



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 211 OF 2015

(Before D. K. N. Marete)

PETER OCHOLA OMBURO.....CLAIMANT

VERSUS

INTER-DIOCESAN PROPERTIES LIMITED.....RESPONDENT

JUDGEMENT

This matter was brought to court vide a Memorandum of Claim dated 18th June, 2015. It does not disclose any issue in dispute on its face.

The respondent in a Statement of Response dated 22nd July, 2015 denies the claim and prays that the same be struck out with costs.

The claimant's case is that he was employed by the respondent on 9th November, 1993 as a labourer and rose to the ranks of a caretaker on 1st January, 1999. He earned 1,530.00 and worked as a messenger and cleaner besides many other duties assigned to him.

It is the claimant's other case that he worked dedicatedly, unsavory and without any meaningful or lawful warning in his employment record until 12th September, 2012 when he was summarily dismissed without following the procedures as laid out in the Employment Act, 2007. This in particular flouts sections 41 (1), 43 (1) and 45 (2) of the said Act. This is expressed as follows;

11. THAT the Claimant avers that termination was unfair and/or illegal on the following grounds;

- (i) The Respondent did not give the Claimant termination notice as provided by Section 35(1) c & 36 of the Employment Act;*
- (ii) The Respondent denied the Claimant's employment without following the procedure laid down in the Employment Act specifically the procedure laid out in Section 15, 41 and 45 of the Employment Act;*
- (iii) The Respondent terminated the Claimant's employment without proving that the reason for termination was valid as provided under Section 43 of the Employment Act;*
- (iv) The Respondent did not regulate the working hours of the Claimant as provided by Section 27 of the Employment Act;*

(v) The respondent declined to pay the claimant his lawful entitlement to: - public holiday, rest days, severance pay, duty allowance, travelling allowance, water and electricity allowance and incentive allowance as per the Terms of Service document.

(vi) The Respondent failed to pay the Claimant his 12 months wages for loss of Employment as provided under Section 15 of the Labour Institutions Act and Section 49 (c) of the Employment Act;

(vii) The respondent did not the claimant's terminal benefits' [See the annexed copy of calculations attached herein and marked an Appendix VII]

The claimant's other case is that the conduct of the respondent in terminating his employment offended his basic rights as enshrined in Article 41 and 77 of the Constitution which provide for fair labour practices and administrative action as follows;

(i) The respondents working environment was not reasonable as the claimant was subjected to witch hunt, ill motive, and was a victim of scape goat.

(ii) The claimant was never issued with notices to show cause and an opportunity to dispute.

He claims as follows;

1. One month pay lieu of notice

Basic Salary Kshs. 23,649/-

2. Unpaid public holiday 11 days per yr x yrs worked x basic ÷ 30days 11 days x 19 yrs x 23649 ÷ 30 days Kshs.164,754.7/-

3. Unpaid rest days 4 days p.m x months worked x basic + hse allow ÷ 30days 4 days x 228 x 22387 ÷ 30 days Kshs.680,564.8/-

