



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 415 OF 2014

BETWEEN

KENYA HOTELS AND ALLIED WORKERS UNION.....CLAIMANT

VERSUS

ALI BARBOUR'S CAVE RESTAURANT RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. John Simiyu, Industrial Relations Officer for the Claimant

Anjarwalla & Khanna Advocates for the Respondent

JUDGMENT

1. The Claimant Union filed this Claim, on behalf of its Member Isaac Wanyonyi [Grievant], on 1st September 2014. It is claimed that the Grievant was employed by the Respondent Restaurant in January 1992 as a Maintenance Technician. His contract was terminated by the Respondent on account of redundancy, effective 2nd June 2014. The Claimant stated redundancy was unfair, and the Grievant was not paid his rightful redundancy benefits. He earned a monthly basic salary of Kshs. 16,445 and house allowance of Kshs. 2,467, as at the time of termination. The Claimant prays the Court to declare redundancy unfair, and order the Respondent to pay to the Grievant, the following items:-

- a) 3 months' salary in lieu of notice at Kshs. 56,736
- b) Severance pay over a period of 22 years at Kshs. 229,680
- c) Pending 8 off- duty days, at Kshs. 5,568.
- d) Leave pay on pro-rata basis for 6 months at Kshs. 8,352
- e) 3 public holidays at Kshs. 2,088
- f) 12 months' salary in compensation for unfair termination at Kshs. 226,944

Total... Kshs. 528,968

g) Costs be provided for

2. The Respondent filed its Statement of Response on 7th October 2014. Its position is that the Grievant was employed by the Respondent on the date, terms and conditions of employment indicated in the Claim. The Respondent did not terminate Grievant's contract unfairly. The dispute was resolved by Kwale County Labour Officer who recommended:-

i. The Grievant is paid 3 months' salary in lieu of notice at Kshs. 56,736.

ii. The Grievant is paid severance pay based on a service period of 22 years, computed at Kshs. 229,680

iii. The Grievant is paid leave pay on pro-rata basis at Kshs. 8,352

The Respondent has paid notice and annual leave pay. It was agreed severance pay is paid through monthly installments. Only 2 installments remained to be paid as at the time of filing the Statement of Response. The Respondent states the Grievant is not entitled to pay for off-duty days, and public holidays. Redundancy was conducted fairly, and compensation for unfair termination is not merited.

3. The matter was referred to Kwale County Labour Office where Parties agreed on other issues, except on whether redundancy was unfair. This position was confirmed by the Parties when the matter came up for mention on 28th September 2016.

4. Hearing on this single issue was scheduled for 19th September 2017. The date was taken in open Court by Parties' Representatives. The Grievant gave very brief evidence, essentially summarizing what is contained in the Statement of Claim.

The Court Finds:-

5. In the absence of the Respondent, the Court is not able to conclude as urged by the Respondent in its Pleadings, that the Grievant's contract was terminated on genuine redundancy ground. There is no evidence to show that the Respondent justifiably relied on the ground of diminished returns in tourism industry, and that it suffered a business meltdown, as a result of tourists not frequenting the Respondent.

6. The Conciliator rejected the prayer for compensation, arguing incorrectly that because the issue related to redundancy, it could not result in unfair termination. According to the Labour Officer, compensation could only be granted in cases of unfair termination or dismissal for misconduct.

7. Termination under Section 40 of the Employment Act 2007 can result in unfair termination, if not substantively justifiable or carried out in accordance with fair procedure. Compensation can be granted under Section 49 of the Employment Act. Redundancy is just one of the various reasons for which termination decision can be justified. It can be deemed to be fair or unfair termination. The law governing fair termination is applicable to termination based on redundancy. If redundancy is not justified, and/or is carried out without regard to fair procedure, compensation is one of the remedies to be considered.

8. The Conciliator ought to have satisfied himself that the Respondent had encountered a genuine redundancy situation. This goes to enquiring if there was valid reason or reasons justifying termination. Secondly, the Conciliator ought to have concerned himself with issues relating to fair procedure. Was the Grievant given notice of intention to declare redundancy; did requisite notices issue to the Grievant, his Trade Union and the Labour Ministry; were the reasons for, and extent of redundancy disclosed by the Respondent; was the Grievant's role of Maintenance Technician, fairly selected for redundancy; was he issued with a notice of termination; and was he paid redundancy dues as of the date he left employment? These questions were not addressed by the Conciliator.

9. The Respondent did not address these issues in Court either. From what has been availed to the Court, redundancy was not fair. It amounted to unfair termination. It did not meet the minimum statutory standards of fairness under the Employment Act 2007. The Court shall therefore resolve the outstanding issue in dispute, by ordering that the Respondent pays to the Grievant the equivalent of 5 months' gross salary at Kshs. 94,560 in compensation. Other prayers have been settled as indicated by the Parties. There shall be no order on the costs. Interest allowed at 14% per annum from the date of Judgment till payment is made in full. IN SUM, IT IS ORDERED:-

[a] Termination of the Grievant's contract, by way of redundancy, was unfair.

[b] The Respondent shall pay the Grievant through the Claimant, the equivalent of 5 months' gross salary in compensation for unfair termination at Kshs. 94,560.

[c] No order on the costs.

[d] Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 9th day of November 2017

James Rika

Judge