



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE NO. 741 OF 2016

JOEL AMANI.....CLAIMANT

VERSUS

KENYA TRANSPORTERS ASSOCIATION LTD.....RESPONDENT

JUDGMENT

Introduction

1) The Claimant brought this Suit on 3.10.2016 claiming Kshs. 1,093,000 as terminal dues plus compensation for unfair termination of his employment on 5.3.2016. The respondent entered appearance but failed to file defence and therefore the Suit proceeded by formal proof on 13.4.2017. The issues for determination are whether the termination of the claimant's contract of service was unfair and whether he is entitled to the relief sought.

Claimant's Case

2) The Claimant testified that he was employed by the respondent on 11.10.2012 under a one year term. After the expiry of the first contract, he continued without any written contract enjoying the same salary of Kshs. 18,000 per month. His letters requesting for the formal extension of the contract were never answered until 5.3.2016 when he was terminated on account of redundancy by notice dated 5.2.2016 which was served on 1.3.2016.

3) The claimant contended that the termination was unfair because it was not preceded by a proper redundancy notice and payment of termination dues. He therefore prayed for salary in lieu of notice, compensation for unfair termination, unpaid House allowance arrears, accrued leave allowances and commuter allowances.

Analysis and Determination

4) There is no dispute that the claimant was employed by the respondent from 11.10.2012 to 5.3.2016 when his services were terminated by the respondent as already stated herein above, the issues for determination are:-

a) Whether the termination was unfair.

b) Whether the claimant is entitled to the reliefs sought.

Unfair Termination

5) Under section 45(2) of the Employment Act, termination of employment is unfair if the employee fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason for termination cited was redundancy after the only company car, which was being driven by the claimant was sold. That sounds like a valid and fair reason for terminating the claimant's service.

6) However, the procedure followed was not fair because it was not in accordance with section 40 of the Act. The said provisions bars the employer from terminating the employee's contract of service on account of redundancy, before just serving at least one month written notice on the employee (or his trade union) and the Labour Officer. Thereafter he must hold a fair selection process to identify the right process for the termination after which he must pay the employee at least one month salary in lieu of notice, all other accrued benefits plus severance pay at the rate of at least 15 days' pay per year of service.

7) In this case, the respondent served the redundancy notice dated 5.2.2016 on 1.3.2016 that was not proper notice because it was only four days' notice and it was never served on the Labour Officer. Secondly, the respondent never conducted any fair selection process to identify the Claimant as the right person to lay off. Thirdly, even after identifying the claimant for the layoff, he never consulted with him to see whether there was any alternative job for him. Finally, the respondent never paid to the claimant salary in lieu of notice, accrued terminal dues plus severance pay. Consequently, I agree with the claimant that the termination of his contract of service on account on ground of redundancy was unfair within the meaning of section 45 of the Act because it was done in breach of the strict procedure provided under section 40 of the Act.

Reliefs

8) Under section 49 of the Act, I award the claimant one month salary in lieu of notice being Kshs. 18000 plus Kshs. 216000 being twelve months' salary compensation for the unfair termination. The reasons for awarding the maximum compensation are that the claimant worked for a fairly long period of 4 years and did not contribute to the termination through any misconduct.

9) However, the claims for unpaid House Allowance, leave allowance and commuter allowance have no foundation in the contract of service and are therefore dismissed. The contract of service which expired in 2013 provided for gross pay of Kshs 18000 and the same never changed thereafter. Finally the claim for service pay must fail because the payslips and NSSF Statements showed that the claimant was a contributor and beneficiary of the NSSF. Under section 35(6) of the Act, an employee who is a beneficiary of the NSSF is disqualified from payment of service pay by the employer.

Disposition

10) For the reasons that the termination of the claimant's services was unfair, I enter judgment for him in the sum of Kshs. 234,000 plus costs and interest.

Signed, Dated and Delivered at Mombasa this 24th day of November 2017.

ONESMUS MAKAU

JUDGE