4. Severance pay

15 days x years worked x basic ÷ 30 days

15 days x 19 yrs x 23649 ÷ 30 days Kshs.224,665.5/-

5. Overtime

Year 1999

1702 X 1.5 X 14925 ÷ 195 Kshs.195,402.70/-

Year 2000

1940 X 1.5 X 14925 ÷ 195 Kshs.222,726.92/-

Year 2001

2444 X 1.5 X 14925 ÷ 195 Kshs.280,590/-

Year 2002

1984 X 1.5 X 14925 ÷ 195 Kshs.227,778.46/-

<i>Year 2003</i>	
$1882 \times 1.5 \times 14925 \div 195$	<i>Kshs.216,068.07/-</i>
<i>Year 2004</i>	
$1902 \times 1.5 \times 14925 \div 195$	<i>Kshs.218,364.23/-</i>
<i>Year 2005</i>	
$1964 \times 1.5 \times 14925 \div 195$	<i>Kshs.225,482.30/-</i>
<i>Year 2006</i>	
$1982 \times 1.5 \times 14925 \div 195$	<i>Kshs.227,548.85/-</i>
<i>Year 2007</i>	
$1964 \times 1.5 \times 14925 \div 195$	<i>Kshs.225,252.69/-</i>
<i>Year 2008</i>	
$1964 \times 1.5 \times 14925 \div 195$	<i>Kshs.225,252.69/-</i>
<i>Year 2009</i>	
$1914 \times 1.5 \times 149925 \div 195$	<i>Kshs.219,741.92/-</i>
<i>Year 2010</i>	
$1918 \times 1.5 \times 14925 \div 195$	<i>Kshs.220,201.15/-</i>
<i>Year 2011</i>	
$1964 \times 1.5 \times 14925 \div 195$	<i>Kshs.223,415.77/-</i>
<i>Year 2012</i>	
$1390 \times 1.5 \times 14925 \div 195$	<i>Kshs.159,582.69/-</i>
<i>6. Special Duty allowance 1000 yearly x 12 months x yrs worked</i>	
$1000 \times 12 \text{ months} \times 19 \text{ yrs}$	<i>Kshs.228,000/-</i>
<i>7. Travelling Allowance 1000 yearly x years worked</i>	
$1000 \times 19 \text{ yrs}$	<i>Kshs.190,000/-</i>
<i>8. Water and Electricity allowance</i>	
$500 \text{ pm} \times 12 \text{ months} \times 19 \text{ yrs}$	<i>Kshs.114,000/=</i>
<i>9. Incentive/Responsibility allowance</i>	
$1000\text{pm} \times 12 \text{ months} \times 19 \text{ yrs}$	<i>Kshs.228,000/-</i>

10. Compensation for unfair termination

Gross pay x 12 moths 23880 x 12 months

Kshs.286,560/-

TOTAL CLAIM

KSHS.5,227,602.44/-

The respondent's case is a denial of the claim. She blows hot and cold in her defence. This is demonstrated by paragraph 16 and 18 of the defence where she denies being an employer of the claimant and on the same note denies his prayers on allowances, overtime, unpaid public holidays, unpaid rest days, special duty allowance, travelling allowance and incentives/responsibility allowance as all being time barred misplaced in law and having no basis.

The respondent's further aver that if ever the respondent's service was terminated, this was done in accordance with the Employment Act, 2007. Further, the claimant was a member of the Church Commission of Kenya Provident Fund from which he claimed all his benefits and is therefore not entitled to severance pay.

This matter came to court severally until the 1st August, 2016 when it was heard. Earlier, there were attempts at consolidation of the matter with Employment and Labour Relation Court No.223 of 2011 but this appears not to have been concretized. This is attributable to the oversight of the parties. Nonetheless, it was always treated as so consolidated. I shall proceed as such – like the matter was consolidated.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant at the hearing on 1st August, 2016 testified in reiteration of his claim. He also adopted paragraphs 3 and 4, and the entire claim as his pleadings and claim. This also includes all the annexed documents at pages 8 to 251 of the claim. This was also reiterated in cross-examination and re-examination.

The claimant in his written submissions dated 18th October, 2017 faults the respondents defence for not disclosing any cause of action against himself. It is his submission that this is not a real defence within the provisions of paragraph 14 of the Industrial Court (Procedure) Rules, 2010 and Order 2 of the Civil Procedure Rules, 2010. He prays that this defence be struck out in line to provisions of Order 2 rule 15 of the Civil Procedure Rules for the following reasons;

- a) *The defence discloses noreasonable cause of action or defence in law.*
- b) *It is scandalous, frivolous and vexatious.*
- c) *The defence is an otherwise (sic) an abuse of the process of court.*

The claimant seeks to rely on the provisions of section 40 of the Employment Act, 2007 on redundancy 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 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 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 had not place the employee at a disadvantage for being or not being a member of the trade union;

f) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

g) 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

h) 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.

It is his other submission that termination by way of redundancy under the respondent's terms of service is provided for under page 13 of the terms of service document as follows;

'In the likely event of redundancy becoming necessary, a notice must be given to the ministry of labour of the intention to declare redundancy.'

The claimant in totality submits a case of a botched up redundancy process by the respondent whereby the provisions of the law above cited or even adherence to the terms of service on redundancy was not followed in the termination of the claimant's employment service.

The claimant further seeks to rely on the authority of **Julie Tupiran Njeru v. Kenya Tourist Board Industrial Cause number 886 of 2010** where Rika, J. observed as follows:-

a) Termination of employment through redundancy being an involuntarily termination must be procedurally fair and substantively justifiable and must follow the law on unfair termination in particular under section 43 and 45 of the Employment Act, 2007.

b) Fairness of the redundancy process includes engagement of the employee by the employer in adequate consultations which should precede any decision on termination.

c) Fairness of the redundancy process further requires the employee to be informed on the selection criteria and must involve the participation of the claimant in evaluation and scoring system.

d) The principle of First In, Last Out (FILO) or Last In, First Out (LIFO) would have been another acceptable mode of determining who was to be selected for termination on account of redundancy.

e) There are four forms of Notification envisaged in the law of redundancy; the first one announces to the affected employee the intention to declare the redundancy, which notice meant to pave way for consultations. The second one is the normal termination notice.

f) Even in straightforward and genuine case of redundancy, the employer must ensure there is a valid reason in the process of selection of each individual position for redundancy.

