



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 528 OF 2015

GEORGE MUKEYWA KISAKA..... CLAIMANT

VERSUS

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES..... RESPONDENT

JUDGMENT

Introduction

1. George Mukeywa Kisaka, a person living with a hearing and speech disability, is a former employee of the National Council for Persons with Disabilities. He brought this claim seeking compensation for unfair termination of employment and payment of his terminal dues. The claim is contained in a Memorandum of Claim dated 31st March 2015 and filed in court on 1st April 2015.

2. The Respondent filed a Memorandum of Reply on 15th May 2015 but did not attend the hearing in spite of due notification. The Claimant testified on his own behalf, with Eunice Agunda (PJ No 40042) from Makadara Law Courts acting as sign language interpreter.

3. Both parties filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a Data Entry Clerk, on a three months’ fixed term contract, from 20th November 2014 until 4th March 2015. The agreed monthly salary was Kshs. 18,000. The Claimant was however paid Kshs. 16,800.

5. The Claimant worked for the Respondent until 31st January 2015, when his employment was terminated. He claims that he was discriminated as some of his colleagues serving on similar contracts were re-deployed. He claims that most of the retained employees were not persons living with disabilities.

6. It is the Claimant’s case that the termination of his employment was unlawful and unfair. He therefore claims the following:

- a) Refund of December and January salary.....Kshs. 2,400
- b) 1 month’s salary in lieu of notice.....18,000
- c) February salary.....18,000

d) Maximum compensation for unfair termination.....216,000

e) Costs plus interest

The Respondent's Case

7. In its Memorandum of Reply dated 4th May 2015 and filed in court on 15th May 2015, the Respondent denies the Claimant's claim of discrimination. The Respondent states that the Claimant was deployed on casual appointment as a Data Entry Clerk, with the responsibility of registering persons with disabilities. The Claimant's continued employment was therefore dependent on availability of workload.

8. The Respondent justifies the termination of the Claimant's appointment on its operational requirements. The Respondent states that the Claimant was informed that if the workload increased, he would be considered for deployment on priority basis.

9. While denying the Claimant's claim for salary refund for December 2014 and January 2015, the Respondent states that the Claimant was obligated to pay tax as he had not been exempted under Section 35 of the Persons with Disabilities Act No 14 of 2003.

Findings and Determination

10. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Termination

11. The Claimant's employment was terminated by letter dated 28th January 2015, stating as follows:

"TERMINATION OF CASUAL ENGAGEMENT DATA ENTRY CLERK

The above subject refers.

Followign our offer of appointment to you as Data entry Clerk on Casual basis for three months w.e.f 20th Nov 2014 to 4th March 2015, I wish to notify you that this engagement stands terminated on 31st January 2015. The purpose for this termination is due to the fact that the workload, that necessitated your appointment has finished (sic).

Thank you for the services you rendered to this organization. We wish you well in your Endeavours.

(Signed)

RUTH RURAA

FOR: EXECUTIVE DIRECTOR

NCPWD.

12. According to the Claimant's offer of appointment dated 20th November 2014, he was to serve a fixed term running from 20th November 2014 and terminating on 4th March 2015. His employment was however terminated midstream on the ground of end of workload. In my understanding, this would fall under what is commonly known as redundancy.

13. Section 2 of the Employment Act, 2007 and the corresponding section in the Labour Relations Act, 2007 define redundancy as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

14. While the law recognises redundancy as a lawful form of termination of employment, there are stringent conditions to be observed. In this regard, Section 40 of the Employment Act, 2007 sets out the following conditions:

- a. where the employee is a member of a trade union, the employer notifies the union of 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 the 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 an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.***

15. In *Francis Maina Kamau v Lee Construction [2014] eKLR*, this Court held that a termination on account of redundancy which does not follow the conditions set out under Section 40 of the Employment Act is unfair within the meaning of Section 45 of the Act.

16. The Respondent states that the Claimant was a casual employee and is therefore not entitled to the remedies sought. From the evidence on record, the Claimant worked for a continuous period in excess of one month, the maximum period for casual employment fixed under Section 37 of the Employment Act. The assertion that the Claimant was a casual employee is therefore not backed by law and fact.

Remedies

17. Pursuant to the foregoing, I award the Claimant three (3) months' salary in compensation for unfair termination of employment. In making this award, I have taken into account the Claimant's length of service alongside the Respondent's conduct in the termination transaction. I further award the Claimant one (1) month's salary in lieu of notice.

18. Regarding the claims for salary refund I have this to say; every employer has a legal obligation to deduct statutory tax from its employees for onward transmission to the Kenya Revenue Authority (KRA). This is what the Respondent did and the Claimant has no legitimate claim on the amounts deducted and

remitted to KRA. This claim therefore fails and is dismissed.

19. The Claimant did not work in the month of February 2015 and the claim for salary for the month is consequently without basis and is dismissed.

20. Ultimately, I ether judgment in favour of the Claimant in the following terms:

a) 3 months' salary in compensation.....Kshs. 54,000

b) 1 month's salary in lieu of notice.....18,000

Total.....72,000

21. This amount, which is subject to statutory deductions, will attract interest at court rates from the date of judgment until payment in full.

22. The Claimant will have the costs of the case.

23. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF DECEMBER 2017

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JUDGE

Appearance:

Mr. Rakoro for the Claimant

No appearance for the Respondent