseph Kimeu filed his Memorandum of Claim dated 16/12/2013 on 17/12/2013 through Namada & Company Advocates. He stated that the issues in dispute concerned unlawful and unfair termination of his employment and non-payment of his terminal dues.
2. He presented oral evidence in Court and his evidence is that he was employed by the Respondent from 2003 until 14/8/2012 as a Grader and thereafter worked continuously with due diligence and to the satisfaction of the Respondent.
3. He states that on 9.7.2012 he was sent on compulsory leave and asked to resume duty on 14.8.2012. He avers that he reported back on 14.8.2012 and the Respondent's Human Resource Manager handed him a letter dated 1.7.2012 which indicated that he had been declared redundant.
4. He avers that despite the Respondent promising to pay him his terminal dues, he was never paid.
5. The Claimant avers that in dismissing him, the Respondent breached mandatory provisions of the law, principles of natural justice and constitutional right to fair labour practice.
6. The Claimant avers that arising from the unlawful dismissal/redundancy, he is entitled to payment of his terminal benefits which he tabulates as follows:

1. 1 month salary in lieu of notice = 17,084/=.

2. Salary arrears for 14 days in August 2012 being $14/20 \times 17,084 = 7,972/=$.

3. Leave traveling allowance = 2,300/=.

4. Pending leave days being $17/30 \times 17,084 = 9,680/=$.

TOTAL = 113,914/=

7. The Respondent on their part filed their Memorandum of Response on 14.2.2014 through the firm of Musa Juma & Company Advocates.

8. They admit that the Claimant was their employee but deny employing him in 2003. They aver that they employed him on 17.6.2004 as a Supervisor at a gross salary of 8,500/= as per his appointment letter – Appendix 1.

9. They contend that at termination, the Claimant was a Truck Conductor whose main job was to accompany the Driver to fetch flowers and produce from various company farms (Appendix 2). They admit that at the time of this termination he was earning 17,084 (Appendix 3).

10. The Respondents also aver that the claimant was a member of their provident fund and so the issue of service pay does not arise. That the Claimant was also a member of NSSF.

11. They claim that the Claimant's job became redundant immediately the truck system was farm based meaning the company truck no longer started their trips from Nairobi early morning to return late evening and so the driver did not need to have a conductor through night travel.

12. The Respondent avers that they were willing to accommodate the Claimant in their other establishments in Nanyuki and Naivasha but claimant declined and so they were forced to declare Claimant redundant.

13. They aver that they paid Claimant his terminal dues of Kshs.70,274/= from the providence fund (Appendix 12 A and 13 B).

14. They submit that the Claimant is not entitled to prayers sought and want Court to dismiss this claim with costs accordingly.

15. I have considered the evidence of both parties. I note that this is a case where the Respondent avers that they declared Claimant redundant after discussion and also gave him options to take up another job in Naivasha or Nanyuki and that he declined.

16. The evidence of this offer is not exhibited in Court though. There is also no evidence of the discussion that took place knowing as admitted by Respondent that the Claimant was a member of a trade union.

17. The Respondent have exhibited the appointment letter of the Claimant Appendix 1 showing he was employed on 17/6/2004 but the letter indicates as follows:

“The letter of appointment including the terms and conditions specified below is effective from 17.6.2004. It replaces and supersedes any previous employment contract or letter of appointment or confirmation letter”.

18. This is an indication that there was a previous appointment which was replaced by the letter of 17.6.2004.

19. The Claimant avers that he was employed in 2003. There is of course no letter of appointment exhibited. I will however based on Respondent Appendix 1 take 2004 as the effective date of appointment.

20. The issue for determination by this Court is then whether the redundancy was lawful or not. Section 40(1) of the Employment Act states as follows:-

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

21. This section sets out the processes to be followed before redundancy is effected.

22. The letter issued to the Claimant indicating he is now redundant is dated 1.7.2012 and indicates that the redundancy was effective on even date. The letter is not copied to the Ministry of Labour nor to the Union. It is therefore this Court's finding that the redundancy was unfair and unjustified and the Respondent deliberately flouted the law.

23. There is no evidence of consultation on the impending redundancy. This was the finding in **Civil Appeal 46/2013 – Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR.**

24. Having found that the Respondent flouted the law, I find that the redundancy was unfair and unjustified and I declare it so.

25. I therefore find for the Claimant and award him as follows:

1. 1 month salary in lieu of notice = 17,084/=.

2. Pending leave for 17 days = 9,680/=.

3. 12 months salary for unlawful redundancy = 17,084/= x 12 = 205,008/=.

TOTAL = 231,772/=

4. The Respondent will pay costs of this suit.

Read in open Court this 20th day of September, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wathome for Claimant – Present

No appearance for Respondent