The claimant further submits a seven step process an employer must undertake in pursuance of section 40 (1) of the Employment Act, 2007 – procedural fairness as follows;

(i) The first stage is to issue redundancy notifications. According to section 40(1)(a) and (b), an employer must issue not less than a month's prior notice to the union detailing the reasons for and the extent of the intended redundancy.

(ii) Where the employee was a member of a trade union, notification to the union and the local labour office at least one month before the redundancy date.

(iii) Thereafter, the employer is to deal directly with the trade union. When the employee is not a member of a trade union notification has to be in writing to the employee and a local labour office.

(iv) Initial notification in a redundancy situation is intended to alert the parties to the redundancy situation and is not the same as a notice of termination of employment.

(v) At this stage, no decision has been made and the employer is simply inviting the social partners to discuss a possible redundancy situation.

(vi) The second notification is normally the termination notice which must be for a period of not less than one month.

(vii) An initial redundancy notification hence should not be communicating a fait accompli; it is intended to invite the employee, his representatives and the competent authorities to explore alternatives to redundancy, and if inevitable, form some consensus on how the social impact of the decision can be mitigated.

This was not pursued and therefore the fallacy of the redundancy in the circumstances.

At the hearing, DW 1: Millicent Akinyi Odhiambo, the star and only witness of the respondent testified on the hearing on 23rd March, 2017 and 21st September, 2017. It was her evidence that the claimant was paid a salary in lieu of notice and issued with a certificate of service. She also narrated the process of termination of the claimant on grounds of redundancy which she defended as being open and non partisan. It was her further evidence that the claimant was paid his benefits through the employer's provident fund to the tune of Kshs. 358,791.52.

The respondents did not file any written submission in support of their claim. We are forced to rely on their pleadings and evidence as adduced in the testimony of DW 1- Millicent Akinyi Odhiambo.

Overall, this matter comes out as a case of a redundancy gone haywire. The respondents did not in the least comply with the law and procedure on redundancy as provided by section 40 of the Employment Act, 2007. The merely embarked on an innocent termination process on grounds of redundancy without considering the actual legal basis of the term. This way, the end results was disastrous and unforgivable. Redundancy is a legal process that requires the involvement of the parties – employer, employee and where applicable the employees trade union plus the labour officer in the articulation of the legal requirements and processes involved.

The claimant's case overwhelms that of the respondent. There was no articulation of section 40 above in the termination of the employment of the claimant. I therefore find a case of unlawful termination and hold as such. And this secures the 1st issue for determination.

The 2nd issue for determination is whether claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to a relief sought.

I am therefore inclined to allow relief as follows;

i. A declaration be and is hereby issued that the termination of employment to the claimant by the respondent was unfair, unprocedural, unlawful and a violation of his rights to employment.

ii. Severance pay

15 days x years worked x basic salary ÷ 30 days

15 days x 19 yrs x 23649 ÷ 30 days Kshs.224,665.50

iii. 2 months salary as compensation for unlawful

termination of employment Kshs.23,880.00 x 2 months Kshs.47,760.00

Total of claim Kshs.272,425.50

iv. The costs of these claims should be borne by the respondent.

In respect to Ruth Awour Amollo, Cause No. 223 of 2015, the award is as follows;

i. A declaration be and is hereby issued that the termination of employment to the claimant by the respondent was unfair, unprocedural, unlawful and a violation of his rights to employment.

ii. Severance pay

15 days x years worked x basic salary ÷ 30 days

15 days x 19 yrs x 20000 ÷ 30 days Kshs.190,000.00

iii. 2 months salary as compensation for unlawful

termination of employment Kshs.20,000.00 x 2 months Kshs.40,000.00

Total of claim Kshs.230,000.00

iv. The order on costs in the lead case applies.

Delivered, dated and signed this 15th day of November 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the claimant.

2. Mr. Olel instructed by Olel, Onyango & Ingutia Company Advocates for the respondent.