



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 969 OF 2013
DENNIS KIARIECLAIMANT
VERSUS
MARAISON TECHNOLOGIES LIMITED.....RESPONDENT

Mr. Wathome for claimant

Mr. Munyu for respondent

JUDGMENT

1. The suit commenced vide a statement of claim on 27th June 2013. The claimant prays for:

- a. One month's salary in lieu of notice, USD 5,500;
- b. USD 4800 being rent paid in advance until July 2013;
- c. USD 5,500 service pay;
- d. USD 5,500 being loss of future earnings for 10 months;
- e. USD 1,283 in lieu of leave days not taken;
- f. USD 400 being family travel costs;
- g. USD 235 being relocation costs;
- h. USD 12,500 being general damages for mental anguish;
- i. USD 12,500 being punitive damages;
- j. USD 2,352.94 being legal costs.

2. The claimant premises the above on a declaration by the court that the claimant was wrongfully, unlawfully and libellously discriminated at the work place causing him irreparable damage.

3. The claimant further seeks interest and costs.

4. In the statement of claim the claimant sets out particulars of breach as follows:-

- a. Failure to pay salary and dues in lieu of notice;
- b. Failure to pay outstanding leave days;
- c. Failure to provide termination package for loss of earnings;
- d. Failure to provide the claimant with a certificate of service;
- e. Failure to observe discriminatory and libelous acts at the work place by arbitrarily, wrongfully and unlawfully dismissing the claimant from work place.

5. The claimant was employed by the respondent on 9th July 2012 by executing a contract of employment dated 18th June 2012 effective from 9th July 2012 in the capacity of product designer. Terms and conditions of employment are in the contract itself and the contract was not fixed but was subject to confirmation upon completion of three (3) months' probation.

6. The monthly gross salary was USD 5,500 paid in arrears into a bank account.

7. The claimant was entitled to 28 days leave per annum. Leave may not be accumulated unless not taken at the insistence of the company.

8. The claimant worked for a period of eight (8) months until he was dismissed from employment on 25th February 2013.

9. The contract of employment was concluded in Kenya and in terms thereof, the claimant was to relocate to the company premises in Tanzania, which was his place of work.

10. The contract did not specify the particular duties to be performed by the claimant but provided "..... will be required to carry out all such duties as may be assigned to you by the Directors of the company or your immediate supervisor from time to time" *inter alia*;

11. The claimant testified under oath and adopted a witness statement dated 25th June 2013 and filed on 27th June 2013. The claimant also relied on list of documents filed on 27th June 2013. These were admitted as exhibits *seriatim*.

12. The claimant told the court that he was assigned to work in a project, named "TIGO" and that the said project had come to an end and he was declared redundant. The claimant denied that his employment was based on a particular project adding that he was a permanent employee subject to three (3) months' probation. That he was not solely employed to work in Tanzania only. He was told that the company would deploy him to another project.

13. That upon termination, the claimant said he was not paid outstanding leave days. That he had served for less than one year and had only taken five (5) days leave. He was now working for a bank but was unemployed for nine (9) months. He had to take a lesser pay. The claimant had signed and paid for a one year lease upon relocation to Tanzania. He forfeited four (4) months' rent which the landlord refused to refund upon loss of his employment.

14. The purported project he served was still running in Chad and he told the court that another person was employed to replace him and deployed to Chad.

15. The claimant says that the reason for the dismissal was not valid and seeks payment of damages for loss and suffering occasioned him by the respondent. The claimant added that he had to forego his job in Kenya to take up the appointment in Tanzania to his loss and detriment.

16. The claimant's wife also forfeited her job in Kenya to relocate. The claimant said that the whole experience was humiliating.

17. The claimant added under cross-examination that he was not given one month notice. He left Tanzania in February and his wife left in March. The claimant was paid salary up to 24th March. He added that someone else replaced him as product designer. That the Human Resource manager confirmed to him that the project was ongoing. The claimant said he was not paid in lieu of leave and was not paid relocation expenses for himself and his wife. The claimant produced the payment vouchers.

18. The claimant admitted that he was paid in lieu of one month notice and that there was no provision for refund of rent but there was legitimate expectation that he would serve for the period the rent had been paid for. The claimant did not make a claim for reimbursement. The claimant seeks payment of service pay for the period served and severance for redundancy.

Defence

19. The respondent filed a replying memorandum on 19th December 2013 in which it admitted having employed the claimant as product designer on terms and conditions set out in the contract dated 18th June 2012.

20. That the employment commenced on 9th July 2012. That the employment was terminated lawfully, upon giving the claimant one month notice as provided in the contract.

21. That the reasons for the termination are contained in the letter dated 26th February 2016 and are lawful.

22. The respondent confirms that the place of work for the claimant was in Tanzania or any other place respondent's activities were situate and insists that the claimant was not employed only to work in Tanzania.

23. The respondent denies that the termination was done under pretext that a specific project in Tanzania had come to an end.

24. The respondent also confirms that the employment of the claimant was not based on a specific project.

25. The respondent states that all dues to the claimant were paid upon termination and denies the particulars of breach set out in the statement of claim.

26. The jurisdiction of the court is admitted. The respondent denies the claims by the claimant in totality.

27. The respondent called RW1, Samuel Onono to testify for the respondent. RW1 was the General Manager Human Resource of the respondent from February 2014. RW1 joined the respondent after the claimant had left. He told the court that from the records, the claimant was deployed to a project in Tanzania but after a few months the deal fell through and the claimant's services could not be retained there and the company made a decision to terminate his services.

28. The claimant had worked from July 2012 to February 2013, a period of about eight (8) months.

29. The claimant was given one month notice and was paid for outstanding leave days and relocation costs.

30. RW1 added that the contract had an exit clause and was not permanent and pensionable. That rent was not part of the contract. He was paid consolidated salary. RW1 stated that the claimant did not suffer any damage or mental anguish as claimed or at all.

31. RW1 confirmed that the contract was not for a fixed term. That it was only subject to there (3) months' probation upon which claimant was confirmed to employment as a permanent employee.

32. That the claimant was entitled to pay his rent. That he was not paid relocation expenses. RW1 confirmed an email by one Priscila Gathugu who stated that though the project is confirmed, the company was not ready to offer support to claimant anymore.

33. RW1 stated that subsequently, the company offered to refund airfare and relocation expenses.

34. RW1 insisted that termination was not for underperformance but claimant was declared redundant and his position was to be abolished as indicated in the letter dated 26th February 2013.

Determination

35. The issue for determination are: -

(i) Whether the termination for redundancy was for a valid reason and in terms of a fair procedure.

(ii) Whether the claimant was entitled to the specific claims sought.

Issue i

36. The claimant was employed in terms of an open-ended contract subject to three (3) months' probation. The claimant served the probation period upon relocation to Tanzania from Kenya and thereafter served a further five (5) months until the employment was terminated by a letter dated 26th February 2013 for reasons of redundancy.

37. In terms of RW1, the project the claimant was assigned to as product designer in Tanzania fell through and the company could no longer retain the services of the claimant.

38. The monthly salary payable to the claimant is not in dispute. It is also not in dispute that the sum of USD5,500 was gross salary and the claimant was entitled to make own arrangement for accommodation.

39. The claimant had however executed with his landlord a one year lease with a monthly rent of USD1,200 paid for 12 months in advance. By fact of the unexpected termination of his employment, the claimant lost four (4) months' rent, USD4,800 which loss he attributes to the unlawful conduct of the respondent.

40. The claimant also paid for relocation costs which RW1 confirmed had now offered to reimburse the claimant in respect thereof. The claimant seeks payment of USD635 relocation costs for self and family.

41. It is now clear that the claimant was declared redundant and in terms of Section 40 of the Employment Act, the claimant is entitled to payment of prorata service pay or severance pay equivalent to 15 days salary for the period served. The claimant served a period of eight (8) months and is entitled to payment of severance pay in respect thereof in the sum of USD3,667 and the court awards accordingly.

42. With respect to outstanding leave days, the claimant testified that he had only taken 5 leave days and was entitled to 28 days leave in a year. The claimant served a period of 8 months and had outstanding leave days.

43. RW1 made a bare claim that the claimant had been paid in lieu of outstanding leave days without producing any documents in support. This is information that is specially in custody of employer and the court is inclined to give the benefit of doubt to the claimant that he was not paid in lieu of leave days not taken in the sum of USD1,283 and awards him accordingly.

Notice pay

44. The claimant admitted during cross-examination that he was paid in lieu of one month's notice. This claim is untenable and is therefore dismissed. However in terms of Section 40 of the Employment Act, the one month notification under subsection 4 (1) (c) to the employee and Ministry of Labour is a mandatory requirement meant to provide a window to the parties and the Ministry of Labour to consult on the requirements under Section 40 (1) (c) of the Act, that is

“(c) the employer has in the selection of employee 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;”

45. This requirement goes into the procedural fairness of the redundancy and should not be overlooked or taken for granted by the employer.

46. In the present case, the claimant claims that he was unfairly selected for termination on the basis of redundancy and that another employer was immediately employed in the same capacity he held and was deployed to Chad.

47. The respondent did not adequately or at all respond to these allegations. The email by the former Human Resource Manager supports the allegation by the claimant that there were still project(s) that were relevant to the position held by the claimant. To this extent, the court is satisfied that the selection criteria applied by the respondent did not meet the statutory requirement under Section 40 (1) (c) of the Employment Act and the retrenchment was therefore unfair and contrary to Section 40 as read with Section 45 of the Act.

48. Accordingly the court finds that the claimant lost his employment unfairly and suffered loss and damage aggravated by the following factors: -

(i) The claimant and his wife had just forfeited their jobs in Kenya to relocate to Tanzania.

(ii) The claimant was not given a certificate of service to enable him get a replacement job quickly and remained unemployed for 9 months.

(iii) The claimant took a lesser pay in the new job.

(iv) The claimant was not reimbursed relocation expenses immediately before or upon return.

(v) The claimant's employment was terminated for no fault at all on his part and he wished to continue serving the respondent.

(vi) Though the claimant had only served the respondent for eight (8) months, he had good prospects to continue serving the respondent for a long time since he had successfully completed the probation period.

49. And the claimant suffered loss and damage as a result and in terms of Section 49 (1) (c) as read with Section 49 (4), the court awards the claimant the equivalent of three (3) months' salary as compensation for unfair declaration of redundancy in the sum of USD16,500.

50. The rest of the claims by the claimant have no merit and are dismissed.

51. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:
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(i) Three (3) months' salary being compensation for unfair retrenchment in the sum of USD16,500.

(ii) USD4,800 forfeited rent.

(iii) USD 3,667 severance pay

(iv) USD 1,283 in lieu of leave

(v) USD635 travel and relocation costs

Total award USD26,885.

(vi) The award is payable with interest at court rates from date of filing suit till payment in full except the award of compensation in (i) above whose interest is from date of judgment.

(vii) Costs to follow the outcome.

Dated, Signed and Delivered on this 24th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE